



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E009 OF 2020

STANLEY MBAABU.....APPELLANT

VERSUS

M'ANAMPIU M'IMUTI.....RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.) delivered on 30th September, 2020, in Tigania PMCC No. 88 of 2017)

JUDGMENT

1. The appellant brought his suit in the lower court claiming he had purchased **L.N. No. Nyambene/Kitheo/10** from one Joseph Karuu on 8.6.2007 but the land was illegally, erroneously and mistakenly registered in the name of the respondent.
2. He sought a declaration that he was the bonafide owner, cancellation of the title deed and an order that the land registrar substitutes his name with that of the defendant.
3. Lastly, the appellant sought for a permanent injunction barring and restraining the respondent from in any way whatsoever interfering with the suit land.
4. The respondent filed his defence dated 2.2.2018. He denied the appellant had ever been in occupation of the suit land as alleged or at all and similarly refuted the alleged purchase of the suit land.
5. The appellant brought an application dated 11.12.2017 alongside the plaint seeking for temporary order of injunction and inhibition. This application is supported by his affidavit sworn on 26.12.2017.
6. The respondent filed a replying affidavit sworn on 2.2.2018. The respondent denied the appellant had bought the land. He attached the gathering book, and insisted he was not a party to the alleged sale agreement dated 8.6.2007 which in any event refers to the title of the land as **L.R Nyambene/Kitheo/682** which as per records belongs to one M'Anampiu M'Imuti Baimwera. He stated that the alleged seller Joseph Karuu had never owned the suit land.
7. Interim orders were granted on 9.1.2018. In a ruling of 27.2.2018, the court dismissed the application on the basis that the sale agreement and the plaint were referring to different parcels of land and that a title deed belonged to the respondent; the plaint did not allude to erroneous or illegal registration of the land. The court sated the applicant had failed to establish a prima facie case with a probability of success in line with ***Giella –vs- Cassman Brown dicta***.
8. On 2.6.2020, the appellant brought a notice of motion dated 2.6.2020 seeking for an order of inhibition restricting any dealings over the suit land pending the hearing of the suit. He also sought for leave to amend the plaint as per the attached draft. Further, he prayed pending the hearing, the court to visit the scene and an order directing the District Registrar and the land surveyor to visit the **Land Parcel No. Nyambene/Kiheo/10** and ascertain its position on the ground on the beacons, acreage and occupation and make a report to the court.
9. The application was based on the grounds on the face of it and a supporting affidavit by Stanley Mbaabu Luruki sworn on 26.5.2020.
10. The grounds were that there had been encroachment of the applicant's land; the respondent was out to dispose of the land to third parties so as to defeat the ends of justice; the applicant was in occupation of the land; the suit land was less than 0.20 ha. as per the register but on the ground it was more than 3 acres yet only 0.50 acres was registered and that the mix up was aimed at perpetuating fraud by land adjudication officer and land surveyors hence the need to enjoin them in the suit.

11. The respondent opposed the notice of motion through a replying affidavit sworn on 17.8.2020. The trial court noted prayer 2 and 3 of the notice of motion had been dealt with in the previous application dated 11.12.2017.
12. Parties filed written submissions and by a ruling delivered on 30.9.2020, the court dismissed the notice of motion triggering this appeal.
13. The appellant complains that: the trial court failed to appreciate he was only seeking to have the property preserved pending hearing of the suit; failed to find the issues he had raised in the two applications were not similar and hence did not fall under **Section 7 of the Civil Procedure Act**; failed to find the suit against the government had not been instituted hence **Cap 40** was not applicable; failed to find that the appellant was being deprived of his land without compensation and against the Constitution; failed to find that the doctrine of equity and fairness required parties to be given a fair hearing on merits; ruled against the weight of evidence available, hence was unfair to the appellant.
14. This being a first appeal, this court is duty bound to go through the lower court record and come up with independent findings and conclusion as held in ***Peter –vs- Sunday Post Limited [1958] E.A. 424.***
15. This court has gone through the court record and the grounds of appeal. The issues for determination are:
- a) If the second application was res judicata.**
- b) If the trial court reached the correct finding and conclusion based on law, facts and evidence.**
16. The first ground of appeal is that the trial court was at fault in failing to find the applicant's sole intention was seeking for temporary orders of injunction aimed at preserving the suit land pending the hearing and determination of the suit.
17. In the plaint dated 11.12.2017, the appellant claimed to be the owner of **Parcel No. Nyambene/Kitheo/10** by virtue of a sale agreement dated 8.6.2007 alleged bought land from one Joseph Karuu. He averred the land was erroneously, illegally and unlawfully registered in favour of the respondent hence sought for the reversal of the title deed to his favour over and above a declaration that he was the bonafide purchaser who should be registered a such.
18. In support of the claim, the appellant relied on the sale agreement.
19. The respondent defence was that he was the first registered owner of the **Parcel No. Nyambene/Kitheo/10** and that there had been no objection during the gathering, registration and or the subsequent issuance of the title deed.
20. Further, the respondent pleaded the appellant's sale agreement talked of Parcel No. 682 Kitheo Part II Komakori owned by a different person and not his parcel of land.
21. In ***Nguruman Limited –vs- Jan Bonde Nielsen & 2 others [2014] eKLR***, the Court of Appeal held in an interlocutory injunction the applicant has to satisfy the triple pillars to establish his case at prima facie level; demonstrate irreparable damage if the temporary injunction is not granted and show that the balance of convenience was in his favour.
22. In ***Mrao Ltd –vs- First American Bank Ltd [2013] eKLR***, the court held a prima facie case is made up where the court based on material before it concludes there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
23. Turning to the res judicata, the appellant faults the lower court for finding the application to be have been raising prayers already determined to finality by a court of competent jurisdiction.
24. **Section 6** of the Civil Procedure Act prohibits a court from proceeding with a proceeding where a matter in issue was previously directly in issue over the same parties or the same title. Under **Section 9 of the Civil Procedure Act**, court is prohibited from determining an issue twice where it has been previously heard and finally determined by such a court.
25. The second application sought for similar prayers except the one for amendment.
26. In ***Uhuru Highway Development Ltd –vs- Central bank of Kenya & 2 Others [1996] eKLR***, the court held once an application for injunction where a suit has been heard and determined under the principles laid down in ***Giella vs Cassman Brown & Co. Ltd [1973] E.A 358***, a similar application cannot be brought unless there are new facts not brought to court earlier on after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling.
27. A keen look at the application dated 2.6.2020, supported by an affidavit sworn by the appellant on 26.5.2020, shows the appellant was relying on new set of facts as opposed to those in the application dated 11.12.2017. The nexus between Land Parcel No. 682 being combined and or encroached into and registered in **L.N. No. Nyambene/Kitheo/10** in the defendant's name is brought up in the second application.
28. The appellant blames the alleged combination of the two parcels of land on the intended 2nd, 3rd and 4th defendants hence the prayer for the amendment of the plaint.
29. In my view therefore, the second application did not fall under the concept of res judicata going by the decision of the Court of Appeal in ***Uhuru Highway Development Ltd (Supra)***.

30. Similarly, the court had not determined similar prayers in the previous application such as prayers No. 4, 5 and 6 in the second application.

31. In the premises, I find merits in the appeal. The lower court orders dismissing the application dated 30.9.2020 are hereby set aside. I direct the said application to be heard afresh.

32. Costs to the appellant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 9TH DAY OF FEBRUARY, 2022

In presence of:

No appearance for parties

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE