



**Mumo v Kisencha & 2 others (Environment & Land Case
E008 of 2023) [2024] KEELC 6303 (KLR) (1 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E008 OF 2023
CG MBOGO, J
OCTOBER 1, 2024**

BETWEEN

DAVID MUTUTO MUMO PLAINTIFF

AND

MOSES KISENCHA 1ST RESPONDENT

**KENNEDY KIPROP LEL (T/A LEL & ASSOCIATES
ADVOCATES 2ND RESPONDENT**

DISTRICK LAND REGISTRAR NAROK NORTH 3RD RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 4th October, 2023 filed by the plaintiff/ applicant and the notice of motion dated 11th April, 2024 filed by the 1st defendant/ respondent. The notice of motion dated 4th October, 2023 is expressed to be brought under Article 159 and 40 of *the Constitution*, Sections 1A, 1B, 3, 3A and 63 (c) and (e) of the *Civil Procedure Act*, Sections 25 and 26 of the *Land Registration Act*, Cap 300, Order 40 (1) Rule 3 and Rule 4 (1), Order 51 Rule 1,3 and 13 (2) of the Civil Procedure Rules seeking the following orders: -
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending inter-partes hearing of this suit, this honourable court be pleased to make an order directed at the 3rd respondent District Land Registrar Narok North to forbid all dealings or further registration of any entries in the register over Cis-Mara/Olkinyei/793.



5. That pending the inter-partes hearing of this suit a temporary injunction be issued restraining the 1st respondent from transferring, alienating, selling, charging or in any way dealing with the subject property being all that piece of land known as Cis-Mara/Olkinyei/793.
 6. That this honourable court makes such orders or further relief that it may deem just and expedient to grant for the ends of justice to be met in the circumstances.
 7. Costs of this application be borne by the defendants/ respondents.
2. The application is premised on the grounds inter alia that vide a sale agreement dated 7th October, 2013 the plaintiff/ applicant purchased two parcels of land known as Cis-Mara/ Olkinyei/ 790 and 793 from Nareiyon Ologeso (deceased) and he was the registered proprietor of Cis-Mara/Olkinyei/793 with a title deed issued to him on 20th November, 2013.
 3. The application is supported by the affidavit of the plaintiff/ applicant sworn on even date. The plaintiff/ applicant deposed that on 21st November, 2013 and without his knowledge, the 1st defendant/ respondent instituted ELC No. 606 of 2013 later transferred to the Magistrates' court and registered as MC ELC No. 90 of 2018 wherein he sought a cancellation of the title deed issued on 2nd October, 2013 to the deceased. He deposed that Nareiyon Ologeso who is deceased, and who was the 1st defendant in CMCC ELC No. 90 of 2018 partly participated in the matter, which was later abandoned and proceeded by way of formal proof.
 4. The plaintiff/ applicant deposed that Nareiyon Ologeso passed on 26th October, 2018 before judgment was delivered on 27th February, 2019. He deposed that in the said judgment, the Magistrates' court found that the 1st defendant/ respondent had proved his case, and the title deed that is said to have been fraudulently issued on 2nd October, 2013 was cancelled. The plaintiff/ applicant deposed that the 1st defendant/ respondent intentionally and deliberately locked him out of the proceedings even though he was aware from the green card that he had been registered as a proprietor of the suit property on 20th November, 2013. That as a result, he was denied his constitutional right to property enshrined under Article 40 of *the Constitution* without being afforded an opportunity to be heard.
 5. In response to the above application, the 1st defendant/ respondent filed the notice of motion 11th April, 2024 which is expressed to be brought under Order 2 Rule 15 (1) (a, b, c & d), Order 26 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A,1B, 3A, 7 and 8 of the *Civil Procedure Act* seeking the following orders: -
 1. That the matter directly and substantially in issue in this suit, as between the plaintiff and the 1st defendant, has been directly and substantially in issue in Narok MCELC No. 90 of 2018, Narok MCELC 115 of 2019 and Narok ELC 90 of 2020 (OS) between the same parties or between parties under whom they or any of them claim, which courts were competent to try such issues and which issues were heard and finally determined by those courts, consequently this suit is res judicata as against the 1st defendant.
 2. That no appeal ever having been filed against the final decisions of the courts in Narok MCELC No. 90 of 2018, Narok MCELC 115 of 2019 and Narok ELC 90 of 2020 (OS), this suit discloses no reasonable cause of action against the 1st defendant, is scandalous, frivolous and vexatious, may prejudice, embarrass or delay the fair trial of the action against the other defendants and is otherwise an abuse of the court and as such ought to be dismissed as against the 1st defendant.



3. That in the alternative and without prejudice to the foregoing, the plaintiff do give security for the 1st defendant's costs in the sum of Kshs. 2,000,000/- to be deposited in a bank or a reputable financial institution in the joint names of the plaintiff's and 1st defendant's advocates and in default of giving such security within the time ordered the plaintiff's suit be dismissed with costs.
4. That costs of this application be provided for.
6. The application is premised on the grounds inter alia that on 6th June, 2013 the 1st defendant/respondent was issued with a title deed. The application is supported by the affidavit of the 1st defendant/respondent sworn on even date. The 1st defendant/respondent deposed that in the year 2013, he bought the suit property from Kilayai Ole Siololo where he was issued with a title deed on 6th June, 2013. He further deposed that a restriction was registered where there was a claim of ownership and the same was removed on 2nd October, 2013 which information he stumbled on and reported the matter at the Criminal Investigations Department.
7. The 1st defendant/respondent further deposed that he filed a plaint on 21st November, 2013 in ELC No. 606 of 2013 against Nareiyon Ologeso and the District Land Registrar challenging the fraudulent transfer of his land. The suit was later transferred to Narok as ELC No. 30 of 2017, and later to the Magistrates Court as CMELC No. 90 of 2018. He further deposed that on 27th February, 2019 judgment was delivered in the matter where it was found that the title and registration of Nareiyon Ologeso (deceased) was fraudulent and the court proceeded to revoke the same. Further, he deposed that the plaintiff/applicant filed two separate applications in CMELC No. 90 of 2018 seeking to have the suit reopened but the same were dismissed on 26th October, 2021 and 5th September, 2023.
8. It was also deposed that the plaintiff/applicant filed ELC Case No. 19 of 2020 (OS) raising the very same issues, and the suit was struck out with costs on 8th November, 2021. The 1st defendant/respondent deposed that the plaintiff/applicant has never appealed any of the decisions, and the fact that Nareiyon Ologeso fraudulently obtained title to the suit property remains unchallenged. Further, it was deposed that should the suit be allowed to continue, he prays that the plaintiff/applicant do deposit security for costs.
9. In response to this application, the plaintiff/applicant filed his replying affidavit sworn on 17th July, 2024. The plaintiff/applicant deposed that the 1st defendant/respondent stole a march from him by instituting MCELC No. 90 of 2018 and MCELC No. 115 of 2019 without informing him. He deposed that the allegation of res judicata does not apply in the instant case since he has never been heard substantively on the suit property in question. He went on to depose that by the time his title had been cancelled, there was no opportunity for him to appeal because he was not a party in the suit. He also deposed that he has tried litigating in the matter to the extent of filing applications in the suit to be enjoined as a defendant or interested party seeking to reopen the matter to afford him an opportunity to be heard which has not been successful, and that should the court direct, he is ready and willing to deposit security for costs in terms of a title deed or a log book.
10. In the notice of motion dated 4th October, 2023, the 2nd defendant opted not to participate in the said application. Mr. Lel, informed the court that the application concerns the plaintiff/applicant and the 1st and 3rd defendants. The 2nd defendant did not file his response to the notice of motion dated 11th April, 2024, either. This court directed that both applications be canvassed by way of written submissions. The 1st defendant/respondent did not file his written submissions.



11. The plaintiff/ applicant filed his written submissions dated 23rd August, 2024 where he raised two issues for determination as listed below: -
 - a. Whether the plaintiff/ applicant has met the legal test to warrant the grant of an order of injunction sought.
 - b. Whether the plaintiff's suit against the 1st defendant is res judicata.
12. On the first issue, the plaintiff/ applicant submitted that he has provided evidence that he is the registered proprietor of the suit property with a title deed issued on 20th November, 2013 a fact which has not been disputed. Reliance was placed on the cases of Mrao Limited v First American Bank of Kenya Lts & 2 Others [2003] eKLR, and Nguruman Ltd versus Jan Bonde Nielsen & 2 Others [2014] eKLR. The plaintiff/ applicant submitted that from the pleadings filed, it follows that the balance of convenience tilts in his favour. The plaintiff/ applicant further relied on the cases of Kanorero River Farm Ltd & 3 Others v National Bank of Kenya Ltd 2002 2 KLR 207, and Henry Kowero Ogeyo & Another v Sammy Obere & Another [2010] eKLR.
13. On the second issue, the plaintiff/ applicant submitted that he only interacted with the suit post judgment, and the doctrine of res judicata cannot apply since the court downed its tool due to lack of jurisdiction. He went on to submit that the issues raised in this suit have not been litigated between him and the 1st defendant/ respondent. He relied on the case of Nicholas Njeru versus Attorney General & 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.
14. I have considered both applications, the replying affidavit and the written submissions filed by the plaintiff/ applicant. In my view, the issues for determination are as follows: -
 - i. Whether the plaintiff/ applicant is entitled to the orders of injunction.
 - ii. Whether the instant suit is res judicata.
15. To begin with the first application, the plaintiff/ applicant sought injunction orders on the grounds that he is the registered proprietor of the suit property, having been issued with a title deed on 20th November, 2013. The plaintiff/ applicant went on to disclose that the 1st defendant/ respondent deliberately and intentionally left him out in the proceedings before the Magistrates Court in MC ELC no. 90 of 2018, where a judgment was delivered on 27th February, 2019. He argued that the 1st defendant/respondent was fully aware that he was the registered owner owing to the green card, and that the cancellation of his title deed is an infringement of his right to property as enshrined in Article 40 of *the Constitution*.
16. In response thereto, the 1st defendant/ respondent filed the notice of motion dated 11th April, 2024, challenging the instant suit as res judicata. He argued that there has been previous litigation over the suit property in MC ELC No. 90 of 2018, MC ELC No. 115 of 2019 and ELC No. 90 of 2020 (OS). I have perused the annexures contained in both applications. In addressing whether the plaintiff/ applicant is entitled to the orders sought, I do note that the plaintiff/ applicant does not refute that there has been litigation over the suit property before the magistrates' court. His contention is that he sought to be joined as a defendant or interested party in the matter before the magistrates' court but his application was denied.
17. It is not in dispute that the plaintiff/ applicant was not a party in MC ELC No. 90 of 2018. However, there is indication that the plaintiff/ applicant tried to seek audience of the court to be joined as a party to the proceedings but the same was dismissed. There is a decree issued on 5th July, 2019 in MC ELC no. 90 of 2018 which the plaintiff/ applicant is not a party. Having said that, there is a valid judgment



and decree in force and which has not been challenged. The plaintiff/ applicant argued that the 1st defendant/respondent deliberately and intentionally left him out in the proceedings when the latter knew that he(plaintiff/applicant) has an interest in the matter. What recourse then is available to the plaintiff/ applicant?

18. It is quite unfortunate that the plaintiff/ applicant knowing very well that there are orders in place which are valid, has not first and foremost sought to set aside the same. Neither did he seek to be joined as a party to the proceedings post judgment. In *Mary Beach Limited v Attorney General and 18 others* [2018] eKLR, the Court of Appeal stated as follows: -

“ However there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. Enjoining such a party a court would also have to set aside the judgement entered to give him/her an opportunity to be heard.”

19. While I place reliance on the above cited authority, the orders for injunction cannot issue at this stage. There is a judgment and decree in place touching on the suit property, and unless the plaintiff/ applicant moves the court appropriately, this court cannot interfere with the said orders. The notice of motion dated 4th October, 2023 thus fails.
20. Having stated the above, it ultimately follows that there is merit in the notice of motion dated 11th April, 2024 to the extent that a court of competent jurisdiction, heard and determined the subject matter between the 1st defendant/respondent and Nareiyon Olorgeso (Deceased). Upon being dissatisfied with the decision of the Magistrates’ court, the plaintiff/ applicant had a recourse which was to file an appeal but it appears he has not done so.
21. From the above, the notice of motion dated 4th October, 2023 is thus dismissed with costs to the 1st defendant/respondent. The notice of motion dated 11th April, 2024 is thus allowed to the extent that the plaint dated 4th October, 2023 is an abuse of the court process, and it is hereby dismissed with costs to the 1st defendant/respondent.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 1ST DAY OF OCTOBER, 2024.

HON. MBOGO C.G.

JUDGE

01/10/2024.

