



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 27 OF 2019

PAUL NDUNGU NYOKABI & 31 OTHERS.....PLAINTIFFS/APPLICANTS

VERSUS

JOHN NZIOKA NZUKI.....1st DEFENDANT/RESPONDENT

DAVID GITONGA GITHINJI.....2nd DEFENDANT/RESPONDENT

LAND REGISTRAR, NYANDARUA.....3rd DEFENDANT/RESPONDENT

THE CHIEF MAGISTRATE.....4th DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....5th DEFENDANT/RESPONDENT

RULING

1. Simultaneously with the plaint, the Applicants herein had filed Nyahururu Misc. Application No. 4 of 2019 dated the 17th June 2019 in which they had sought leave to file Judicial Review writs out of time which leave would then operate as stay of execution in the proceedings in Nyahururu CMCC No. 21 of 2000. The application was heard orally wherein on the 5th November 2019, the same was dismissed for reasons that the Court had no jurisdiction to extend time for orders of certiorari after 6 months from the time of the action complained of.

2. Following the said dismissal, the Applicants filed the present application dated the 6th November 2019 on an equal date, pursuant to the provisions of *Sections 3, 3A and 63 (c) & (e) of the Civil Procedure Act, Order 40 Rules 1(a)(b)2,3 and 4 and 11 and Order 51 Rules 1 and 3, of the Civil Procedure Rules*, seeking injunctive orders against the Respondent herein restraining them from entering, trespassing upon, taking over, damaging, developing, evicting or in any other manner howsoever from interfering with the Plaintiffs'/Applicants' possession, occupation and quiet enjoyment of all that property known as Nyandarua /Oljoro Orok Salient/1635 currently known as Nyandarua /Oljoro Orok Salient/26199, 26200, 26201, 26202, 26203, 26204, 26205, and 26206.

3. The application was premised on the grounds on the face of it as well as the incomplete supporting affidavit of Paul Ndungu Nyokabi, the 1st Applicant herein, sworn on the 6th November 2019.

4. On the 18th November 2019, the 1st and 2nd Respondents herein filed their Replying Affidavit as well as their Notice of Preliminary Objection to the said Application wherein they sought to have both the Applicant's suit and Application dated the 6th November 2019 struck out in limine for reasons that the issues sought to be determined were Res Judicata by reason of Court decisions, judgments, rulings and orders made in the following cases:

- i. Nyahururu PMC Land Dispute Case No. 21 of 2000.
- ii. Nyahururu PMCC No. 253 of 2000.
- iii. Nakuru High Court Civil Appeal No. 108 of 2002.
- iv. Nakuru Environment and Land Court No. 238 of 2014 (OS).
- v. Court of Appeal Civil Appeal No. 48 of 2016.

5. Subsequently, the Court directed that both the applications and the Preliminary Objection be disposed of by way of written submissions with no interim orders.

6. The Court further set a date to confirm compliance and to take a date for ruling for the 21st January 2020 pending which the Applicants filed another Application dated the 15th January 2020 to the effect that they were in danger of being evicted on the 16th January 2020 from the suit land.

7. The Court, having noted that the matter was scheduled for mention on the 21st January 2020 for confirmation of compliance of the Court's orders of 25th November 2019 by which time the eviction would have taken place, issued an order of status quo up to the 21st January 2020 when the said application would be heard inter-parties.

8. Come the 21st January 2020, when the matter came up for confirmation of compliance of the Court's orders of 25th November 2019, and the hearing of the application dated the 15th January 2020 inter-parties, the Court was informed that there had already been an eviction of the Applicants pursuant to orders from the Magistrates' Court.

9. The Application dated the 15th January 2020 was neither a Notice of Appeal nor an application for preservative orders in respect to the lower Court's Judgment and /or decree which had ordered for the eviction of the Applicants. Instead, it was an application for injunction in terms of prayer 2 of the Application dated 6th November 2019 since they faced eminent danger of being evicted from the suit land. What the Applicants did not inform the Court was that the eminent eviction was pursuant to a Court order/decree in Nyahururu CM Land Dispute No. 21 of 2000, which award and decree had not been quashed or set aside.

10. In this effect, I must state that the Court had no Jurisdiction to entertain the application of 15th January 2020 as the matters therein were not before the Court and further, the said issues had been heard to finality and Judgment given, a matter I shall discuss later in the ruling.

11. The Supreme Court in the case of **Board of Governors Moi High School Kabarak & Another vs Malcolm Bell [2013] eKLR** held that

Jurisdiction flows from either the Constitution or Legislation or both. As such a Court cannot arrogate to itself Jurisdiction exceeding that which is conferred upon it by Law. It must operate within the Constitutional limits; and lastly, the inherent power of the Court is meant to prevent its process from being misused in such a way as to diminish its capability to arrive at a just decision of the dispute adjudicated.

12. I therefore find that the Application dated the 15th January 2020 was brought in bad faith and was an abuse of the Court process and therefore disentitled the Applicants to any interim remedy.

13. Having said that, I wish now return to the Application dated the 6th November 2019 as well as the Preliminary Objection dated the 18th November 2019 which applications were disposed of by way of written submissions.

Applicants' submissions;

14. The Applicants framed their matters for determination in as far as the Preliminary Objection is concerned as follows;

- i. Whether the honorable Court has jurisdiction to hear and determine the matter
- ii. Whether the suit was Res Judicata.

15. On the first issue for determination, the Applicant considered the meaning of Preliminary Objection as was held in the case of **Kenya Council of Employment and Immigration Agencies vs Nyamira County Government & 10 Others [2015] eKLR**, as well as the ingredients of a Preliminary Objection as was established in the celebrated case in **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**, pursuant to which they submitted that the Court had jurisdiction to handle the matter as was held in the case of **Owners and Masters of the Motor Vessel "Joey" vs Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** and as such it should not down its tools.

16. On the second issue for determination, the Applicants submission was that a matter could only be deemed to be Res Judicata after it had been heard on merit and conclusively determined as provided for both in Section 7 of the Civil Procedure Act and in the decided case of **Housing Finance Company of Kenya vs J.N Wafubwa [2014] eKLR**.

17. That in the present scenario they had raised the issue of forgery to which their suit was anchored, a matter which had not been determined on merit, and which had not been an issue in the former suits herein listed by the Respondent and therefore the said suit was not to be considered as being Res Judicata. In so submitting, the Applicants relied on the decided case of **Henderson vs. Henderson [1843-60] ALL ER 378** where the Court had held that the plea of Res Judicata applied with an exception in a "special case" and that a current issue which was not a subject of any suit between the parties constituted a 'special case' and therefore was not Res Judicata. It was thus the Applicants' submission that the Preliminary Objection was a nonstarter and ought to be dismissed with costs.

18. On the Application dated the 6th November 2019, the Applicants' submission was that the application for orders of injunction was sought so as to prevent the Respondents from taking any further steps to their detriment and that the same had been brought pursuant to the principles laid down in the decided case of **Giella vs. Cassman Brown & Co. Ltd [1973] (EA) 358**.

19. The Applicants framed their issues for determination as follows:

- i. Whether the Plaintiffs have established a prima facie case to be granted the order of injunction.

- ii. Whether the Plaintiffs will suffer irreparable harm if the order of injunction is not granted.
- iii. Whether the balance of convenience tilts in favour of the Plaintiffs in the grant of an injunction order.
- iv. Whether the title acquired by fraud is impeachable.

20. On the first issue for determination it was the Applicants' submission while relying on the decided case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**, that they had established a prima facie case with a high probability of success through their annexures marked as PN1-PN4 in the supporting affidavit of Paul Ndungu Nyokabi which annexures had identified them as beneficial owners who were in physical and current possession on the suit parcels of land, having acquired proprietorship rights from the original allottee of the suit land in 1998. That further, they had also been furnished with a forensic examiner's report from the Directorate of Criminal Investigation which had established that the 2nd Respondent had forged the Power of Attorney by which strength he had subsequently acquired ownership of the original suit property during the pendency of orders of stay of execution issued in the Nyahururu CMCC No. 21 of 2000, and which property he had subsequently sub-divided and had registered the sub-divisions in his name.

21. That in regard to their second issue for determination, the Applicants submitted that they would suffer irreparable harm not capable of compensation by an award for damages if the order of injunction was not granted. That they had taken possession of the suit parcels of land since the year 1998 wherein they had developed the same and had settled therein for more than 20 years. That there existed an eviction order to which if the injunction was not granted they would be evicted from the suit lands.

22. They cited the case in **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** to submit that it was trite law that where an Applicant stood to suffer irreparable loss which could not be compensated by an award of damages, the Court ought to grant them injunctive relief to prevent the loss from happening.

23. The Applicants' submission to their third issue for determination was that there was a high probability that they would suffer more if the 1st and 2nd Respondents proceeded to evict them if the orders of injunction were not issued, having lived on the suit property uninterrupted for more than 20 years. They relied on the decided case in **William Kiptoo Kimaiyo & 3 Others vs Nicholas Biwott & 4 Others [2017] eKLR** to buttress their submission.

24. Lastly, the Applicants submitted on their last issue for determination that the 2nd Respondent could not claim to be the registered absolute proprietor of the suit land or that the 1st Respondent was his predecessor, because the said title was challengeable for having been obtained through fraudulent . they based their submission in the case of **Gulf Energy Limited vs County Government of Kiambu & Another [2018] eKLR**. That further, the provisions of Article 40(3) of the Constitution gave the state the discretion to deprive a person off title that they had acquired fraudulently. They sought for their Application to be allowed.

25. In regard to the Respondents' Notice of Opposition to the Applicants' application for injunction, the 1st and 2nd Respondents' framed their matters for determination as follows;

- i. Whether the Plaintiffs' suit was improperly filed and hence incompetent, fatally defective, bad in law and an abuse of the Court process for none compliance with the mandatory provisions of the law.
- ii. Whether the Plaintiffs' suit is Res Judicata.

26. On the first issue for determination, and the Respondent submitted that there was no written authority from the 31 Plaintiffs herein authorizing the 1st Plaintiff to act for them in the present suit and therefore the suit was untenable and unacceptable under the provisions of Order 1 Rule 13(1) (2) of the Civil Procedure Rules. The Respondents also relied on the decided case of **John Kariuki & 37 Others vs John Mungai Njoroge & Others (Nakuru HCC No. 152 of 3003)** to buttress their submission. That the Plaintiffs having failed to comply with these provisions which Section 89 of the Civil Procedure Act obligated them to comply with, rendered their suit improperly filed and therefore the same was incompetent, fatally defective, bad in law and an abuse of the Court process.

27. On the second issue for determination, the Respondents relied on the decided case of **Njue Ngai vs Ephantus Njiru Ngai & Another [2016] eKLR** to submit that the Plaintiffs' suit was Res-Judicata.

28. Respondent's submission was that the Plaintiffs herein lay claim to the suit land by virtue of having purchased the same from one George Kamau who was the initial Government allottee, in the year 1998.

29. It was thus their submission that in the year 2000 the said George Kamau had filed suit against one John Nzuki and the Settlement Fund Trustee in Nyahururu PMCC No. 253 of 2000 where he had claimed title to the suit land through rectification of the register of parcel No. Nyandarua OI Jororok salient/1635. The suit was dismissed wherein he had filed an Appeal in Nakuru HCCA vide No 108 of 2002 which Appeal was dismissed for want of prosecution.

30. That the said John Nzioka Nzuki had subsequently filed a claim over the same suit land in the Nyandarua District Land Disputes Tribunal No. 16 of 2000 which matter was adjudicated upon, an award issued in favour of the 1st Respondent wherein the same was adopted as judgment of the Court on the 13th December 2000 in Nyahururu PMC Land Dispute No. 21 of 2000. The said Award and decree were not appealed against, quashed or set aside.

31. The Plaintiff herein then filed suit in Nakuru Environment and Land Court being ELC No. 238 of 2014 against the 2nd Respondent herein David Gitinga Githinji claiming title to the suit land by adverse possession. The suit was heard and dismissed wherein the

Plaintiff/Applicants appealed against the said finding vide Nakuru Civil Appeal No. 48 of 2016 which matter was heard and dismissed by the Court of Appeal

32. It was the Respondent's submission that the subject matter in all the decided matters herein above stated was Nyandarua /Oljoro Orok Salient/1635 which has since been subdivided giving rise to Nyandarua /Oljoro Orok Salient/26199, 26200, 26201, 26202, 26203, 26204, 26205, and 26206 the suit lands in the present suit. That the parties were the same. The issue of ownership had been finally determined in the said suits and Appeal while the matters raised in the present suit had been adjudicated upon in the earlier suits. The current suit was therefore Res Judicata and the same ought to be struck out in limine with costs.

33. In regard to the Applicants' Application dated the 6th November 2019 seeking for injunctive orders, the Respondents' submission was that the Applicants had not satisfied the principles laid down in the decided case of **Giella vs Cassman Brown (supra)**.

34. That in the first instance, they had not established a prima facie case with a high probability of success to the effect that they had not supplied the Court with any documents that they were the registered proprietors of the suit land or that George Kamau had been registered as such.

35. Secondly they had not supplied the Court with any sale agreements, payment receipts and consents of the Land Control Board as evidence that they had bought the suit land from the said George Kamau.

36. That the Applicants could also not claim suit by virtue of being in physical possession and occupation thereto bearing in mind that their Application for Adverse possession had been dismissed in the Nakuru ELC Case No 238 of 2014 where they had claimed title by adverse possession. That the 2nd Respondent was the current registered proprietor of the suit land and therefore the Applicants could not be granted temporal injunction orders as they had not established a prima facie case.

37. That if at all the suit land was transferred to the 2nd Respondent fraudulently by the 1st Respondent, then the Applicants could not be heard to complain for it was up to the 2nd Respondent to complain, which had not been done. The Respondents prayed for the Applicants' application to be struck out with costs.

Determination

38. I have considered the Application herein filed, both the Applicants' and the Respondent's written submissions as well as the annexures and authorities so cited for and against the granting of an order for injunction in this matter.

39. The often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the Court is in any doubt in regard to the first two conditions the Court may determine the matter by considering in whose favor the balance of convenience tilts.

40. Looking at the facts of this case, the Court has been moved under certificate of urgency, by the Applicants, to issue temporary injunction orders against the Respondents. At this stage, the Court is only required to determine whether the Applicant is deserving of the Orders sought and not to determine the merits of the case.

41. In the present case there is no dispute that the 1st Respondent was the legal proprietor of the original parcel of land being No. Nyandarua /Oljoro Orok Salient/1635 having been registered as proprietor on the 13th January 2000. The land was subsequently transferred to the 2nd Respondent herein who sub divided the same on the 27th November 2014 giving rise to the current parcels No. Nyandarua /Oljoro Orok Salient/26199, 26200, 26201, 26202, 26203, 26204, 26205, and 26206 which parcels are currently registered in his name meaning that as it stands at the moment, the 2nd Respondent is the registered proprietor of the said parcels of the suit lands.

42. The suit lands having been registered on 27th November 2014, their registration is governed by the Land Registration Act, Act No. 3 of 2012, which constitutes the 2nd Respondent as an absolute proprietor and confers on him all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act.

43. The rights of a proprietor are set out in Section 25 of the Land Registration Act, which provides as follows.

Section 25 (1) provides:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of Court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject:-

to the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

44. Section 26 (1) of the Act provides that the certificate of title is to be taken as conclusive evidence of proprietorship section 26 (1) provides:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

45. The Applicant has argued and asserted that the 1st Respondent’s title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked the title. Both the Land Registration Act Section 26 (1) that provide for the indefeasibility of title and Article 40 (6) of the Constitution envisage that where a registered title is impugned on the grounds set out in the provisions that due process would be followed to have such title revoked, cancelled and/or annulled. The Courts have in a series of cases in the recent past held that due process has to be followed before a registered title can be revoked on the grounds of having been fraudulently or irregularly issued.

46. The 2nd Respondent having demonstrated that he was the registered owner of the suit property namely No. Nyandarua /Oljoro Orok Salient/26199, 26200, 26201, 26202, 26203, 26204, 26205, and 26206 and having been issued with a title, prima facie his title is indefeasible and the burden shifts to the Applicants to show or demonstrate that the title is challengeable within the provisions of the law.

47. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 2nd Respondent’s title but the mere proof that he holds duly registered certificates which on the face of it were properly acquired, is sufficient to lead the Court to hold that the Applicants have not established that they have a prima facie case.

48. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the Court can give an injunction unless the Court is entertaining a doubt as to whether or not a prima facie case has been established. The Court of Appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

49. Consequently, the application dated 6th November 2019 is herein dismissed. The matter would have been set down for pre-trial save for the fact that the 1st and 2nd Respondents in response to this application, also raised a Preliminary Objection to the fact that the Plaintiffs/Applicants’ suit was Res Judicata.

50. The Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Limited (1969) EA. 696** defined a Preliminary Objection where Law J.A. stated as follows:-

“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.”

51. In this proceedings it is the 1st and 2nd Defendant/Respondents’ case inter alia that this suit should be dismissed with costs as the same was Res Judicata and an abuse of the Court process.

52. 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 ”

53. The doctrine of Res Judicata is important in adjudication of case and serves two important purposes;

- i. it prevents multiplicity of suits which would ordinarily clog the Courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
- ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

54. In order therefore to decide as to whether this case is Res Judicata, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case(s) and the instant case to ascertain;

- i. what issues were really determined in the previous case;
- ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a Court of competent jurisdiction.

55. 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

56. Having considered and reviewed the pleadings and submissions by both Counsel in the matter, it is not in dispute, that the Plaintiffs/Applicants herein lay claim to the suit land by virtue of having purchased the same from one George Kamau who was the initial Government allottee, in the year 1998.

57. In the year 2000 the said George Kamau had filed suit against one John Nzuki and the Settlement Fund Trustee in Nyahururu PMCC No. 253 of 2000 where he had claimed title to the suit land through rectification of the register to parcel No. Nyandarua Ol Jororok Salient/1635. The suit was dismissed wherein he had filed an Appeal in Nakuru HCCA No 108 of 2002 which Appeal was also dismissed for want of prosecution.

58. That the said John Nzioka Nzuki the 1st Respondent herein had subsequently also filed a claim over the land suit in the Nyandarua District Land Disputes Tribunal No. 16 of 2000 which matter was adjudicated upon, an award issued in his favour. The award was adopted as judgment of the Court on the 13th December 2000 in Nyahururu PMC Land Dispute No. 21 of 2000, which Award and decree have not appealed against, quashed or set aside.

59. The Plaintiffs/Applicants then filed suit in Nakuru Environment and Land Court being ELC No. 238 of 2014, against the 2nd Respondent herein David Gitinga Githinji claiming title to the suit land by adverse possession. The suit was heard and dismissed. The Plaintiff/Applicants appealed against the said finding vide Nakuru Civil Appeal No. 48 of 2016 which matter was heard and dismissed by the Court of Appeal

60. Looking at the circumstance of the present suit where the Plaintiff/Applicants have again sought title to the suit land which was the issue in the previous suits, this Court finds as follows:

- i. That the subject matter in the current suit as was in the previous matters herein stated above was Nyandarua /Oljoro Orok Salient/1635, land which was subdivided giving rise to the current Nyandarua /Oljoro Orok Salient/26199, 26200, 26201, 26202, 26203, 26204, 26205, and 26206
- ii. That the parties in the current suit as in the previous suits/Appeal were the same.
- iii. That the issue of ownership of the suit land had been finally determined in the said previous suits and Appeal.
- iv. That the matters raised in the present suit had been adjudicated upon in the earlier suits by Courts of competent jurisdiction wherein the decisions thereto had been a finality in the sense of *Res Judicata*.

61. The upshot of the foregoing is that the matters herein this suit have been conclusively decided previously in the matters herein above stated and therefore the present case is *Res Judicata* in that sense and an abuse of the Court process. The Plaintiff's suit is therefore dismissed with costs to the 1st and 2nd Defendant/Respondents.

It is so ordered.

Dated and delivered at Nyahururu this 28th day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE