



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

PETITION NO. 1 OF 2014

CONSOLIDATED WITH JR 1 of 2013 and JR 2 OF 2014

MARTIN MAURICE ODHIAMBO.....APPLICANT/ PETITIONER

VERSUS

JOEL KIPSANG A. NGENO.....1st RESPONDENT

KENYA COMMERCIAL BANK.....2nd RESPONDENT

DAWNING AGENCIES.....3rd RESPONDENT

M/S E. ORINA & CO ADVOCATES.....4th RESPONDENT

LAND REGISTRAR.....5th RESPONDENT

SAMWEL BIRGEN CHERUIYOT.....6th RESPONDENT

GOITA REAL INVESTMENT.....7th RESPONDENT

RULING

1. Before me for determination is the Petitioner's application dated 7th April 2021 in which he seeks the following orders:

i. Spent

ii. That the title given to the 6th Respondent **Samwel Birgen Cheruiyot** on 13th September 2018 be canceled (deleted from the register) forthwith.

iii. That any subsequent dealings on the property *Kericho/Kipchimchim/1690* between the 6th Respondent and the 7th Respondent be canceled.

iv. That the application be heard together (consolidated) with the applications dated 15th April 2020 and 13th July 2020.

v. That the Respondents herein be restrained and either by themselves, agents, servants or otherwise from interfering with the Petitioner/Applicant's possession of the property *Kericho/Kipchimchim/1690* or *taking forceful possession pending the hearing and determination of Civil Appeal No. 41 of 2019*

vi. *Any other order or direction the honorable court might deem fit to grant*

vii. *Cost of the application*

2. *The application was supported by the affidavit of the Applicant sworn on 9th April 2021*

3. Pursuant to directions by the court for the disposal of the application by way of written submissions and compliance thereto by parties, the Applicant's bone of contention in summary was to the effect that 2nd, 4th 5th, and 6th Respondents conspired to fraudulently register the suit property in the name of the 6th Respondent on 13th September 2018, who then sold the same to the 7th Respondent whilst the matter was still pending in court.
4. His argument was that since title had been acquired fraudulently and when the matter was pending in court, which was in contravention of the doctrine of *lis-pendens*, the said title ought to be canceled.
5. The Applicant further sought that the present application be consolidated with his previous applications dated 15th April 2020 and 13th July 2020.
6. The Applicant's application was opposed by the 6th Respondent's Replying Affidavit of 16th April 2021 as well as the 1st, 4th and 6th Respondents' submissions dated 29th April 2021 in which the Respondents stated that the prayers sought by the Applicant were substantive in nature and could not be granted in an application and further that the same had been overtaken by events the suit property herein having been legally transferred to the 6th Respondent and a title deed issued on 13th September 2018.
7. The Respondents further submitted that the Applicant's application was an abuse of the court process and lacked merit the Applicant having made a similar application dated 7th December 2018 seeking for stay of execution of the court's judgment wherein a ruling was delivered on the 28th June 2019 by a court of concurrent jurisdiction dismissing the said application. The issues raised in the application dated 15th April 2020 were thus *res judicata* the court's judgment dated 11th May 2016.
8. The Applicant not being satisfied with the court's judgment had preferred an Appeal to the Court of Appeal but continues to file frivolous and vexatious applications upon applications which is an abuse of the court process.
9. The Respondents submitted that the doctrine of *lis pendens* did not apply in the instant case as the issues raised had previously been determined by the court of concurrent jurisdiction.

Determination.

10. I have considered submissions by both the Applicant herein and the Respondents in respect of the Applicant's application dated the 7th April 2021.
11. I have also considered the Applicant's applications dated 15th April 2020 and 13th July 2020 respectively where the Applicant sought that the 6th and 7th Respondents be made party to the respective applications and that they be restrained from interfering with his (Applicant's) possession of the suit property namely *Kericho/Kipchimchim/1690*, pending the hearing determination and of the applications and an appeal No. 41 of 2019.
12. It is worth noting that the Applicant herein filed Kericho ELC Petition No. 1 of 2014 which was amended on 15th May, 2017 and consolidated with the 1st Respondent's Judicial Review Application No. 2 of 2014.
13. The Applicant in his application had sought for the following orders;
 - i. *That the public auction dated 28th May 2003 be set aside on the grounds of irregularity and fraud as the 2nd Respondent had received some payment from the Petitioner on the same property and the same has also lapsed in law.*
 - ii. *That the Respondents be permanently be restrained jointly and severally by themselves, their directors, employees, servants and/or any authorizing agents from dealing with that parcel of land registered as Kericho/Kipchimchim/1690 for the Applicant paid kshs. 120,000 to the 2nd Respondent for the same property and has been in occupation for the last 24 years.*
 - iii. *That a declaration do issue directed to the 2nd Respondent for a valid discharge of the suit property upon payment of Kshs. 475,000 and the title be registered in the name of the Petitioner as initially agreed between the Petitioner and the 1st and 2nd Respondents and the same be paid within 90 days from the date of judgment/ruling.*
 - iv. *The 5th Respondent (District Land Registrar be ordered to effect transfer of the said land Kericho/Kipchimchim/1690 into the name of the Petitioner and the balance of Kshs. 475,000 be paid as earlier agreed or deposited in court within 90 days from the date of judgment/ruling.*
 - v. *Any other or further orders and relief that the court may deem fit to grant.*
 - vi. *Costs and interest of this Petition be given.*

14. The 1st Respondent on the other hand in his Judicial Review application against the bank, the Land Registrar Kericho and the Petitioner **had sought for the following orders.**

- i. *That this Honorable Court be pleased to issue an order of mandamus compelling the Land Registrar to register the discharge of*

charge and effect the transfer in respect of L.R No. Kericho/Kipchimchim/1690 in favour of the Applicant.

ii. That this Honorable Court do issue an order of prohibition restraining the 2nd Respondent(the Applicant herein) by himself, agents, servants, employees or otherwise from occupying, assigning and/ or in any other way interfering with the Applicant's proprietary interest in land parcel No. Kericho/Kipchimchim/1690.

15. **Vide its judgment of the 11th of May, 2018, the court found that (Petitioner) the Applicant herein had** failed to prove his case wherein it dismissed his Petition with cost.

16. On the other hand the court found in favour of the (Applicant) the 1st Respondent herein, in his judicial Review Application No. 2 of 2014 and granted the orders sought. The (2nd Respondent) who is the Applicant in the present application was condemned to pay the costs of application.

17. The dismissal of the Applicant's application opened a pandora's box wherein the Applicant herein went on an application filing spree wherein on the 7th December 2018 he filed an application seeking the following orders:

i. Spent

ii. An order of stay of the order/decreed dated 11.5.2018 pending appeal

iii. That the Honorable court be pleased to extend time for giving notice of intent to appeal out of time from the judgment of the Honorable court dated 11th May 2018

iv. Any other relief that the honorable court may deem fit and expedient to grant in the circumstances

18. The application was dismissed vide a ruling of 28th June 2019.(see **Martin Maurice Odhiambo v Joel Kipsang A. Ngeno & 3 others [2019] eKLR**)

19. Therein after the Applicant filed applications dated 15th April 2020, 13th July 2020 and 7th April 2021 seeking orders as herein above enumerated.

20. Suffice to state that pursuant to the delivery of the court's judgment of **11th May 2018**, the order of the court was extracted and issued on 23rd May 2018 following which the title was issued to the 6th Respondent. The orders the Applicant now seeks are substantive orders which cannot be issued at this stage as the same would amount to the court sitting on its own appeal, against the orders made earlier, which is an erroneous exercise of discretion or power.

21. A stay of execution postpones the enforcement of a judgment against a litigant who has lost a case. Stay of execution may also be used to describe any number of legal measures taken to provide temporary relief to the Applicant herein. The orders sought by the Applicant in the preset application are akin to orders of stay of execution and which issues were conclusively decided by the court in its ruling of 28th June 2019.

22. 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"

23. 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:

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.

24. Looking at the circumstance of the present Applications and the previous application dated the 7th December 2018, this court finds that the decision of the court to the effect that; *"Having arrived at the finding that an extension of time will not be granted, there would be no reason to grant a stay of execution. In any event this request is coming rather late in the day without demonstrating sufficient cause."*..... was in my view a decision of finality in the sense of *res judicata*.

25. It was held in the case of **E.T vs Attorney General & Another (2012) eKLR** that:

“The courts must always be vigilant to guard 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 of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

26. The upshot of the foregoing is that the Applicant’s application(s) were conclusively decided vide the ruling of 28th June 2019 and therefore the applications are res judicata and an abuse of the court process.

27. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to. The Applicant’s applications dated the 15th April 2020, 13th July 2020 and 7th April 2021 are herein dismissed with costs.

DATED AND DELIVERED AT KERICHO VIA MICROSOFT TEAMS THIS 28TH DAY OF OCTOBER 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE