



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 42 OF 2018**

**TERESIAH WANGUI THUITA.....PLAINTIFF/APPLICANT**

**VERSUS**

**IGNATIUS MAINA NDURU.....DEFENDANT/RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Motion dated 20<sup>th</sup> July 2018 brought under *Order 40 of the Civil Procedure Rules* Section 3 and 13(7) of the Environment and Land court Act, Section 1A and 3A of the Civil Procedure Act, and all other enabling provisions of the law where the Applicant seeks three prayers mainly, that:

i. The court stays the execution and enforcement of the award of the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal case No. 1/2009 dated the 30<sup>th</sup> March 2009 or any decree/order arising from its adoption as a judgment of the court, pending the hearing and determination of the suit herein

ii. Further that there be an order of temporal injunction restraining the Respondents from interfering with the applicant's quiet use, possession and occupation over the suit land being Nyandarua/Silibwet /310 and the subdivisions arising therefrom pending the hearing and determination of the suit.

iii. Lastly the applicant also seeks for orders that the proceedings in the Nyahururu Chief Magistrates' Court Misc Civil application No 2 of 2018 be stayed pending the hearing and determination of the suit and for costs of this application be borne by the Defendant/Respondent.

2. The application is supported on the grounds set out on its face and on the supporting affidavit sworn on the 20<sup>th</sup> July 2018.

3. The gist of the Application is that the Applicant was the proprietor of parcel of land No. Nyandarua/Silibwet /310 which has since been sub-divided resulting into parcel No. 3155, 3156, and 3157 where she has been in occupation since the year 1983.

4. That there arose a boundary dispute between parcels No. No. Nyandarua/Silibwet /310 and parcel No. Nyandarua/Silibwet /282 wherein in the year 2009, the matter was referred to the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal. An award was issued to the effect that the disputed portion formed part of parcel No. Nyandarua/Silibwet /282 and that the Survey of Kenya Nyandarua to brace the disputed parcel No. Nyandarua/Silibwet /282 and the Applicant and her family herein cease to cultivate, harvest trees or leasing the said disputed portion immediately.

5. That following the pronouncement of the said award, the Applicant filed her Appeal at the Nyeri Provincial Land Tribunal which determined the matter and over turned the ward of the Tribunal confirming that the disputed parcel of land formed part of land parcel No. Nyandarua/Silibwet /3155.( This was a sub division of parcel No.310)

6. The Defendant then filed an Appeal to the High court sitting in Nakuru vide Appeal No. 163 of 2009 which court allowed the Appeal and overturned the Nyeri Provincial Land Tribunal Provincial award, to which effect that the Respondent filed a Misc Application No 2 of 2018 seeking for the award of the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal to be adopted as an order of the court.

7. The Applicant's contention is that the decision sought to be enforced by the respondent was a nullity as the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal acted outside its mandate because the said parcels of land do not share the same boundary as they are separated by a road therefore by the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal issuing the award as it did, they had in fact awarded part of her land to the Respondent which was a preserve of the court.

8. It was upon service of the said application that the Respondent filed their Notice of Preliminary Objection on the 27<sup>th</sup> July 2018 on the ground that the plaintiff's suit was *res judicata* by virtue of the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal, and the Nyeri Provincial Land Tribunal.

9. On the 11<sup>th</sup> March 2019, the court directed that the matter be disposed of by way of written submissions. I have considered the said written submissions as follows;

#### **Applicant's written submissions.**

10. The Applicant's submission was that based on the provisions of Section 7 of the Civil Procedure Act, the decided cases of **Damaris Kondoro vs Gachanja Gitere & Another Nakuru HCC No. 127 of 20404** and **Bernard Mugo Ndegwa vs James Githae & 2 Others [2010] eKLR** as well as the writing in **Mulla the Code of Civil Procedure 18<sup>th</sup> Edition at page 285**, that this suit cannot be *Res judicata* by virtue of the fact that the Land Disputes Tribunal did not have jurisdiction to try the case as the same was touching on issues of title to land, and therefore it was not a competent court in the strict sense of explanation No. 2 of Section 7 of the Civil Procedure Act.

11. On the issue of jurisdiction, it was the Applicant's submission and while relying on the case of **John Mwangi Waitthaka vs Jackson K. Cherop & Another [2014] eKLR** that there was no bar in seeking to have a decision of the Tribunal declared a nullity through the filing of a suit as was provided for under the Land Disputes Act.

12. The Applicant further relied on the decided cases of **Jamin Kiombe Lidodo vs Emily Jerono Kiombe & Another [2013] eKLR**, **Johanan Buti vs Walter Rasugu Mariba & Others CA Civil appeal No 182 of 2006** and **Robert Entwistle & 7 Others vs The Registered Trustees of Nairobi Baptist church & 2 Others, Court of Appeal at Nairobi, Civil application No. 312 of 1999** to submit that a party is entitled to move the superior court seeking declaratory orders to impeach a judgment or order arrived at by subordinate Court or other tribunal in excess of its jurisdiction and therefore the court had jurisdiction to hear and determine the matter before it.

13. The Applicant further submitted that their application for stay of execution of the award arising from the Land Disputes Tribunal in the Nyahururu CM Misc Civil Appl No 2 of 2018 is so as to preserve the ends of justice and to obviate a situation where the suit herein is rendered a mere academic exercise. That the adoption of the award had a direct bearing on the determination of this matter as the Respondent would be in the position to alter the entitlement of the Applicant in respect to the suit property thereby leading to an undesirable and absurd outcome of this application.

14. That in this regard, the court ought to consider the overriding principles of proportionality and equality so as to place both parties on an equal footing as was held in the case of **Suleiman vs Amboseli Resort Limited [2004] 2 KR 589**.

15. On the issue as to whether the court should grant the Applicant temporal injunction, it was their submission that they had established a *prima facie* case that the Applicant was the proprietor of the suit land. Further that the award granted by the tribunal had the effect of reducing the acreage of the said parcel of land and so it would be in the best interest of just to grant the interlocutory prohibitory orders to ensure that the subject suit is preserved so that the course of justice is not subverted by the time the suit is heard.

16. That the appropriate order to issue in the circumstance where there was serious conflict of facts was to order for the parties to maintain the status quo. They relied on the case of **Ougo & Another vs Otieno [1987] KLR 364** amongst other cases.

17. The Applicant further submitted that if injunctive orders were not issued, an award for damages may not compensate the Applicant should there be any infringement of her rights and loss. That in the circumstance an order for status quo would suffice in the present instance.

#### **Respondent's submission.**

18. The Respondent gave a brief history of the matter giving rise to the present situation herein and stated that based on the fact that this matter had been through the process of hearing before the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal, the Nyeri Provincial Land Tribunal, the Applicant had exhausted all tricks in the book and had now come before this court seeking various temporal reliefs, founded on a plaint, against the Respondent.

19. That at paragraphs 5 and 9 of the Applicant's plaint, she had acknowledged that the issues of entitlement and ownership of parcel No 282 and 310 respectively, had been the subject matter for determination before the tribunal and between the same parties and therefor in essence, the matter before court was *res Judicata*. The Respondent relied on the decided case of **Njue Ngai vs Ephantus Njiru & Another [2016] eKLR**, and **Ukay Estate Ltd & Another vs Shah Hirji Manek Ltd and 2 Others [2006] eKLR** as well as the provisions of Section 7 of the Civil Procedure Act to buttress their submission.

20. The Respondent also relied on a decision by this court in the case of **Charity Njanja Mwaniki (Suing on her behalf and 8 other siblings) vs James Mwaniki Gaturu [2017] eKLR** to submit that the test in determining whether a matter was *res judicata* was summarized as follows;

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision

21. I must point out that that case was distinguishable to the present case.

22. It was further the Respondent's submission that the issue raised by the Applicant to the effect that the Tribunal had no jurisdiction to handle a case involving a title to registered land was a new issue and it could not be raised in fresh proceedings between the same parties over the same subject matter. That notwithstanding, the said application was misconceived as the Applicant admitted that there had been a land boundary dispute before the tribunal which had jurisdiction to hear the said dispute by virtue of the provisions of Section 3(1) of the Land Disputes Tribunal Act.

23. That the provision of explanation 4 of Section 7 of the Civil Procedure Act was to the effect that:

*Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

24. The Respondent further relied on the case of **George W.M Omondi & Another vs National Bank of Kenya Ltd & 2 Others [2001] eKLR**, to submit that litigation should not be allowed to go on forever on the same issue with the same opponent before a court of competent jurisdiction.

25. The Respondent submitted that the Tribunal which was established under the Land Disputes Tribunal Act was a court in the sense that it had jurisdiction to adjudicate over the Registered Land. In so submitting, the Respondent relied on the case of **Republic vs Chairman Land Disputes Tribunal Kirinyaga District and Another ex-parte Peter Maru Kaiuki [2005] eKLR** and submitted that it was therefore not correct to state that the Land Disputes Tribunal had no jurisdiction to hear disputes concerning registered Land.

26. That since the Applicants had exhausted the procedure provided under the repealed Land Disputes Tribunal Act, she could not now reopen the dispute through the filing a declaratory suit as it amounted to abuse of court process.

27. They sought that the court upholds the Preliminary Objection to dismiss the Plaintiff's suit.

#### **Analyses and Determination.**

28. I have considered the matter in issue the law, the able submissions by counsel as well as the authorities herein attached. I find that the matters arising for determination being;

i. Whether this matter is res judicata Nyandarua North (Ol Joro Orok) Land Disputes Tribunal, and the Nyeri Provincial Land Tribunal

ii. whether this court should grant the Applicant an interim injunction pending the hearing of the suit

29. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

*"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

30. In this proceedings, it is the Defendant/Applicant's case inter alia that this suit should be dismissed with costs as the same was res judicata by virtue of the proceedings in the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal, the Nyeri Provincial Land Tribunal, and the Nakuru HC Civil Appeal No. 163 of 2009.

31. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

***"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"***

32. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. what issues were really determined in the previous case;

ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

33. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

The matter in issue is identical in both suits;

- i. The parties in the suit are the same;
- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

34. It is not in dispute that this matter was first brought before the Nyandarua North (Oljoro Orok) Land Dispute No. 001 of 2009 where an award was issued on the 30<sup>th</sup> March 2009. It is also not in dispute that pursuant to the delivery of the Award, the Applicant herein, being dissatisfied, filed an appeal before the Nyeri Provincial Land Tribunal being No 2 of 2009 wherein vide their decision, over turned the award issued by the Nyandarua Land Dispute to which the Respondent filed an appeal before the Nakuru High Court in Civil Appeal No. 163 of 2009. The Appeal was allowed and the court upheld the decision of the Nyandarua Land Dispute which decision the Respondent filed a Misc Application No 2 of 2018 in the Nyahururu Chief Magistrate's court, seeking for the adoption of the award, of the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal, as an order of the court.

35. It is further not in dispute that the **matter in issue at the Land Dispute tribunal was directly and substantially the same with the present matter and between the same parties.**

36. The dispute that arises herein is whether the Land Disputes Tribunal was a court of competent jurisdiction to try the matter before it. In order to decide on this aspect, it is imperative to consider the award that was issued by the Disputes Land Tribunal vis a vis the jurisdiction of land disputes Tribunals.

37. The award of the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal case No. 1/2009 dated the 30<sup>th</sup> March 2009 was to the effect that:

- i. The disputed portion is part of parcel No. Nyandarua/Silibwet /282*
- ii. The Survey of Kenya Nyandarua to brace the disputed parcel to No. Nyandarua/Silibwet /282.*
- iii. The objector Teresih Wangui and her family cease to cultivate, harvesting trees or leasing this disputed portion immediately.*
- iv. Each party to meet own costs*

38. Section 3 (1) of the Land Disputes Tribunals Act Cap 303A (now repealed) limited the jurisdiction of land disputes Tribunals as follows;

- a). the division of, or the determination of boundaries to land, including land held in common;
- (b). a claim to occupy or work land; or
- (c). trespass to land

39. Clearly from the award issued by the Land Tribunal, it emerges that the same touched on title of a registered land. The Act did not confer to the Land Disputes Tribunal, jurisdiction to determine disputes over title or ownership of land. The Land dispute tribunal therefore acted in excess of jurisdiction when it purported to annex the Applicants' parcel of land to Nyandarua/Silibwet /282 and further directing the Survey of Kenya Nyandarua to brace the disputed parcel to No. Nyandarua/Silibwet /282, a power that is a preserve of the High Court.

40. In the case of **SIR ALI BIN SALIM VS. SHARIFF MOHAMED SHATRY CIVIL APPEAL NO. 29 1940** it was stated that; -

*“If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.*

41. It therefore follows that the decision by the Nyandarua North (Ol Joro Orok) Land Disputes Tribunal to brace the disputed parcel to No. Nyandarua/Silibwet /282 therein was in total disregard to its limits of jurisdiction in law and therefore was not a court of competent jurisdiction in the circumstance. I proceed to hold that the plea of *res judicata* must fail as against the decision of the tribunal in the former suit.

42. The second issue that this court is to determine is whether the court should grant the Applicant interim orders of injunction pending the hearing of the suit. The celebrated case of **Giella vs Cassman Brown (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian case of **R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried( prima facie case)
- ii. Will the Applicants suffer irreparable harm if the injunction is not granted;
- iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

43. On the first issue as to whether the Plaintiff/Applicants in this matter had made out a prima facie case with a probability of success. I am guided by the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described as follows:

*“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”*

44. Have the Plaintiff/Applicants herein demonstrated that they have a genuine and arguable case? In asserting their ownership rights over the suit property, they annexed copies of titles of the suit properties as evidence to show that she was the registered proprietor of the suit property. The law is very clear on the position of a holder of a title deed in respect of land.

45. **Section 26(1)** of the **Land Registration Act** provides as follows:

*“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner .....and the title of that proprietor shall not be subject to challenge...”*

46. In light of the above, this court finds that the Plaintiff/Applicant has established that she is duly registered proprietor of the suit property and is entitled to all the rights appurtenant thereto unless otherwise proved during the hearing of the main suit. It therefore follows that and it is herein ordered that the proceedings in the Nyahururu Chief Magistrates Court Misc Civil application No 2 of 2018 are stayed pending the hearing and determination of the suit.

47. On the second issue as to whether the applicant would suffer irreparable harm if the injunction is not granted, I have considered the award issued by the Tribunal to the effect that if the same was to be effected, it would interfere with the said parcel of land by reducing its acreage and therefore alienating and/or disposing the said contested piece of land which in turn render the suit nugatory.

48. Given such a scenario the court has a duty to consider whether or not to grant or deny the conservatory relief so as to enhance the Constitutional values and objects of the specific right in the Bill of Rights.

49. Based on the above findings, I am convinced that the Plaintiff/Applicant has shown that she has beneficial interest in the suit land which is capable of being preserved and/or protected by means of an interlocutory injunction as we await the conclusion of this case.

50. On the issue of which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits, I find that *in determining where the balance on convenience lies*, considering the facts of this case in totality, I find that the balance of convenience is in favour of the Applicant herein. In order to preserve the subject matter herein, I do proceed order that parties do maintain the Status quo pending the hearing of the suit herein with the result that the Applicant’s Notice of Motion dated 20<sup>th</sup> July 2018 succeeds with costs to the Plaintiff/Applicants.

51. I now direct parties to comply with the provisions of order 11 of the Civil Procedure Rules within 30 days from today so that the matter can be set down for hearing.

**Dated and delivered at Nyahururu this 9<sup>th</sup> day of July 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**