



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 28 OF 2020**

**MACHAKOS GOLF CLUB LIMITED.....PLAINTIFF**

**VERSUS**

**MACHAKOS TEACHERS COLLEGE.....1<sup>ST</sup> DEFENDANT**

**BOARD OF GOVERNORS MACHAKOS**

**TEACHERS COLLEGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Motion dated 27<sup>th</sup> March, 2020 that was brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 40 Rules 1, 2, 4 and 8 and Order 51 of the Civil Procedure Rules 2010, the Plaintiff/Applicant sought for the following orders:

***a) That pending the hearing and determination of the suit herein, an order of injunction do issue restraining the Defendants/Respondents jointly and severally whether by themselves, their agents, servants and/or any other person claiming through them from in any way at all entering into, trespassing, occupying, continuing fencing, building or in any way at all engaging in any acts of possession, usage and wastage of all that parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Ha.***

***b) That, costs of this Application be paid by the Defendants/Respondents.***

2. The Application was supported by the Affidavit of Anne Kiusya, the Plaintiff's Secretary, who deponed that the Plaintiff is the registered owner of all that parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Ha (*the suit property*) and that its members have enjoyed peaceful and un-interrupted use and occupation of the said parcel of land for many years.

3. The Plaintiff's Secretary deponed that the Plaintiff is a members' only Golf Club whose access is restricted to members or authorized persons only; that sometimes in March, 2020, the agents of the Defendants trespassed on part of the Plaintiff's land and started fencing the same without any lawful excuse and that the actions of the Defendants were actuated with malice and fraud.

4. It was deponed by the Plaintiff's representative that the illegal and unlawful presence of the Defendants' agent on the Plaintiff's land was exposing the members of the Plaintiff to security breaches and health dangers especially during the existing pandemic and that the continued fencing of part of the Plaintiff's land without permission amounted to grabbing of its land thus infringing on the Plaintiff's right to the use of the land.

5. According to the Plaintiff's Secretary, there were indicators by reciprocating Clubs that they might cancel reciprocating services with the Plaintiff unless third parties are prohibited from accessing the Plaintiff's land and that it was in the interest of justice that the orders sought be granted.

6. The Application was opposed by the Defendants vide the Replying Affidavit of the Defendants' Chief Principal who deponed that all the activities of the 1<sup>st</sup> Defendant were regulated by the Ministry of Education and that the Defendants have no capacity to annex any land except as allocated by the Ministry of Lands.

7. The Defendants' Chief Principal deponed that the college was established by the colonial government in 1958 and was allocated land known as L.R. No. 909/548 measuring approximately 17.24 Hectares where it has erected several structures; that the Defendants' land neighbours the Plaintiff's land amongst other parcels of land and that the Defendants were allocated an additional land known as parcel number 26 (*L.R. No. 909/717*) measuring 10.9 Hectares in the 1970s.

8. It was the deposition of the Defendants' Chief Principal that the parcel of land known as No. 26 (909/717) measuring approximately 10.9 Hectares is the land the Plaintiff is claiming; that by consent, both parties engaged the services of the Ministry of Lands and Physical Planning to establish the boundaries between the Plaintiff's and the Defendants' parcels of land and that the said survey work was completed.

9. It is the Defendants' case that the survey report established that the land in dispute belonged to the 1<sup>st</sup> Defendant; that this being a boundary dispute rather than ownership, it was only a survey report that could establish the boundaries and that the 1<sup>st</sup> Defendant has been in possession of the suit land and has all along been utilising the land.

10. It was deponed on behalf of the Defendants that the suit was time barred; that the issues raised in the present suit are *res judicata* since they were raised and addressed in Machakos HCCC No. 507 of 1971 in which the same parties were involved.

11. According to the Defendants' Chief Principal, the 1<sup>st</sup> Defendant having been in actual possession and use of the suit land since August 1970 as indicated in the Plaint in HCCC No. 507 of 1971, they cannot be deemed to be trespassing on the said land; that the 1<sup>st</sup> Defendant is in occupation of the suit land as its lawful owner having been issued with a legitimate allotment letter and that it did not require the permission or consent from the Plaintiff to develop or fence off the land.

12. The Plaintiff's Secretary filed a Further Affidavit and deponed that in 1953, the Chief Commissioner, through the Registrar of Titles, allocated to the Plaintiff all that land known as L.R. No. 909/397 measuring 104 Acres for a leasehold term of 33 years meaning that the lease was to expire in the year 1988; that in 1978, the Plaintiff applied for the extension of the lease for 99 years and that after extension of the lease in the year 1980, the Plaintiff's land became to be known as Machakos Town Block 1/25.

13. It was deponed by the Plaintiff's Secretary that if at all the land belonged to the Defendants, they should have been issued with an allotment letter and a Certificate of Title, which is not the case herein and that the Plaintiff's land, which has a Certificate of Title, was not available to be allotted to the Defendants.

14. It is the Plaintiff's case that the Plaintiff has been in possession and use of the disputed portion of land and the claim that the suit was time barred was not true; that the Plaintiff was not aware of any suit between the Plaintiff and the Defendants herein over the same subject matter and that there was no law which authorized the Commissioner of Lands to issue an allotment letter over private land.

15. The Application was canvassed by way of written submissions. The Plaintiff's advocate submitted that the Plaintiff has enjoyed peaceful and uninterrupted use and occupation of the suit property; that Section 26(1) of the Land Registration Act 2012 provides that a title document is *prima facie* evidence of absolute ownership which is indefeasible and that the Plaintiff's golfing and other recreational activities stands to be defeated by the actions of the Defendants. The Defendants' advocate did not file submissions.

16. Having considered the pleadings and the submissions, the two issues that arise are:

(i) *Whether the matter is res judicata.*

(ii) *Whether the court should issue an injunction in favour of the Plaintiff.*

17. This suit was commenced by way of a Plaint and an Application for an injunction dated 27<sup>th</sup> March, 2020. In the Plaint, the Plaintiff has averred that it is the registered owner of all that parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Ha (*the suit property*) and that its members have enjoyed peaceful and un-interrupted use and occupation of the said parcel of land.

18. The Defendants have averred that this suit is *res judicata* Nairobi HCCC No. 507 of 1971 and should be struck out on that ground. To support the deposition that the suit is *res judicata*, the Defendants attached on the Supporting Affidavit a copy of the Plaint which was filed in that suit.

19. Section 7 of the Civil Procedure Rules provides as follows:

*"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

20. In the case of **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another, (2017) eKLR**, the Court of Appeal extensively considered the principle of *res judicata* and held as follows:

*"...The elements of res judicata have been held to be conjunctive rather than disjunctive. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2007) eKLR**:*

*'The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent Court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and forces to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation and the judicial process would be*

*rendered a noisome nuisance and brought to disrepute and calumny The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”*

21. In the case of **Mburu Kinyua vs. Gachini Tutu (1978) KLR 69**, Madan, J. (as he was then), quoting with approval **William Koross vs. Hezekiah Kiptoo Komen & 4 others (2015) eKLR**, stated:

*“Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same person to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which parties exercising reasonable diligence might have brought forward at the time.”*

22. The doctrine of *res judicata* is grounded on public interest and thus transcends the parties’ interest in a suit. In the **Maina Kiai** case (*supra*), the court quoted with approval the Indian Supreme Court in the case of **Lal Chand vs. Radha Kisham, AIR 1977 SC 789** where it was stated:

*“The principles of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.*

*The practical effect of res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”*

23. The general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation (“*the finality principle*”) outweighs the public interest in achieving justice between the parties (“*the justice principle*”) and therefore the doctrine of *res judicata* applies (See **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (2014) eKLR**).

24. Although the Plaintiff’s predecessor, the Trustees of Machakos Club, sued the 2<sup>nd</sup> Defendant in Nairobi HCCC No. 507 of 1971 in respect of the suit property, there is no evidence before me to show that the said suit was heard and determined on merit. Indeed, the Defendants did not inform this court what became of that suit, and whether the same was heard and determined.

25. In the absence of evidence showing that Nairobi HCCC No. 507 of 1971 was heard and determined by the High Court, it is my finding that the elements of what amounts to *res judicata* have not been established by the Defendants.

26. The test for granting of an interlocutory injunction was considered in the **American Cyanamid Co. vs. Ethicon Limited (1975) A AER 504** case in which the court provided that for an injunction to issue, the Applicant must satisfy three elements, namely:

(i) *There must be a serious/fair issue to be tried;*

(ii) *Damages are not an adequate remedy;*

(iii) *The balance of convenience lies in favour of granting or refusing the application.*

27. These are the same grounds that had been postulated earlier on in the case of **Giella vs. Cassman Brown (1973) EA 358** as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages, and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience.

28. What amounts to a *prima facie* case was explained in **Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** as follows:

*“So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

29. In **Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR**, the Court of Appeal analyzed the grounds upon which the court can grant temporary orders of injunction as follows:

*“...These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See **Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86**. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted,*

*will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."*

30. In the same case, the Court of Appeal stated that the party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.

31. In considering whether or not a *prima facie* case has been established, the court is not required to hold a mini trial and must not examine the merits of the case closely. All that the court has to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation (*See the Nguruman case*).

32. The Certificate of Incorporation annexed on the Plaintiff's Secretary's Affidavit shows that the Plaintiff was incorporated as a limited liability Company on 24<sup>th</sup> July, 1992. The copy of the green card in respect to parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Hectares shows that the said land was registered in favour of the Plaintiff's predecessor, The Registered Trustees of the Machakos Club, on 3<sup>rd</sup> February, 1988.

33. The green card shows that on 1<sup>st</sup> August, 2005, a Lease Certificate for the same land was re-issued to the Plaintiff. Before the Lease Certificate was issued to the Plaintiff's predecessor in 1988, the evidence exhibited by the Plaintiff shows that land known as L.R. No. 909/397 measuring 104.0 acres (*approximately 41.6 Ha*) had been registered in favour of the Plaintiff's predecessor on 19<sup>th</sup> October, 1962. This is the same land that was converted from the Registration of Title Act to the Registered Land Act, and became parcel of land known as Machakos Town Block 1/25 (*the suit property*).

34. The issue of the Plaintiff owning and being in occupation of parcel of land known as Machakos Town Block 1/25 was confirmed by the surveyor's report dated 30<sup>th</sup> July, 2019. From the surveyor's report, it would appear that parcel of land known as Machakos Town Block 1/25 was sub-divided to create parcels numbers 25 and 26 measuring 25.32 Ha and 10.90 Ha respectively.

35. According to the surveyor's report, parcel number 26 is the same land that was being claimed by both parties herein. The surveyor's report indicates that the 1<sup>st</sup> Defendant has a letter of allotment for parcel number 26 measuring 10.9 Ha and that the land is not fenced although it has buildings belonging to the 1<sup>st</sup> Defendant.

36. The surveyor's report indicates that the Defendants are in possession of another parcel of land known as L.R. No. 909/548 measuring 17.24 Ha where the 1<sup>st</sup> Defendant has built the administration block and classrooms and other facilities. This land is fenced, and the Defendants have a title for it.

37. Although the surveyor indicated in his report that the Defendants are in possession of the letter of allotment for parcel number 26 (*LR No. 909/717*), the said letter of allotment was not exhibited.

38. Furthermore, it is not clear to this court at what particular point in time the Plaintiff's land measuring 104 acres, and which was registered in favour of its predecessor in 1962, was sub-divided to create parcels numbers 25 and 26. Indeed, the evidence produced by the Plaintiff shows that it is still the registered proprietor of parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Ha (*approximately 105 acres*).

39. Section 27(a) of the Registration of Land Act (*repealed*), under which parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Hectares was registered, provides that '*the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.*'

40. In the absence of any evidence to show that parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Hectares was sub-divided with the concurrence of the Plaintiff, and considering that a letter of allotment cannot be issued in respect to land which has already been allocated and a Title Deed issued to a third party, it is my finding that the Plaintiff has established a *prima facie* case with chances of success.

41. For those reasons, I shall, which I hereby do, allow the Plaintiff's Application dated 27<sup>th</sup> March, 2020 as follows:

***(a) That pending the hearing and determination of the suit herein, an order of injunction is hereby issued restraining the Defendants/Respondents jointly and severally whether by themselves, their agents, servants and/or any other person claiming through them from in any way at all entering into, trespassing, occupying, continuing fencing, building or in any way at all engaging in any acts of possession, usage and wastage of all that parcel of land known as Machakos Town Block 1/25 measuring 42.0888 Hectares.***

***(b) Each party to bear its own costs.***

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30<sup>TH</sup> DAY OF APRIL, 2021.**

**O. A. ANGOTE**

JUDGE