



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC 93 OF 2019

JOSEPH MAINA NJOROGE.....PLAINTIFF

VERSUS

JOHNSTONE MBUGUA KINORO.....1ST DEFENDANT

SUSAN NYANCHAMA MOKAMBA.....2ND DEFENDANT

RULING

The Application

1. The applicant moved the court through notice of motion dated 17/5/2021 brought under **Order 40 rule 1 (a)** and **Rule 2** and **Order 51** of the **Civil Procedure Rules, 2010** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act** seeking the following orders:

(1) ...spent

(2) That pending the hearing and determination of this application *inter partes* the Honourable court be pleased to issue a temporary injunction restraining the respondents either by themselves or their representatives, servants, agents and/or assigns from entering, remaining in trespassing, cultivating, selling, constructing or otherwise dealing in any way with the plaintiff's/applicant's land known as MAU SUMMIT/MOLO BLOCK 7/1036 (Tayari).

(3) That pending the hearing and determination of this suit the Honourable court be pleased to issue a temporary injunction restraining the respondents either by themselves or their representatives, servants, agents and/or assigns from entering, remaining in trespassing, cultivating, selling, constructing or otherwise dealing in any way with the plaintiff's/applicant's land known as MAU SUMMIT/MOLO BLOCK 7/1036 (Tayari).

(4) That costs of this application be borne by the defendants/respondents.

2. The application is supported by the affidavit sworn on 17/5/2021 by the plaintiff **Joseph Njoroge Maina** where he deposed that in 1980 he was a registered member and shareholder of a land buying company known as Tayari Farmers Limited and by dint of the amount of shares he held, he successfully balloted and upon paying the requisite fee he was allotted **Plot No. 22** which he immediately took possession of and started cultivating; that the 1st defendant/respondent fraudulently registered his **Plot No. 22** in his own name as **Mau Summit/Molo Block 7/1036 Tayari** and further transferred it to the 2nd defendant/respondent who has since developed the suit property. He finally deposed that he is apprehensive that the defendants/respondents may dispose of his property and urged the court to allow the application.

Response

3. 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.

4. The preliminary objection is to the effect that the plaintiff/applicant's claim is a violation of **Section 7** of the **Limitation of Actions Act** hence statutorily barred; that it is about 29 years since the said title deeds were issued to the defendants/respondents; 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**.

5. The 1st defendant/respondent in the replying affidavit deposed that he acquired the suit property from Tayari Farmers Company Limited on 20/9/2003 and was issued with a title deed on 13/10/2003; that the plaintiff/applicant filed a civil suit against him in **Molo Civil Suit No. 315 of 2003 Joseph Njoroge Maina vs John Mbugua & Tayari Farmers Co. Ltd.** which was later struck out on 26/3/2004; that he had

taken possession of the suit land at the time he bought it until around **29/7/2008** when he sold the land to the 2nd defendant/respondent.

6. He further deposed that the 2nd defendant/respondent has extensively developed the suit property; that the same documents relied on this matter are materially the same as the ones the plaintiff relied on in the Molo case; that the plaintiff/applicant in his affidavit refers to **Plot No. 22** which is actually **Plot No. 404** and was the subject property in the Molo case which property is now **Mau Summit/Molo Block 7/1036 (Tayari)**; that the suit was instituted on **29/8/2019**, **16** years and **10** months from the time he was issued with the title deed and over **15** years since the plaintiff/applicant lost the Molo case; that the 2nd defendant/applicant was brought into this case **13** years **10** months from the date she was issued with the title deed.

7. He concluded by deposing that no leave was sought to institute the case out of time hence the same is statutorily barred and the instant application should be struck out with costs.

Submissions

8. Upon perusal of the file, I have found that there are no submissions filed by any of the parties.

Determination

9. It is my opinion that the only issues for determination are whether the instant suit is *res judicata* and whether the order of injunction sought should issue.

10. Section 7 of the **Civil Procedure Act** states:

“No court shall try any suit 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 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.”

Further, **Section 28** of the **Environment and Land Court Act** prevents the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

11. In **Gurbachau –v- Yowani Ekori (1958)EA 450**, the Court of Appeal of Eastern Africa, cited a passage from the judgment of the **Vice Chancellor in Henderson –v- Henderson (1) 67 ER 313** wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that 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 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.” (Emphasis mine.)

12. Further, in the case of **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a) The suit or issue was directly and subsequently in issue in the former suit.***
- b) The 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***

13. In the instant case, it is clear from the pleadings that there was a case filed by the plaintiff/applicant herein **Molo SRM Civil Suit No. 315 of 2003 Joseph Njoroge Maina vs John Mbugua & Tayari Farmers Co. Ltd.** The issues raised are on alleged fraud by the defendants on **Plot No. 404**. It is also a fact that the suit property herein **Mau Summit/Molo Block 7/1036** arose from **Plot No. 404**. The plaintiff/applicant in his supporting affidavit stated that he was allotted **Plot No. 22 Tayari Farm**, however, he went on to annex a ballot card for **plot No. 404**. It is my opinion and in agreement with the 1st defendant/respondent that the plaintiff/applicant is referring to **Plot No. 404** but not 22. The plaintiff/applicant confirms the same in the instant suit in his amended complaint under **paragraph 8** and **3** where he

averred **Plot Number 404 Tayari Farm** is now registered as **Mau Summit/Molo Block 7/1036 (Tayari)**.

14. Further, the plaintiff/applicant in both cases raises the issues of fraud by the defendants/respondents. In view of the above, it thus clear that the suit property in **Molo SRM Civil Suit No. 315 of 2003** is exactly the same as the instant case and raises similar issues that is fraud.

15. The plaintiff/applicant in **Molo SRM Civil Suit No. 315 of 2003** sued John Mbugua and Tayari Farmers Co. Ltd as the 1st and 2nd defendants respectively. In the instant suit, he has sued Johnstone Mbugua Kinoro and Susan Nyanchama Mokama as the 1st and 2nd defendants respectively. It is my opinion and from the pleadings and the title document that *John Mbugua* and *Johnstone Mbugua Kinoro* are the same person the 1st defendant/applicant herein. 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.

16. In the case of **E.T. –v- Attorney General & Another (2012) eKLR, Majanja J** stated that:

“The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

17. It is my considered opinion that in the instant suit, the plaintiff/applicant seems to attempt to reopen a suit in which issues that were raised or ought to be raised in the previous suit by introducing the new ruse of using a different name of the 1st defendant herein with the clear knowledge that he is one and the same person. This is a clear abuse of the court process as the plaintiff/applicant wants to re-litigate on an already concluded matter; to make matters worse, he failed to disclose to the court that he had filed a similar suit involving the same subject property and the same party and raising similar issues back in **2003**. Instead he filed the instant suit while appearing to think that he would go undetected. Public interest demands that litigation must come to an end at some point and no party should not engage others and the court in a plethora of litigation on the same issues involving the same parties.

18. In the light of the above, it is this court’s view that the 1st defendant/applicant’s preliminary objection dated **1/6/2021** has merit and it is allowed; the instant application dated **17/5/2021** lacks merit and it is hereby dismissed with costs. Consequently, the instant suit is also hereby struck out for being *res judicata* and an abuse of court process.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF OCTOBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU