



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 134 OF 2021

SULEIMAN KUWEAH GAKURIA.....1ST PLAINTIFF/APPLICANT

BINTI OMAR MOHAMMED alias HAWA ABDUL MWASSERRAH....2ND PLAINTIFF/APPLICANT

- VERSUS -

DOUGLAS MWANGI.....1ST DEFENDANT/RESPONDENT

ALI NDULI.....2ND DEFENDANT/RESPONDENT

MBAYA BAKARI.....3RD DEFENDANT/RESPONDENT

MOHAMMED HAMISI.....4TH DEFENDANT/RESPONDENT

ALI HAMISI.....5TH DEFENDANT/RESPONDENT

RULING

I. PRELIMINARIES

1. Before this Court is the Notice of Motion application dated 13th July, 2021 by the 1st and 2nd Plaintiffs/Applicants and the notice of Preliminary Objection dated 14th September, 2021 by the Law firm of of Kedeki & Company Advocates for the Defendants herein. On 21st September, 2021 due to the complexity of the matter, it was agreed and hence directed that all these matters be tackled simultaneously in this ruling.

II. The 1st & 2nd Plaintiffs/Applicants case

2. The 1st, 2nd, 3rd, 4th and 5th Plaintiffs/Applicants also instituted a suit vide a Plaint dated 13th July, 2021 against the 1st, 2nd, 3rd, 4th & 5th Defendants/Respondents herein seeking among numerous other prayers including a permanent injunction restraining the 1st, 2nd, 3rd, 4th and 5th Defendants from entering, trespassing and interfering in any other way all that suit property known as MOMBASA/MAINLAND SOUTH/BLOCK 1/1808 measuring 0.1401 Ha or thereabout) (Hereinafter referred to as “The Suit Property”). and an order of eviction and demolition of all the structures erected by the Defendants and costs.

3. The aforesaid application is brought under the provision of Order 40 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Sections 1A, 1B, 3, 3A & 63 (e) -of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The application seeks the following orders:

a. Spent

b. Spent

c. THAT pending the hearing and determination of the Application herein this Honorable Court be pleased to issue an order of temporary injunction restraining the Defendants whether by themselves, their servants, agents and/or employees from constructing, selling, wasting, damaging, trespassing, developing, and /or in any way interfering with the property being

MOMBASA/MAINLAND SOUTH/BLOCK 1/1808.

d. THAT pending the hearing and determination of the Suit herein this Honorable Court be pleased to issue an order of temporary injunction restraining the Defendants whether by themselves, their servants, agents and/or employees from constructing, selling, wasting, damaging, trespassing, developing, and /or in any way interfering with the property being MOMBASA/MAINLAND SOUTH/BLOCK 1/1808.

e. THAT this Honorable Court be pleased to grant any other orders as they deem fit in the circumstances and towards the preservation of the suit property.

f. THAT costs of this application be provided for.

4. The said application is based on the grounds, testimonies and six (6) annexures marked as "HAM – 1 to 6" of the 12 Paragraphed Supporting Affidavit of HAWA ABDUL MWASERAH the 2nd Plaintiff/Applicant herein sworn and dated on the 13th July, 2021 (Hereinafter referred to as "The Supporting Affidavit"). On 13th July, 2021, the 1st Plaintiff/Applicant gave her a consent and authority to plead and act on his behalf in this matter under the provision of Order 1 Rule 13 of the Civil Procedure Rules.

5. She deposed that she was a female adult of sound mind and understanding and the Joint registered owner together with the 2nd Plaintiff/Applicant of all the suit land situated in Likoni area. She annexed a copy of the current official search dated 4th July, 2021 in the names of the 1st and 2nd Plaintiffs. She held that they had always been in possession of the land and had been paying all the statutory rates and lands rents to the County Government of Mombasa without failure. She annexed copies of the official receipts to that effect.

6. She stated that sometimes in the month of April, 2021 she noticed that there some temporary small kioks being constructed on the suit land and indeed upon inquiry she found out that there were by some vendors people who were trespassing into the suit land. She lodged a complaint with the police. They vacated.

7. Once again in the month of June, 2021, she noticed again constructions of the same temporary kioks and some permanent structures and a public toilet on the suit land and upon making inquiry and doing due diligence she found out that it was the Defendants were the ones behind all these illegal and irregular development on the suit land. Her Advocates issued demand letters to them but they declined to stop the constructions and the acts of trespassing onto the suit land. She did once again lodge a complaint with the police but instead the Defendant now invited more people to invade and enter into the suit land. Indeed, she states that the Defendants had become extremely violent as the suit land had been reduced as free no man's land for all.

8. She avers that this is a property due to its high potential and high commercial viability, it is highly coveted by many influential people including politicians. The 1st Plaintiff/Applicant urged Court to grant them injunctive orders sought to stop any further actions of by the Defendants/Respondents as the said actions were injurious to them. They pleaded having prima facie case being the registered owners with prove of the Certificate of Lease and paying the rates. They were likely to suffer irreparable damage if the orders were not granted. The balance of convenience was to grant the orders as they Defendants/Respondents who were only trespassers and illegal on the suit land stood not to be prejudiced at all. They prayed for the prayers sought and costs be granted thereof.

III. The 1st, 2nd, 3rd, 4th 5th Defendants/Respondents' case

9. On 15th September, 2021, the 1st, 2nd, 3rd, 4th & 5th Defendants/Respondents filed an 11 Paragraphed Replying Affidavit sworn by DOUGLAS MWANGI and dated 14th September, 2021. It has three (3) annexures marked as "DM 1 to 3" annexed thereto. He deposed that he was the 1st Defendant/Respondent and duly authorized by all the other Defendants to swear and plead on their behalf in this matter as per the Consent of Authority marked as "DM – 1". He held that the application by the Plaintiffs/Applicants was frivolous, vexatious and an abuse of the due process of court and law.

10. He averred that on or around June, 2020 the other Defendants/Respondents and him were engaged by one Mohamed Mohammed Mwabungare to renovate has dilapidated toilets which work they undertook to its completion making this application to be overtaken by events. They indicated that they had no direct personal interest nor relationship and/or connection with the said suit property. Their role was purely of rendering skilled artisanship as masons and that was all.

11. The Defendants argued that they were the wrong persons to be sued and therefore, even if the temporary injunction orders were obtained against them, it would still leave the beneficial owner above stated free to engage other persons to work on the properties on the suit land.

12. The Defendants brought the attention of this court to a similar case on the same parties and same subject matter instituted by the Plaintiffs/Applicants being ELC No. 178 of 2020 and where a ruling had been delivered on 27th July, 2021 by this Honorable court and which they annexed the said ruling making this application "*Res Judicata*" contrary to the provisions of Section 7 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. They were of the view that the application was "*Sub – Judice*" and ought to be Stayed under the provisions of Section 6 of the Civil Procedure Act, Cap. 21. This court was "*Functus Officio*" so to speak. Essentially, therefore, they argued that this was the basis of the notice of the Preliminary Objection filed herein on pure matters of law urging that this application and the entire suit should be dismissed with costs hereof.

IV. The Submissions

13. On 21st September, 2021, when the parties appeared before court, it was directed due to the complexity of the matter that the application

dated 13th July, 2021 and the Preliminary Objection dated 14th September, 2021 be canvassed by way of written submissions. Pursuant to this direction, all parties fully complied and ruling date was reserved for 14th December, 2021.

A. The Submissions by the Plaintiffs/Applicants

14. On 5th October, 2021, the Advocates for the 1st, 2nd, 3rd, 4th & 5th Plaintiffs/Applicants, the firm of Messrs. Madzayo, Mrima & Jadi Advocates filed written submissions dated the same in support of the notice of motion application dated 13th July, 2021 and the Preliminary Objection dated 14th September, 2021 by the Defendants/Respondents Advocates herein. In a nutshell, Learned Counsel submitted that the 1st and 2nd Plaintiffs/Applicants had satisfied all the requirements of granting a temporary injunction as set out in the famous case of **“Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358”**. He argued that, the Plaintiffs/Applicants had established a *“prima facie”* case, in that as the legal and absolute registered owners to the suit property they had all the interest, rights and title to it and that right was at a risk of being infringed by the 1st, 2nd, 3rd, 4th and 5th Defendants/Respondents. On the issue of having a Prime facie case, he relied on the case of the ***Court of Appeal case Mrao Limited - Versus - First American Bank of Kenya (2003) KLR 125***.

15. They held that the Defendants/Respondents who had not explained how they had acquired the right on the land and even started construction on it had no right on being on the suit land. The Learned Counsel submitted that they had not obtained any approvals from the County Government nor the Physical Planning Committee. They had not even challenged the title being held by the Plaintiffs/Applicants. The Advocates held this was a case with a high probability of success and if the orders sought was not granted they stood to suffer by losing their property.

16. On the balance of convenience, the Learned Counsel urged court to find that the Plaintiffs/Applicants stood to suffer most by losing their land, if the application was dismissed while on the other hand if the application was allowed, the Defendants/Respondents stood to lose nothing taking that they were invaders and trespassers onto the Plaintiff/Applicants land and were busy constructions both permanent and temporary structures onto the land. There were photographs to that effect. They stood to lose irreparably damage which could not be compensated by monetary value at all and hence the balance of convenience tilted to their favour. The Learned Counsel prayed for the application and the prayers sought to be allowed.

17. On the Preliminary Objection, the Learned Counsel submitted that the application nor the suit by the Plaintiffs/Applicants were neither **“Res Judicata nor Sub – Judice”** as alleged. They relied on the case of **“Kenya Commercial Bank Limited – Versus – Benyon Amalgated Limited – 2017, e KLR”** to the effect that all the five (5) elements under Section 7 of the CPA had to be fulfilled for this principle to be applicable. They held that all these were being allegations and he who alleged ought to prove which the Defendants/Respondents failed to do. They contended that the matter of **ELC No. 178 of 2020 between Mohamed Mohammed Mwabungare – Versus – Binti Omar Mohammed & Suleiman Kuweah Gakura** clearly different parties to the Plaintiffs and Defendants in this suit. The Defendants herein were not parties to that suit and hence count be bound by any orders emanating from that suit.

18. The Learned Advocates held that in ELC (OS) No. 178 of 202 was an originating Summons whereof which has not been fully determined, the Plaintiff was seeking to be declared an owner of the suit property by way of land adverse possession whereas the suit herein is on trespass by the Defendants. There cannot be any bar for the suit from proceeding as the parties are not the same parties. They submitted that the court is not *“functus officio”* as the two issues and suit are way different and distinct.

19. They argued that the Defendants/Respondents were trespassers and were just using Mr. Mohammed Mwabungare to shield themselves who himself has not yet been declared an owner to the suit property. They relied on the decision of **“Henderson _- Versus – Henderson (1843) eKLR 313”** to support their point. They once more urged court to allow the application dated 13th July, 2021 and to the Preliminary Object for lack of merit.

B. The Submissions by the 1st, 2nd, 3rd, 4th, & 5th Defendants/Respondents

20. On 19th October, 2021, the Advocates to the 1st, 2nd, 3rd, 4th & 5th Defendants/Respondents the law firm of Messrs. Kedeki & Company Advocates filed their written submissions dated 19th October, 2012 opposing the application by the Plaintiffs/Applicants and the entire suit through the filed Preliminary objection.

To buttress his point, he relied on the case of **Air Land Tours – Versus - National Industrial Credit Bank Milimani HCCC No. 1234 of 2002 where the court held that “in an interlocutory application, the court is not required to make any conclusive or definite findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of law.”**

21. The Learned Counsel submitted that the Plaintiffs/Applicants had not met the conditions for granting an injunction, as provided for under the provision of Order 40 Rule 1 of the Civil Procedure Rules, 2010.

The Counsel persuaded court to dismiss the application with costs to the 1st Defendant/Respondent.

ANALYSIS AND DETERMINATION.

I have carefully read and put into account all the filed pleadings, the submissions, authorities relied on and the relevant provisions of the appropriate and enabling laws with regard to the Notice of Motion application dated 13th July, 2021 and the Preliminary Objection dated 14th September, 2021.

In order to arrive at an informed decision, I have framed the following salient issues for determination. These are:-

a. Whether the 1st, 2nd, 3rd, 4th and 5th Plaintiffs/Applicants have fulfilled the fundamental requirements of being granted a temporary injunction as stipulated in Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010.

b. Whether the application dated 13th July, 2021 and the entire suit breached the doctrine of Res Judicata and Sub Judice hence offending the provisions of Section 7 of the Civil Procedure Act taking that it is the same as ELC No. 178 of 2020.

c. Whether the Plaintiffs/Applicants are entitled to the orders sought.

d. Who will bear the cost of the said Notice of Motion application.

Issue No. a). Whether the Plaintiffs/Applicants have fulfilled the fundamental requirements of being granted a temporary injunction as stipulated in Order 40 Rules 1 & 2 of the Civil Procedure Rules, 2010.

The purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The principles which guide the court in deciding whether or not to grant an interlocutory injunction are well settled in the now famous *“Giella -Versus - Cassman Brown (supra)”* as follows:

i. prima facie with a probability of success,

ii. the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages, and

iii. if the court is in doubt on the existence or otherwise of a prima facie case, it will decide the application on the balance of convenience.

The first requirement the applicants is required to establish a prima facie case. The Prima facie case was defined by the **Court of Appeal in MRAO Ltd - Versus - First American Bank of Kenya Ltd & 2 others (2003) eKLR** *“so what is “a prima facie case” I would say that in civil cases it is a case in which on the material presented to the court or tribunal properly directly 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.”* When examining whether the applicants have established a prima facie case, court ought not to indulge into examining the merits and demerits of the case as it was stated by **Odunga J in Peter Kasimba & 219 others - Versus - Kwetu Savings & Credit Co-operative Society Limited & 11 others (2020)eKLR**, stated that *“at an interlocutory stage, the court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties.”*

The Plaintiffs/Applicants have produced a copy of the Certificate of Lease to the suit property through an Official search dated 4th July, 2012 for a 99 years while claiming legal proprietorship to it. They have held that they have been paying all the statutory dues being land rents and rates to the County Government of Mombasa. On the other hand, they have alleged that the Defendants/Respondents were invaders and trespassers onto the land and were busy construction both permanent and temporary illegal and wrongful structures on the land.

The Plaintiffs/Applicants have accused the Defendants/Respondents for hiding under the cover of Mr. Mohammed Mwangungare who is not himself an owner of the land but one who is also trying to lay claim on title through land adverse possession another suit. The Defendants/Respondents have not challenged this Certificate of title at all. Instead they have only held that they were mere artisans called onto the suit land to just undertake renovation of the toilets belonging to Mr. Mohamed. They have further denied being the persons on the land and that this suit was **“Res Judicate and Sub Judice** as there exists another suit over the same parties and same subject matter.

In the meantime, this court is called to preserve the suit property until these questions are heard and determined.

The second requirement is for the Plaintiffs/Applicants to prove to court that they might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The Plaintiffs/Applicants have stated that they stand to lose the suit property due to the continued trespass, invasion and the construction of the permanent and temporary structures onto the suit land. Indeed, the land has now been invaded by numerous people at the behest of the Defendants.

The 1st Defendants/Respondents have denied that they were actually on the suit land only to casually hold that the matter has been over taken by events. In the given circumstances, I am satisfied that the 1st and 2nd Plaintiffs/Applicants stand to lose and suffer irreparable damage if the orders are not granted. The provision of Order 40, Rules 1 & 2 of the Civil Procedure Rules, 2020 empowers court to grant an order of temporary injunction to restrain such acts and to prevent the wasting, damaging, alienation, sale, removal or disposition of the suit property. The Plaintiffs/Applicants stand to suffer irreparable injury that cannot be quantified by damages. On this preposition, I fully associate myself with the ratio in the **Court of Appeal in Nguruman Limited – Versus - Jan Bonde Nielsen & 2 others (2014)eKLR** *“in conclusion, we stress that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of multiplicity of suits and where facts are not shown to bring the case within these conditions the relief of injunction is not available.”*

When court is in doubt, it examines on which side the balance of convenience tilts to. In this case, the balance of convenience tilts in favour of the 1st and 2nd Plaintiffs/Applicants and in preserving the suit property during the hearing and determination of the suit.

ISSUE No. b. Whether the application dated 13th July, 2021 and the entire suit breached the doctrine of Res Judicata and Sub Judice hence offending the provisions of Section 7 of the Civil Procedure Act taking that it is the same as ELC No. 178 of 2020?

22. Additionally, the Defendants herein raised an object to the effect that the instant suit was in breach of the *vis-à-vis* the Principles of “**Sub judice**” and “**Res judicata**” as founded under the provisions of Section 6 and 7 of the Civil Procedure Act Cap 21 of Laws of Kenya by the Plaintiff in filing this case. They held the instant suit was the same as that of **ELC No. 178 of 2020 between Mohamed Mohammed Mwabungare – Versus – Binti Omar Mohammed & Suleiman Kuweah Gakura**”. Therefore, there is need for Stay of the proceedings of the case before this court. Sections 6 & 7 provides that:-

6. “No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

23. From this provision, the ingredients to satisfy the condition of granting stay of the suit or proceedings in any matter in Court are as follows:-

- a). There has to be a matter pending or previously heard in court;
- b). The matter involved a subject in issue which was directly and substantially in issue in a previously instituted suit or proceeding.
- c). The matter must have been between the same parties, or between parties under whom they or any of them claim, litigating under the same title;
- d). The matter must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The provision of Section 6 is a bar to parallel prosecution of cases in two forums of equal jurisdiction. These two provisions of the law are so intertwined. Thus, the legal justification as to why the provisions of both Sections 6 and 7 of the Civil Procedure Act as advanced by the Defendants herein are not applicable here is graphically stated out herein below.

7. “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 or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court’.

24. From the above provisions of the law, for the doctrine of Res Judicata to be achievable, the following the ingredients must to be fulfilled:-

- a. The suit or issue was directly and substantially in issue in the former case
- 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.

Expounding on the essence of the doctrine of Res Judicata, the court in “**John Florence Maritime Services Limited & Another – Vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR**” pronounced itself as follows:

“The rationale behind Res Judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter, Res Judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgements by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, very essence of the rule of law would be in danger of unravelling uncontrollably”.

Apart from the subject matter being the suit land, there is no relationship between these two suits at all. The parties and the cause of action is different and distinct.

Furthermore, this suit has not even been heard and finally determined. For that reason, the doctrine of “Res Judicata” as pleaded are inapplicable in the instant case as has been elaborately demonstrated hereof. The Preliminary Objection must fail.

Determination

From the foregoing analysis, I am persuaded to judicially exercise my discretion and direct as follows:-

a. THAT the Notice of Motion application dated 13th July, 2021 by the 1st & 2nd Plaintiffs/Applicants has merit and the same is allowed but only in terms of prayers numbers 2 and 5 of the said application.

b. THAT the Preliminary Objection dated 14th September, 2021 by the 1st, 2nd, 3rd, 4th and 5th Defendants/ Respondents is bereft of any merit and the same is dismissed with costs to the 1st & 2nd Plaintiffs/Applicants herein.

c. THAT for the sake of expediency and moving this matter forward, the suit should be fixed for full hearing within the next ninety (90) days on a priority basis. There should be a mention of the matter on 17th February, 2022 for purposes of compliance and case management – holding of the Pre Trial conference session pursuant to the provisions of Order 11 of the Civil Procedure Rules, 2010.

ISSUE No. e). Who will bear the costs.

According to the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Costs follow the events. The result of this application is therefore that the Costs is to be borne by the 1st, 2nd and 3rd Defendants/Respondents.

IT IS SO ORDERED.

RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 14TH DAY OF DECEMBER, 2021

HON. JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

In the presence of:-

M/s. Yumna – the Court Assistant

M/s. Jadi Advocates for the 1st & 2nd Plaintiffs/Applicants.

M/s. Kyalo holding brief for Mr. Kedeki Advocates for the 1st, 2nd, 3rd, 4th & 5th Defendants/Respondents