



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. E011 OF 2021(O.S)

PETER KABUE KIHARA & 10 OTHERSPLAINTIFF/ APPLICANTS

VERSUS

WANJIKU NDUNGU1ST DEFENDANT/RESPONDENT/OBJECTOR

GABRIEL NDICO NGANGA....2ND DEFENDANT/RESPONDENT/OBJECTOR

RULING

There are two matters for determination. One is the Notice of Motion Application dated **25th March 2021**, by the Plaintiffs/ Applicants and the 2nd one is the Notice of Preliminary Objection dated **12th April 2021** by the Defendants/ Objectors.

In the Notice of Motion Application, the Plaintiffs/ Applicants sought for orders that;

- 1. That an interim injunction do issue restraining the Defendants their servants, agents, nominees and/or any person acting under their authority from evicting the Plaintiffs, entering, disposing, charging, encroaching, blocking access to, subdividing, registering any dispositions, trespassing onto or in any way interfering with the Plaintiff's quiet possession of the suit property Ruiru/ Ruiru East Block 2/452 (with all resultant parcels therefrom) pending the hearing an determination of this suit.***
- 2. That an injunction do issue restraining the Defendants from registering any transfer and or change of ownership of the suit property Ruiru/ Ruiru East Block 2/452 (with all resultant parcels therefrom).***
- 3. That costs of this Application be in the cause.***

The Application is premised on the grounds that the Plaintiffs/ Applicants have been in effective occupation and possession of the suit property since the year **2005** and have lived peacefully and uninterrupted since then. That of late the Defendants/Respondents have been harassing the Plaintiffs/ Applicants while threatening them with the eviction from the suit property, despite having extensively developed the suit property and established their homes on the said property .

That only by halting any dealings and transactions illegally being carried out concerning the suit property can the ends of justice be met and to avoid any unsuspecting third parties from being defrauded on the basis of new subdivisions which are not reflected on the ground. That the Plaintiffs/ Applicants have a previous litigation between them and one of the Respondents **Ndungu Wamugi** over share **certificate No. 1381 (Nyakinyua Investment Company Limited)** In Ruiru Law Courts **SPMC**

ELC NO. 89 of 2019, which was dismissed and the Respondents are shoving the dismissal order as the ticket for eviction, despite the fact that the suit property in Ruiru suit is not the suit property herein. That it is only for good order and preservation of the suit property if the record of the suit property is not manipulated further. That the Court has powers to grant the orders sought as it will lead to a fair determination of the suit.

In his Supporting Affidavit **Obadiah Njagi Njiru**, averred that he is one of the Plaintiffs/ Applicants and has the authority of the other Plaintiffs/Applicants to swear the Affidavit. That the Defendants/ Respondents are the registered owners of the suit property although they have never asserted ownership of the suit property prior to the acquisition of the title or thereafter. That the Plaintiffs / Applicants are facing threats of eviction by people in the bidding of the Defendants/ Respondents . That the Defendants/ Respondents, actions are prejudicial to the outcome of the suit as the Plaintiff/Applicants have their permanent homes established in the suit property since **2005**, and the evictions will be a high risk venture against them.

Further, that they believe that whoever is purporting to subdivide the suit property is keen on defrauding the innocent members of the public, who may be duped in purchasing non-existent plots and it is crucial to have the Defendants/ Respondents halted from further registrations concerning the suit properties or any subdivisions and therefore it is in the interest of justice to preserve the suit property, as the Orders would not be prejudicial to any party who would have the peace of dealing with the matter.

The suit is opposed and the Defendants/ Respondents filed a Replying Affidavit sworn on **12th April 2021**, by **Wanjiku Ndungu** who averred that the 2nd Defendant/ Respondent is her brother in law and is in her care due to unsoundness of mind and thus unable to swear the instant Affidavit. That through a suit numbered **ELC 89 of 2019**, all the ten Plaintiffs/ Applicants, had sued her husband **Ndungu Wamugi**, for the ownership of the suit property which suit he defended in person. That the land in issue then was **Ruiru/ Ruiru East Block 2/452**, which the ten Plaintiffs/ Applicants claimed unsuccessfully ownership. That the subject matter in **ELC E011 of 2021(O.S)** before the Honourable Court now is land known as **Ruiru/ Ruiru East Block 2/452**.

That the previous suit had the same ten Plaintiffs suing against her husband **Ndungu Wamungi**, her brother in Law and a strangers **Samuel Njuguna Gitumbi**, while she appeared in Court as a witness. That the person of great importance was the stranger whom the Plaintiffs/ Applicants claimed had sold the suit property to them and issued them with share certificates. However, his name has been omitted from the suit.

That the trial Court of first instance decided the suit in favour of 1st & 2nd Defendants whom are brothers and unequivocally pronounced the 3rd Defendant had encroached onto the suit property, and illegally subdivided it and unlawfully sold it and the Plaintiffs/ Applicants who were given **90 days** to vacate the said suit property . That time is not on their side and that is why they have filed the instant suit and recklessly failed to disclose the existence of the said Judgment. Further, that the Plaintiffs/ Applicants are turning litigation into a game, where they want to outsmart the administrative procedures, and hence she has filed an Objection on a point of law.

The Defendants/ Respondents filed a Notice of Preliminary Objection opposing the Notice of Motion and the entire suit on the following point of law;

1. The present suit is Res Judicata and should be struck out in limine since there exist a Court judgment between the exact parties and on the very same subject matter.

2. The Court Judgment was signed and pronounced on the 18th of February 2021 before the Senior Principal Magistrate Ruiru in ELC No. 89 of 2019.

The Plaintiffs/ Applicant's filed a further Affidavit sworn by **Obadiah Njagi Njiru**, on **23rd April 2021**, and averred that the 1st Defendant's/Respondent's Affidavits is gross uttering of falsehoods meant

to mislead the Honourable Court. That the 2nd Defendant/ Respondent is of sound mind and has never been certified to be of unsound mind. Further that the Plaintiffs/ Applicants have never been in litigation with the 1st Defendant/ Respondent, and the only litigation the Applicants have had has been disclosed to the Court and the pleadings have been filed. That **Ruiru SPMCC No 89 of 2019**, was over land share certificate **No. 1381 (Nyakinyua Investment Company Limited)** (which is dissimilar to the suit property herein and the Defendants were **Ndungu Wamugi, Gabriel Ndichu Nganga & Samuel Njuguna Gatumbi**. That the suit was a misguided one and did not touch on the suit property herein nor the principal parties herein.

That from the Replying Affidavit, it is a testament that the Applicants have been residing at the suit property and gives credence to the Applicants plea of having acquired the suit property by prescription. That indeed the Applicants were given **90 days** to vacate the suit property, but it is notable that part of the Judgment was not pleaded and the issue of ownership of the suit property as described was never a subject of that suit hence their claim for prescriptive rights. That the 1st Respondent has failed to disclose that she is keen on having the Applicants evicted from the suit property where their homes are and have lived for over 15 years. That the Respondents merely want to shut them from the seat of justice knowing very well they have never been part of any litigation.

The Application and Notice of Objection were canvassed by way of Written Submissions, which the Court has carefully read and considered. The Court has also read and considered the Application, Notice of Preliminary objection, the affidavits and the annexures thereto together with the provisions of law and finds that the issues for determination are;

- 1. Whether the Notice of Preliminary Objection dated 12th April 2021 is merited.**
- 2. Whether the Application dated 25th March 2021 is merited**

1. Whether the Notice of Preliminary Objection dated 12th April 2021 is merited

The Defendants / Respondents have raised an Objection seeking to strike out the suit based on the fact that the same is **Res Judicta**, as the Court delivered its Judgment on the **18th of February 2021**, before the Senior Principal Magistrate Ruiru in **ELC No. 89 of 2019**. A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“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”.

Further Sir **Charles Nebbold, JA** stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

A **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

Before the Court embarks in determining the merit of the **Notice of Preliminary Objections**, it will first determine whether what has been raised by the parties herein satisfy the ingredients of a **Preliminary**

Objection. In this determination, the Court will be persuaded by the findings in the case of Oraro... Vs...Mbaja(2005) 1KLR 141, where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

The Defendant/Respondents have in their Preliminary Objection averred that the suit herein is **Res Judicata** as it relates to **ELC No. 89 of 2019**, which has already been heard and determined. This has however been disputed by the Plaintiffs/ Applicants . In the case of Henry Wanyama Khaemba...Vs... Standard Chartered Bank Ltd & Another (2014) EKLR, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”

Further in the case of George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR, where the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court’s considered view that it will have to ascertain facts and probing of evidence. Further the issue on whether or not the same is **Res Judicata**, facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts. Therefore, this Court holds and finds that what has been raised by the Defendants / Respondents does not amount to a **Preliminary Objection**, hence the same is not merited.

2. Whether the Application dated 25th March 2021 is merited

The Plaintiffs/ Applicants filed the Application seeking interim Reliefs as against the Defendants/ Respondents. The principles upon which the Court can either grant or deny interim injunctions are well laid in the locus classicus case of **Giella...Vs... Cassman Brown**. However, before the Court can determine whether the Applicants are entitled to the injunctive orders sought, it must first determine whether the Suit herein is Res Judicata as the same goes to the jurisdiction of the Court and Jurisdiction is everything without it the Court has no option but to down its tools.

Though the Court has found that the issue of Res Judicata cannot be raised as a Preliminary Objection, the point has also been raised by the Defendants/ Respondents in their Replying Affidavit and submissions and therefore the Court must first deal with it. The legal doctrine of Res Judicata is set out in the provisions of **Section 7 of the Civil Procedure Act**. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. In the case of **Independent Electoral & Boundaries Commission ...Vs... Maina Kiai & 5 Others [2017] eKLR**, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied

conjunctively for the doctrine to be invoked. That is:

- "(a) *The suit or issue was directly and substantially in issue in the former suit.*
- (b) *That former suit was between the same parties or parties under whom they or any of them claim.*
- (c) *Those parties were litigating under the same title.*
- (d) *The issue was heard and finally determined in the former suit.*
- (e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."*

Further in the case of Nguruman Ltd...Vs...Jan Bande Nielsen & another (2017) eKLR; DSV Silo vs the Owners of Sennar (1985) 2 All ER 104 as cited in Bernard Mugi Ndegwa vs James Nderitu Githae & 2 others (2010) eKLR. The case of Henderson vs Henderson (1843) 67 ER 313 has also been cited where res-judicata was described as follows;

"...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 litigations in respect of a 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 pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the 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".

The Plaintiffs/Applicants have averred that the suit herein is not **Res Judicata**, as the parties to the suit are not the same as the 1st defendant/ Respondent was not a party while the cause of action in **ELC 89 of 2019**, was over a land share Certificate No. 1381 and therefore the suit property in the Ruiru suit is not the instant suit.

It is not in doubt that the Plaintiffs were the same Plaintiffs in **Ruiru SPMC 89 of 2019**. It is further not in doubt that the 2nd Defendant was also a defendant in the said suit. The Court notes that in the instant suit the suit property is **L.R Ruiru/Ruiru East Block 2/452** registered in the name of **Wanjiku Ndungu and Gabriel Ndico Nganga**. Though the Plaintiffs/ Applicants contend that the former suit was in relation to a share certificate, this Court is well versed with the process through which the registration of a property is attained when the same involves a land buying Company and in this case Nyakinyua Investment and the parties. That before a party can attain proprietorship, the party will first need the share certificate. The Court having gone through the Judgment of the subordinate Court in the former suit notes that the Court did in fact indicate that the Defendants followed up on the processing of the title, It would automatically then mean that the same resulted in the instant title deed.

There is no doubt in the Court's mind that the instant suit and the former suit refer to the same suit property. In the former suit, the Plaintiffs/ Applicants indicated that they had taken possession in **2005**, and built their houses thereon. In this instant suit, the Applicants have also indicated the same. Could it be that the Applicants have been in possession of two different properties at the same time since 2005. Certainly not. It is quite clear that the Applicants are seeking to be registered as the owners of the same property that was referred in the former suit albeit in a different manner, that they sought to be registered as owners in the former suit. It is quite clear that the Plaintiffs/ Applicants are seeking to evade the doctrine of **Res judicata**

By bringing this suit before this court in another way and inform of a new cause of action which has been

determined by another Court with competent jurisdiction, the Court finds that the same cannot be entertained. Therefore, the Court finds and holds that the instant suit is **Res Judicata** to **Ruiru SPMC 89 of 2019**, and hence this Court has no jurisdiction to determine the matter and consequently this entire suit is **struck out** entirely for being **Res judicata** with costs to the Defendants.

In a nutshell, the instant Notice of Motion application dated **25th March 2021**, is dismissed and the entire suit is struck out as stated above.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF SEPTEMBER, 2021

L. GACHERU

JUDGE

Court Assistant –Lucy