



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 34 OF 2019

DAVID NGIGE THUKU.....1STPLAINTIFF

JAMES NGIGI THUKU.....2NDPLAINTIFF

JOYCE WANJIRU MAINGI.....3RDPLAINTIFF

VERSUS

MARIA WAIHERA MAARA.....1STDEFENDANT

JOSEPH GITHUA MAARA2NDDEFENDANT

PAUL NGUGI MARAA.....3RDDEFENDANT

COUNTY SURVEYOR NAKURU.....4THDEFENDANT

RULING

1. The plaintiffs commenced this suit through plaint filed on 19th March 2019. The 2nd plaintiff and 3rd plaintiffs are the son and wife respectively of the 1st plaintiff. They aver in the plaint that the 1st plaintiff is the owner of the parcel of land known as Gilgil/Karunga Block 6/92 (Kikuyu) and that in the year 2009 the 1st defendant claimed that a portion of the suit property belonged to her. They further averred that the defendants demolished the plaintiffs' house and fenced the suit property with barbed wire. They therefore seek judgment against the defendants for a permanent injunction restraining the defendants, their servants and/or agents from encroaching, alienating and/or interfering with their peaceful stay on the suit property, an order for the rectification of the registered index map to reflect the true position on the ground and costs of the suit.

2. Alongside the plaint, they also filed Notice of Motion dated 18th March 2019, which is the subject of this ruling. The following orders are sought in the application:

1. ...

2. ...

3. *THAT pending the hearing and determination of this suit the honourable court be pleased to issue a temporary injunction restraining the defendants/respondents herein either by themselves, their agents, employees and/or servants from entering into, disposing off, alienating and/ or in any manner dealing with the plaintiff's/applicant's parcel of land known as Gilgil/Karunga Block 6/92(Kikuyu)*

4. *THAT the O.C.S. Gilgil Police Station to enforce the above orders.*

5. *THAT the costs of this application be provided for.*

3. The application is supported by an affidavit sworn by the 1st plaintiff. The 1st to 3rd defendants opposed the application through a replying affidavit sworn by the 1st defendant. The 1st to 3rd defendants also filed defence and counterclaim in which they among other averred that this suit is *res judicata* and *sub judice*. They sought eviction of the plaintiffs from the suit property. The plaintiffs also filed a supplementary affidavit sworn by the 1st plaintiff. Counsel for the 4th defendant indicated that the 4th defendant would not file any response or submissions and indeed none was filed. The court ordered that the application be canvassed through written submissions and gave parties an opportunity to file and exchange submissions. The 1st to 3rd defendants filed submissions but the applicants did not. I have carefully considered the

application, the affidavits and the submissions.

4. I note from the material placed before the court that the registered proprietor of the suit property are the 1st plaintiff and his brother Joseph Ndungu Ngige. The suit property is adjacent to a parcel of land known as Gilgil/Karunga Block 6/125 (Kikuyu) which is owned by the 1st and 3rd defendants as the administrators of the estate of Francis Maara Karubia (deceased). The 1st defendant is the widow of the deceased while the 2nd and 3rd defendants are her children. While the applicants claim that the 1st defendant claimed in the year 2009 that a portion of the suit property belonged to her, that the defendants demolished their house, fenced the suit property with barbed wire and has been threatening to evict them therefrom, the 1st to 3rd defendants have given an elaborate background of the dispute between the parties. Despite filing a supplementary affidavit, the applicants have not shaken the 1st to 3rd defendants' account.

5. The dispute between the parties is essentially a boundary one which has been litigated furiously in both civil and criminal courts. On the civil side, Francis Maara Karubia (deceased) filed **Gilgil Division Land Tribunal Case No. 8/16/2003** against the 1st plaintiff herein and his mother Teresia Mbaire Kabebe. The dispute before the tribunal concerned the boundaries of the two parcels Gilgil/Karunga Block 6/125 (Kikuyu) and Gilgil/Karunga Block 6/92 (Kikuyu). Upon hearing the matter the tribunal rendered its award on 23rd April 2003 as follows:

(1) The boundaries on the official registered map sheet No. 2 are very clear; therefore the disputed part of plot No. 125 is for the plaintiff (Mr. Francis Maara Karubia) reference to the official map Nobody can dispute this fact.

(2) The only advice the land tribunal would give to the defendant, Kabebe family particularly the son Mr. David Thuku Ngigi is to vacate part of disputed plot No. 125 immediately without further notice. In case he continues to trespass into the portion of plot No. 125 he would face the law. The local administrators thus: - the chief Karunga and the D.O. Gilgil should give the necessary assistance to the plaintiff.

(3) The Defendant, Mr. David Thuku Ngigi is hereby ordered to Honour Registered demarcation map of 1988 and all the boundaries on the farm block 6/Gilgil Karunga (Naivasha Kikuyu Farm)

6. The tribunal's award was later registered in court and a decree given on 16th March 2004 in **CM Land Dispute No. 14 of 2003 (Nakuru)**. Aggrieved by the said decree, the 1st plaintiff herein and his mother Teresia Mbaire Kabebe filed **High Court Civil Appeal No. 64 of 2004 (Nakuru)** which ultimately dismissed on 8th May 2007 for want of prosecution. Following the dismissal of the appeal, an eviction order was issued against the 1st plaintiff herein in **CM Land Dispute No. 14 of 2003 (Nakuru)** on 6th October 2008 and duly executed on 15th January 2009 by Sanjomu Auctioneers. Besides the tribunal matter and the ensuing enforcement proceedings, the 1st plaintiff herein filed **High Court Civil Suit No. 17 of 2009 (O.S) (Nakuru)** against Francis Maara Karubia (deceased) claiming to have acquired a portion of Gilgil/Karunga Block 6/125 (Kikuyu) by adverse possession. Considering that Francis Maara Karubia passed away on 25th September 2012 as is manifest from the letters of administration exhibited by the 1st to 3rd defendants, **High Court Civil Suit No. 17 of 2009 (O.S) (Nakuru)** must have since abated. Further, on 15th June 2012 the 1st plaintiff herein and his brother Joseph Ndungu Ngige filed **CMCC No. 412 of 2012 (Naivasha)** against Francis Maara Karubia (deceased) and 2 others seeking an injunction to restrain them from dealing with Gilgil/Karunga Block 6/92 (Kikuyu) as well as general damages for alleged destruction of property. The 1st plaintiff herein has admitted in his supplementary affidavit that the said suit is still pending. Besides the civil cases, the dispute herein has seen the 1st plaintiff charged in Naivasha SPMCC Criminal Case No. 509 of 2011, Naivasha CM Criminal Case No. 394 of 2011 and Naivasha CM Criminal Case No. 388 of 2013. Despite this rich litigation background, the plaintiffs had the audacity to plead at paragraph 12 of their plaint that "there are no previous proceedings between the plaintiffs and the defendants over the same said subject matter".

7. The 1st to 3rd defendants have argued that this suit is *res judicata* in view of the foregoing cases. I will deal with the issue of *res judicata* first since it goes to the jurisdiction of the court and its resolution may have conclusive consequences. The doctrine of *res judicata* is codified at **Section 7 of the Civil Procedure Act** which 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.

8. *Res judicata* becomes applicable in a particular matter if there has been a previous suit in which the matter was in issue; the parties in both matters were the same or litigating under the same title; the previous matter was heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

9. As previously noted above, there were proceedings in **Gilgil Division Land Tribunal Case No. 8/16/2003** between Francis Maara Karubia (deceased) as claimant and the 1st plaintiff herein and his mother Teresia Mbaire Kabebe as respondents. The dispute before the tribunal concerned the boundaries of the two parcels Gilgil/Karunga Block 6/125 (Kikuyu) and Gilgil/Karunga Block 6/92 (Kikuyu). The tribunal proceedings were concluded in favour of the deceased and a decree for the eviction of the 1st plaintiff herein was later issued in **CM Land Dispute No. 14 of 2003 (Nakuru)**. An appeal against the said decree was dismissed for want of prosecution. This suit concerns the very same dispute over the boundary of the two properties. The 1st defendant is the widow of Francis Maara Karubia (deceased) while the 2nd and 3rd defendants are her children. I am therefore satisfied that the issues herein are the same as those in **Gilgil Division Land Tribunal Case No. 8/16/2003**, **CM Land Dispute No. 14 of 2003 (Nakuru)** and **High Court Civil Appeal No. 64 of 2004 (Nakuru)**. All these matters were heard and determined by competent courts. Even the dismissal of **High Court Civil Appeal No. 64 of 2004 (Nakuru)** amounted to a judgment on the merits. The Court of Appeal in **Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR** as follows:

18. Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR stating:

“Rule 4(1) does not say “judgment shall be entered for the defendant or against the plaintiff.” It uses the word “dismissed.” The Civil Procedure Act does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

“Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order;” “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8.”

...

21. Now, we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed. ...

10. In view of the foregoing, I am persuaded that the plaintiffs’ claim offends the doctrine of *res judicata* is therefore for striking out. The same applies to the 1st to 3rd defendants’ counterclaim in which they seek eviction of the plaintiffs from the suit property since eviction was dealt with at length in **Gilgil Division Land Tribunal Case No. 8/16/2003, CM Land Dispute No. 14 of 2003 (Nakuru)** and **High Court Civil Appeal No. 64 of 2004 (Nakuru)**. If any of the parties wishes to clarify those issues, they should go back to the courts which have handled the matter previously. They cannot re-litigate the matters in this court. As was stated in **Republic v Karisa Chengo & 2 others [2017] eKLR**, this court does not have “*the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived ...*” of the High Court.

11. In the end the plaintiffs’ case herein and the 1st to 3rd defendants’ counterclaim are both struck out for being *res judicata*. Each party shall bear own costs.

12. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice’s “Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic”(Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 30th day of April, 2020.

D. O. OHUNGO

JUDGE