



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC No. 436 OF 2017

PETER KIGO WAWERU.....PLAINTIFF

VERSUS

OBADIAH MBOGO.....DEFENDANT

RULING

1. Proceedings herein commenced on 17th November 2017 when the plaintiff filed the plaint dated 15th November 2017. It is averred in the plaint that the plaintiff is the registered owner of the parcel of land known as **Nakuru Municipality Block 29/648 (Ronda)** (the suit Property) and that the defendant trespassed onto the suit property on 29th October 2017 and commenced construction. Further, that besides this suit, there is no other suit between the parties over the same subject matter save for **Nakuru CMCC No. 1171 of 2011** between the plaintiff and one Mbogo Kinyiri that is pending appeal in the High Court Nakuru as **HCCA No. 19 of 2013**. Accordingly, the plaintiff seeks judgment against the defendant for:

i) A declaration that property known as Nakuru Municipality Block 29/648 is the property of the plaintiff, an order of permanent injunction to issue against the defendant by himself, servants, and agents from entering, trespassing, developing or dealing with the plaintiff land Ref No. Nakuru Municipality Block 29/648 in any way and/or manner.

ii) Cost of the suit and interest.

iii) Any other further relief.

2. Together with the plaint, the plaintiff also filed Notice of Motion dated 15th November 2017 in which the following orders are sought:

1. That this application be certified as urgent and be heard ob (sic) priority in the first instance.

2. That pending the hearing and determination if this application inter partes this honourable court be pleased to grant an injunction restraining the defendant either by himself or through his agents, servants and/or employee from interfering developing, construction and/or dealing with the plaintiffs land Ref No. Nakuru Municipality Block 29/648 (Ronda) in any way or manner.

3. That costs of this application be provided for.

3. The application is supported by an affidavit sworn by the plaintiff and in which he generally reiterates what is pleaded in the plaint.

4. The defendant responded to the Notice of Motion through a replying affidavit which he swore on 5th December 2017. He deposed that he is the son of Mbogo Kinyenyeri (deceased) and that his late father purchased a portion measuring approximately 0.0562 hectares to be hive off the suit property. A dispute concerning the transaction arose between the deceased and the plaintiff herein. The dispute was resolved in **Nakuru CMCC No. 1171 of 2011**. The defendant annexed a copy of the decree, the plaint and defence and counterclaim in the said case. He added that the deceased and his family have been in occupation and use of the portion that the deceased bought since 1994.

5. This ruling is in respect of Notice of Motion dated 15th November 2017. The application was heard by way of written submissions. The applicant filed submissions on 7th March 2018. It is submitted on behalf of the applicant that the conditions necessary for granting an interlocutory injunction have been met. Citing the case of **Mrao Ltd -v- First American Bank of Kenya Ltd & 2 others [2003] eKLR**, counsel for the applicant argued that the orders sought should be issued.

6. On the other hand, the defendant's submissions were filed on 15th March 2018. It is submitted therein that in view of the decree in **Nakuru CMCC No. 1171 of 2011**, this matter is *res judicata*. Citing the cases of **Bernard Mugo Ndegwa –v- James Nderitu Githae & 2 others [2010] eKLR** and **George W. M. Omondi & another –vs- National Bank of Kenya Ltd & 2 others [2001] eKLR**, counsel for the defendant urged the court to dismiss the application and strike out the suit entirely.

7. I have considered the application, the affidavits filed, the submissions as well as the authorities cited. Since the issue of *res judicata* goes to the jurisdiction of this court, I will deal with it first. *Res judicata* is provided for under **Section 7 of the Civil Procedure Act**. The said section provides:

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.

8. I need not go into any lengthy treatise on *res judicata* and its ingredients. The Court of Appeal had the following to say as regards the provisions of Section 7 in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

.... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & Another v the Attorney General and Others [2005] 1 EA 83.

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indentation of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313:-

“....where a given matter becomes the subject of litigation in and 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 under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, 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 parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.....”

See also Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263. Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

9. Besides the plaintiff's admission at paragraph 8 of the plaint that there have been proceedings in **Nakuru CMCC No. 1171 of 2011** between the plaintiff and Mbogo Kinyiri and that an appeal being **Nakuru HCCA No. 19 of 2013** is pending, the defendant has gone a step further and provided to the court copies of the pleadings and decree of the subordinate court. It is also important to note that the plaintiff has not filed any affidavit to challenge the defendant's contention that the defendant herein is the son of Mbogo Kinyeneri (deceased) who was the defendant in **Nakuru CMCC No. 1171 of 2011**.

10. A perusal of the plaint and decree in the aforesaid case shows that the plaintiff therein sought judgment against the deceased for:

a) A permanent injunction restraining the defendant, his agents, servants and any other person from entering, occupying, remaining on, trespassing on or in any way interfering with all the entire parcel of land known as L. R. Nakuru Municipality Block 29/648 (Ronda).

b) Costs of the suit.

c) Any other relief this honourable court deems fit and just to grant.

11. These are the same prayers that are sought in the plaint herein save that prayer (i) has been slightly tweaked in this case to include “a declaration that the property known as **Nakuru/Municipality Block 29/648** is the property of the plaintiff ...”. In view of the counterclaim in the subordinate court case which was allowed thus entitling the deceased to a portion of the suit property, this new facelift cannot escape the dragnet of *res judicata*. The subordinate court having heard and finally decided the issue of whether the deceased and parties such as the defendant herein who are claiming under him are entitled to the suit property on 10th January 2013, the plaintiff cannot re-litigate the same issues with the defendant herein who is a son of the deceased.

12. In view of the foregoing discussion, I find and hold that this suit *res judicata*. Consequently, I strike it out with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 6th day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Koome holding brief for Mr Ngure for the defendant/respondent

Mr Nanda holding brief for Mrs Ndeda for plaintiff/applicant

Court Assistants: Gichaba & Lotkomoi