Maina v Kinoro & another (Land Case 93 of 2019)
[2022] KEELC 3764 (KLR) (12 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3764 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 93 OF 2019

FM NJOROGE, J

JULY 12, 2022

BETWEEN

JOSEPH NJOROGE MAINA ..... PLAINTIFF

AND

JOHNSTONE MBUGUA KINORO ..... 1ST DEFENDANT

SUSAN NYANCHAMA MOKAMBA ..... 2ND DEFENDANT

RULING

1. In the ruling on the application dated 17/5/2021 the plaintiff who was the applicant sought an injunction to restrain the defendants from interfering with the suit land. The defendants/respondents filed a notice of preliminary objection dated 1/6/2021 and the 1st defendant/respondent filed a replying affidavit sworn by Johnson Mbugua Kinoro on 14/6/2021 in response to the application.

2. The Plaintiff has now filed the present application dated 28/1/2022 seeking the following prayers:

    1. ... Spent.

    2. That this honourable court be pleased to grant temporary stay of its Ruling delivered on the 28th October 2021 and all consequential orders pending the hearing and determination of this application inter-partes.

    3. That the Ruling delivered and consequential orders issued on the 28th October 2021 by this honourable court be reviewed and the Applicant/Plaintiff herein be given an opportunity to be heard.

    4. That there is an error on the face of record that led to the terms of the ruling delivered by this honourable court.

5. That pending the hearing and determination of this application, the status quo of the property is maintained.

6. That this honourable court grants any other orders that it may deem just, fit and expedient.

7. That cost of this application be provided for.

3. The 1st respondent filed a replying affidavit dated 20/4/2022 on behalf of both respondents.

4. Upon the presentation of the instant application this court issued an order of preservation of the status quo and gave directions as to its hearing. Only the applicant filed submissions on the instant application.

5. The gist of the application is that the earlier suit that is Molo Civil Suit No 315 Of 2003 filed by the plaintiff was not heard on its merits but was dismissed on the ground that the court handling it was not possessed of jurisdiction; it is stated that that case was not heard and determined after a full trial. Prayers no 3 and 4 seek review of the court's orders of 28/10/2021. The grant of an order of review is premised on the conditions set out in order Section 80 of the *Civil Procedure Act* and Order 45(1) of the *Civil Procedure Rules*.

6. Section 80 of the *Civil Procedure Act* provides as follows:

> " Any person who considers himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

7. Order 45 Rule 1 of the Civil Procedure Rules, provides the circumstances under which an application for review of decree or Order may be brought and its text is as follows: -

> " Any person considering himself aggrieved-
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> a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay."

8. In summary the conditions for the grant of an order of review are that:

a. The application must have been made without unreasonable delay;

b. discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made;

c. mistake or error apparent on the face of the record;

d. any other sufficient reason.

9. Any of the above grounds can, once established, lead to a review order.

10. The impugned ruling was delivered on 28/10/2021 and the instant application for review was lodged on 15/2/2022 after a period of about 3 months. Considering that there was a Christmas holiday in between that period, I do not consider the delay which occurred in lodging the application as unreasonable and therefore the first test is therefore passed.

11. The instant application is principally premised on ground (c) above, that there was an error on the face of the record that warrants a review. The ruling in the Molo Case has been exhibited and indeed the court in that case stated as follows:

> " I therefore concur with the applicant's counsel that this court lacks jurisdiction to entertain and determine the matter.
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> For those reasons the application is allowed and the plaintiff's suit is hereby struck out with costs to the applicants."

12. None of the parties filed any submissions in respect of the application that birthed the impugned decision and this court relied purely on the application and the replying affidavit.

13. The preliminary objection filed by the respondent in the first application whose ruling is impugned raised, inter alia, the ground that the suit is unsustainable as per the ruling on 24/9/2020 in Nakuru H.C ELC 538 of 2013- *John Njoroge Gitau & 2 Others vs David Mwangi Gitau & 3 Others* and not that the suit and the application were was res judicata Molo Civil Suit No 315 Of 2003. However, in the replying affidavit dated 14/6/2021 by the 1st defendant, he also raised the issue that the Molo Suit had been filed in respect of the same land by the same plaintiff herein and completely avoided the issue of the Nakuru H.C ELC 538 of 2013. The court heard the application and dismissed it on 28th October 2021 on the basis that this suit is res judicata the Molo Suit. There was no express statement in the replying affidavit that the present suit is res judicata vis a vis the Molo suit. The respondent simply stated that the same documents that the applicant relied on in the instant suit are materially the same documents that he relied on in the molo suit. That is not in this court's view tantamount to stating that the present suit is res judicata. That was the first error that is apparent on the face of the record. The suit was also not said to be res judicata Nakuru ELC No 538 Of 2013 John Njoroge Gitau & 2 Others V David Mwangi Gitau & 3 Others. The respondents only stated that this suit is "unsustainable" in view of the orders issued in the latter suit. It is clear that owing to the nature of the affidavits presented by the parties, and especially the respondent, some element of confusion grew regarding the issue of res judicata. This court was alive to all the similarities between the instant suit and the Molo Suit but the fact remains that it was an error to consider the latter suit as having been heard and determined on its merits as to render this suit res judicata. In its ruling this court considered the concession by the applicant that the previous suit had been concluded and stated as follows:

> " It is also my opinion that the suit was heard and determined in favour of the 1st and 2nd defendants this is because even though the 1st defendant/respondent has not annexed the judgment which was entered on 26/3/2004, there is evidence of a letter received by the Molo

court on 2/4/2004 requesting for a decree and certificate of costs be issued in his favour which in my opinion is sufficient evidence that the suit was indeed heard and determined."

14. It has now turned out that the suit was not heard and determined on its merits. The respondents themselves agree that the Molo suit was not heard on its merits. In the light of the fact that the respondents had not insisted that the instant suit is res judicata the Molo suit and that the court record shows that the Molo suit was not heard and determined on its merits, the course that the court took was quite erroneous and ought to be corrected by way of a review. The application dated 28/1/2022 therefore has merit. In the circumstances I hereby vacate the ruling dated 28/10/2021 and I order that the suit and the application dated 17/5/2021 are hereby reinstated for determination on its merits.

15. Having said so, I must observe at this juncture that the application dated 17/5/2021 had already been responded to by the defendants and the court had reserved it for a ruling. There would therefore be no need to subject the application to another process of hearing and this court holds that it may proceed, now that it has reinstated it and the suit, to issue a ruling on the merits other than on the issue of res judicata which has been determined herein above.

16. And so what are the merits of that application?

17. The applicant's grounds for seeking an injunction are that he is the lawful owner of the suit land which is Mau Summit /Molo Block 7/1036 (Tayari), having acquired it by dint of being a shareholder in Tayari Farmers company Ltd, a land buying company. He states that to acquire the land he balloted for it and paid the requisite fee and immediately took possession thereof and has since had quiet possession, but now the respondents have transacted over the land and have commenced developments thereon, and he stands to suffer irreparable loss if the orders sought are not granted. The applicant has annexed documents in support of his claims in the supporting affidavit. These are share capital receipts, ballot paper and a bank deposit slip.

18. What do the respondents state in response to the application? The replying affidavit of the 1st respondent dated 20/4/2022 states that the exhibit that the applicant relies on shows his plot to be plot no 404 and not No. 22; that plot no 404 was the subject of the Molo case which now this court deems as not having been heard and determined on its merits; that 1st respondent was issued with the title in 2003 yet the present suit was instituted in 2019; that the 2nd defendant was issued with a title deed in the year 2008; that no leave has been sought to institute the suit hence it ought to be struck out as statutorily time barred. Save for the documentation in the Molo Case and some copies of titles, the respondents have nothing to show for the process of acquisition.

19. The issue regarding the numbering of the plots is a matter that should be subjected to evidence. The issue that remains is whether the claim is time barred. In this court's view the plaintiff's claim is for damages for trespass. Trespass is a continuous tort. The claimant is entitled to bring the suit at any time. Each day on the land by an illegal occupant is deemed a fresh act of trespass. I therefore do not agree with the respondents that the plaintiff's claim is time barred.

20. I think the plaintiff has attached persuasive documentation to his application. He has established a prima facie case. If this court does not issue the orders sought in the light of the foregoing, the nature of the property may change further. The plaintiff has in this court's view also established the risk of his suffering irreparable loss. It is therefore necessary to have orders in place to preserve the status of the suit land pending the hearing and determination of the instant suit.

21. Consequently, I hereby issue an order of injunction restraining the respondents either by themselves or by agents from entering, remaining in, constructing on or in any other manner interfering with the

plot known as Mau Summit/Molo Block 7/1036 (Tayari) pending the hearing and determination of the instant suit.

22. The suit shall be mentioned by way of teleconference on 27/9/2022 for further directions as to hearing.

23. Each party shall bear their own costs of the application dated 28/1/2022 but the costs of the application dated 17/5/2021 shall be in the cause.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 12TH DAY OF JULY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU