



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 176 OF 2018**

**ESTHER WATIRI KAHORA.....PLAINTIFF**

**VERSUS**

**PHILISIA NYAMBURA.....1<sup>ST</sup> DEFENDANT**

**MICHAEL WAWERU.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR NAIVASHA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff commenced proceedings in this case on 24<sup>th</sup> May 2018 through plaint dated and filed on that date. She averred that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the registered owners of the parcels of land known as Naivasha/Mwicingiri Block 2/771 and Naivasha/Mwicingiri Block 2/772 (hereinafter the 'suit properties') and that the said parcels are subdivisions of Naivasha/Mwicingiri Block 2/19 which was owned by Wambui Waweru (deceased). She added that the deceased was her mother, the 1<sup>st</sup> defendant's mother and the 2<sup>nd</sup> defendant's grandmother. She accused the 1<sup>st</sup> and 2<sup>nd</sup> defendants of misleading the deceased into subdividing and transferring the suit properties to them and the 3<sup>rd</sup> defendant of accepting to register the subdivisions without consent of the Land Control Board and application to transfer. She therefore sought judgment for a declaration that the subdivisions and title deeds were null and void and for cancellation of the titles to pave way for subdivision of the land among the four children of the deceased.

2. Almost five months after filing the suit, the plaintiff filed Notice of Motion dated 15<sup>th</sup> October 2018 in which she sought the following orders among other prayers which are now spent:

4. *THAT pending the hearing and determination of this suit, this Honourable Court be pleased to grant an order of temporary injunction restraining the Defendants/ Respondents by themselves, their agents, employees, servants, assigns or any other person acting on their behest from forcefully evicting the Plaintiff/Applicant's agents, employees, servants and assigns from land parcel numbers NAIVASHA/MWICIRINGIRI BLOCK 2/771 and NANASHA/MWICIRINGIRI BLOCK 2/772, and/ or selling, leasing, transferring, subdividing or dealing with the said parcels of land in any manner that will prejudice the existence of the subject matter of the suit;*

5. *Costs of this application.*

3. The application is supported by an affidavit sworn by the plaintiff on 15<sup>th</sup> October 2018 in which she deposed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were threatening to forcefully evict her agents or employees from the suit properties and that there was also risk of the said properties being disposed of before hearing and determination of the suit.

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the application through a replying affidavit sworn by the 2<sup>nd</sup> defendant. He deposed that they filed Nakuru ELC 40 of 2013 against Grace Nyokabi Kinuthia who is in occupation of the suit properties and that judgment was delivered in their favour on 12<sup>th</sup> October 2017. He annexed a copy of the judgment and added that this suit is in the circumstances *res judicata* and an abuse of the court's process. Additionally, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed Notice of Preliminary Objection dated 21<sup>st</sup> November 2018. The objection is pleaded as follows:

*TAKE NOTICE that this honourable court shall be moved ... to dismiss the instant suit on the following grounds:*

1. *That the suit is Res judicata the subject matter having been in issue in ELC 40 of 2013 at Nakuru and a judgment delivered.*

2. *THAT the suit is scandalous, frivolous, lacks merit and an abuse of the court process.*

We pray that the Notice of Motion dated 15<sup>th</sup> October, 2018 and the plaint filed thereto be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

5. This ruling is in respect of both the preliminary objection and the Notice of Motion both of which were canvassed together through written submissions. I will consider the preliminary objection first since it goes to the jurisdiction of the court. If the objection succeeds there will be no need to consider the application. The 1<sup>st</sup> and 2<sup>nd</sup> defendants argued that this suit is *res judicata* in view of the judgment in Nakuru ELC 40 of 2013 and that the eviction complained about is a natural consequence of the said judgment. On her part the plaintiff argued that the preliminary objection is not a valid one since the court will have to review the pleadings and judgment in Nakuru ELC 40 of 2013. In that regard, the plaintiff relied inter alia on the cases of **George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014] eKLR** and **Muhu Holdings Limited v James Muhu Kangari [2017] eKLR**.

6. I have carefully considered the preliminary objection and parties' submissions on it. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, Law JA stated:

*So far as I'm 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.*

7. Sir Charles New Bold, P. added as follows:

*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 has to be ascertained or if what is sought is the exercise of judicial discretion.*

8. Thus, for a preliminary objection to be valid, it must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

9. The objection herein is to the effect that this suit is *res judicata*. In that regard, **Section 7** of the **Civil Procedure Act** is material. It provides as follows:

*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.*

10. The 1<sup>st</sup> and 2<sup>nd</sup> defendants argue that this suit is *res judicata* in view of the judgment in Nakuru ELC 40 of 2013. The question that arises is whether existence of the said judgment and the issues determined thereby are matters that require evidence. I think so. Either that evidence should emerge clearly from the plaintiff's case as pleaded or the 1<sup>st</sup> and 2<sup>nd</sup> defendants should introduce the evidence through a formal application. A perusal of the plaintiff's pleadings herein does not disclose the pleadings in Nakuru ELC 40 of 2013. The 1<sup>st</sup> and 2<sup>nd</sup> defendants cannot, as they have sought to do, introduce evidence to support their preliminary objection. There is no basis upon which to conclude that the issues in this matter have been directly and substantially in issue in Nakuru ELC 40 of 2013 and have been finally determined in the said matter. If the 1<sup>st</sup> and 2<sup>nd</sup> defendants wish to explore the issue of *res judicata*, they may wish to bring a formal application and avail all the necessary material for consideration. In the circumstances, the preliminary objection herein is not valid. I dismiss it with costs to the plaintiff.

11. I turn next to consider Notice of Motion dated 15<sup>th</sup> October 2018 through which the plaintiff seeks an interlocutory injunction. An applicant seeking such orders must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages would be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

12. I note that the affidavit in support of the application does not have any annexures or material that support the plaintiff's allegation that the 1<sup>st</sup> and 2<sup>nd</sup> defendants misled the deceased into subdividing and transferring the suit properties to them or that the plaintiff faces any threat of eviction. On the contrary, I note from the documents filed by the plaintiff alongside the plaint that the deceased passed away on 21<sup>st</sup> September 2003 while the 1<sup>st</sup> and 2<sup>nd</sup> defendants became registered proprietors of the suit properties on 25<sup>th</sup> April 2003, some five months before the deceased passed away. No basis has been laid upon which to conclude that the deceased was misled to transfer the properties. As registered proprietors, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are entitled to the protection and benefits accorded by **Sections 24 and 26** of the **Land Registration Act**. I am thus not persuaded that the plaintiff has a *prima facie* case. In line with **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra), I need not consider the aspects of irreparable injury and balance of convenience. That being so, Notice of Motion dated 15<sup>th</sup> October 2018 must fail.

13. In conclusion, I make the following orders:

a) The Preliminary Objection dated 21<sup>st</sup> November 2018 is dismissed with costs to the plaintiff.

b) Notice of Motion dated 15<sup>th</sup> October 2018 is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

14. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> day of January 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Mongeri holding brief for Mr Nyamu for the plaintiff/applicant

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents

No appearance for the 3<sup>rd</sup> defendant/respondent

Court Assistants: Beatrice & Lotkomoi