



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ELC CASE NO.19 OF 2018

ZEPHANIA INGOSI.....1ST APPLICANT
ANDERSON WAFULA.....2ND APPLICANT
BEN MURUNGA WEKESA.....3RD APPLICANT
BENARD SIMIYU JUMA.....4TH APPLICANT
EPHRAIM EREGWA.....5TH APPLICANT
BASIL MASINDE.....6TH APPLICANT
ROBERT WAMALWA.....7TH APPLICANT
ABRAHAM OSERIO.....8TH APPLICANT
CHRISTOPHER DINDIBALE WACHILONGA.....9TH APPLICANT
YONA MASIKA WACHILONGA.....10TH APPLICANT
PHILIP WAFULA.....11TH APPLICANT
ALBERT WAKHUNGU.....12TH APPLICANT
JUSTINE WANJALA.....13TH APPLICANT
VIOLET WAMALWA.....14TH APPLICANT

VERSUS

**SASAKA HENRY MAKOKHA (*being sued for and on behalf of estate of*
ERASMUS SASAKA WACHILONGA.....DEFENDANT**

RULING

What falls for my determination is the Applicant's Notice of Motion dated 30th April 2018 seeking the following prayers:

1.) *Spent*

2.) *Spent*

3.) *Spent*

4. *That pending the disposal of the main suit, this Honourable Court be pleased to restrain the Respondent and/or any other*

person(s) acting or claiming under him from evicting the Applicants from or preventing access to their homesteads established upon 13.35Ha comprised within L.R. No. BUNGOMA/NAITIRI/153 (the suit land) registered in the name of the deceased.

5. That the Officer Commanding MBAKALO POLICE STATION be directed to ensure compliance with any order(s) emanating from the application herein.

6. That the costs of this application be provided for.

The application is based on the grounds set out therein and also supported by the affidavit of **ZEPHANIA INGOSI** the 1st Applicant herein.

The gravamen of the application is that the Applicants have been in occupation and use of land parcel **No. BUNGOMA/NAITIRI/153** openly, peacefully and un-interrupted for a period in excess of 12 years which occupation has been adverse to the proprietary interests of the registered owner **ERASMUS SASAKA WACHILONGA** (deceased) now represented by the Respondent **SASAKA HENRY MAKOKHA** who holds a Grant Ad Litem over the deceased's Estate. That the Respondent has now served the Applicants with an order issued in **BUNGOMA ELC CASE NO.38 of 2014** threatening to evict them yet the Applicants were not parties in that case. That if this Court fails to prevent the said ejection, the Applicants will suffer irreparable loss.

The application is opposed and the Respondent **SASAKA HENRY MAKOKHA** has filed a replying affidavit in which he has deponed, inter alia, as follows:

*- That the supporting affidavit sworn by **ZEPHANIA INGOSI** the 1st Applicant herein is fraudulent and deliberately intended to mislead the Court.*

*- That **ERASMUS SASAKA WACHILONGA** (the deceased) had filed **BUNGOMA ELC CASE NO.38 of 2014** against the following persons who were illegally occupying the suit land i.e.:*

1. SIMON WACHILONGA TOILI

2. MAGGREY K. WACHILONGA

3. MAGDALENE MBAYISI and

4. EVERLYNE NEKESA WACHILONGA

*- That **SIMON WACHILONGA TOILI** had sold part of the suit land to some of the Applicants herein being:*

1. ANDERSON WAFULA

2. BENARD JUMA

3. ZEPHANIA INGOSI

4. BASIL MASINDE

5. PHILIP WAFULA

6. ALBERT WAKHUNGU

7. JUSTIN WANJALA and

8. VIOLET WAMALWA

*- That **CHRISTOPHER DINDIBALE WACHILONGA and YONAH MASIKA WACHILONGA** are children of **SIMON WACHILONGA TOILI** who lost in **BUNGOMA ELC CASE No. 38 of 2014** and cannot now file a fresh suit after their father lost the case involving the same land.*

*- That **ROBERT WAMALWA** bought a portion of the suit land from **EPHRAIM EREGWA***

- That the sale of the suit land to the Applicants was done with full knowledge that there was a dispute in Court since the 1990's.

*- That by a judgement dated 29th November 2016 **MUKUNJYA J** ruled that the suit land belonged to the deceased **ERASMUS SASAKA WACHILONGA** and that any resultant sub-division and titles were null and void (annexture SHM-3).*

*- That **MUKUNYA J** also dismissed the Applicant's counter – claim based on occupation and alleged trusteeship and ownership of the suit land or the resultant sub-divisions.*

- That the Applicants were given 90 days to vacate the suit land but they ignored the decree (annexture SHM 4).
 - That the Applicants were evicted on 17th April 2018 pursuant to the decree under the supervision of the OCS MBAKALO POLICE STATION and **DOMINION YARD AUCTIONEERS** (annexture SHM5).
 - That the Applicants claim to the suit land has always been through the aforesaid defendants in **BUNGOMA ELC CASE No. 38 of 2014**.
 - That having been evicted from the suit land the Applicants moved to BUSIA COURT obtained orders and moved back to the suit land on 21st April 2018 and burnt down the Respondent's house.
 - That the Applicants are in contempt of the Court order and trying to enforce their illegal re-entry on the suit land.
 - That an order of injunction cannot be used to restrain an act that has already taken place.
- That this suit is Res judicata and incompetent since the same land was the subject of **BUNGOMA ELC CASE No. 38 of 2014**.

The application has been canvassed by way of written submissions which have been filed both by **Mr. WESUTSA** advocate for the Applicants and **Ms. KHAYO** advocate for the Respondent.

I have considered the application, the rival affidavits and annexures as well as the submissions by Counsel.

In paragraph (e) of his replying affidavit dated 24th May 2018 and whose contents were not rebutted, the Respondent has made the following profound averment:

e) "That the claimants suit is incompetent as they are claiming through the same people who lost case over the same subject matter (they have privity of estate with the losers) in BUNGOMA ENVIRONMENT AND LAND COURT CASE No. 38 of 2014 and this suit is res judicata."

Res judicata is provided for in Section 7 of the Civil Procedure Act in the following terms:

"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 their 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."

What the Respondent is pleading, and which was not rebutted by the Applicants, is that the suit land has been the subject of previous litigation heard and determined by a competent Court and therefore this suit, and the application now before me are incompetent. For res judicata to apply the following elements must be proved:

- 1. The issues in dispute in the former suit between the parties must be directly substantially in dispute between the parties in the suit where the doctrine of res judicata is pleaded.***
- 2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title.***
- 3. The former suit must have been heard and finally decided.***
- 4. The Court or Tribunal which determined the former suit must have been competent.***

See **KARIA V ATTORNEY GENERAL 2005 1 E.A 83**.

Res judicata is a matter that goes to the jurisdiction of this Court and which I must consider at this earliest opportunity because without it, I must down my tools – **OWNERS OF THE MOTOR VESSEL 'LILLIAN S' -V- CALTEX OIL KENYA LTD 1989 KLR 1**.

It is common ground that the suit land was the subject of the dispute in **BUNGOMA ELC CASE NO.38 of 2014** in which the Respondents deceased father **ERASMAS SASAKA** as the plaintiff sued **SIMON WACHILONGA TOILA, MARGARET K. WACHILONGA, MAGDALENE MBAYISI and EVERLINE NEKESA WACHILONGA** seeking their eviction from the suit land and the resultant subdivisions thereof being land parcels **NO. BUNGOMA/NAITIRI/1245-1250, 1571 1572 1573 1574 1575 1610 and 1611** which the defendants counter-claimed claiming that they reside thereon as beneficiaries. **MUKUNYA J** in a judgement dated 29th November 2016 found in favour of the plaintiff and ordered the eviction of the defendants from the suit land within 90 days failing which they would be evicted. The judge also dismissed the defendant's counter-claim and cancelled their titles to the portion of land hived off from the suit land. There is no evidence that there was any appeal from that judgement which therefore binds the parties and their privies.

The Applicants in this case were not parties to **BUNGOMA ELC Case No. 38 of 2014**. However, it is clear from paragraph 7 of the replying affidavit of the Respondent herein that **SIMON WACHILONGA TOILA** who was the 1st defendant in that case is the father of

CHRISTOPHER DINDIBALE WACHILONGA and **YONA MASIKA WACHILONGA** who are the 9th and 10th Applicants respectively in this suit. The 9th and 10th Applicants herein are clearly therefore litigating under the same title that their father litigated in **BUNGOMA ELC CASE NO. 38 of 2014** and their claim is therefore covered under explanation No. 6 of Section 7 of the Civil Procedure Act which reads:

Explanation 6: “where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the person so claiming”

It is also deponed in paragraph 6 of the Respondent’s replying affidavit as follows:

6: “That SIMON WACHILONGA TOILI had sold part of the land to the following persons who are now part of the claimants (a) ANDERSON WAFULA (bought in 2017) (b) BENARD JUMA (c) ZEPHANIA INGOSI (half an acre) (d) BASIL MASINDE (e) PHILIP WAFULA (f) ALBERT WAKHUNGU (g) JUSTIN WANJALA and (h) VIOLET WAMALWA.”

Finally, it is deponed in paragraph 16 of the Respondent’s replying affidavit as follows:

16: “That the claimant’s claim, if any, are derived from the titles of the above persons and a determination of the above case also determined of (sic) claims of any other person who would derive title from them.”

All I understand the Respondent to be claiming, and which was not rebutted, is that all the Applicants claim to the suit land arise from the same claim that **SIMON WACHILONGA TOILA** had pursued in **BUNGOMA ELC CASE NO.38 of 2014** which he lost and therefore their claim herein is res judicata. There is merit in that assertion. The Applicants’ interest in the suit land is on the basis of the common interest that **SIMON WACHILONGA TOILA** was pursuing through his counter-claim in **BUNGOMA ELC CASE NO.38 of 2014** and which he lost and as was held by the Tanzanian Court of Appeal in **LOTTA -V- TANAKI and OTHERS (2003) 2 E.A. 556 (CAT):**

“... a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit.”

It is clear from the above that this suit is res judicata and this Court cannot entertain it.

Even if I am wrong on res judicata, it is clear from the evidence before me that the Applicants prayer for orders of temporary injunction to restrain the Respondent from evicting them from the suit land is bound to fail. An application for temporary injunction pending trial, as correctly stated by the Applicants counsel in her submissions, is to be determined on the basis of the well known guidelines set out in the case of **GIELLA V CASSMAN BROWN & CO. LTD 1973 E.A. 358**. These are

- 1. The Applicant must show a prima facie case with a probability of success.**
- 2. Secondly, such an injunction will not normally be granted unless be Applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages.**
- 3. If in doubt, the application will be determined on a balance of convenience.**

A prima facie case, as defined in the case of **MRAO V FIRST AMERICAN BANK OF KENYA LTD & OTHERS 2003 KLR 125:**

“... is a case which, on the material presented to the Court, a Tribunal properly directing 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.”

And as was held in **FILMS ROVER INTERNATIONAL 1980 3 ALL E.R 772**, in considering an application such as this one, the Court should take the route that appears to carry the lower risk of injustice should it turn out to have been wrong. Finally, the remedy of an injunction pending trial is an equitable one and the Court will not find favour with a party who has approached it with un-clean hands.

Do the Applicants have a prima facie case? I am afraid not. I am alive to the dicta that in considering whether or not the Applicants have established a prima facie case, I must not hold a mini trial or examine the case with finality. However, as was also held in the case of **NGURUMAN LTD V JAN BONDE NIELSEN & OTHERS C.A. CIVIL APPEAL NO.77 of 2012**, in considering whether or not the Applicant has established a prima facie case:

“All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation.”

It is now clear that following the judgment of **MUKUNYA J** in **BUNGOMA ELC CASE No.38 of 2014**, against which no appeal was preferred, any claims that the Applicants may have had on the suit land and resultant sub-divisions were extinguished and the Court ordered for their eviction therefrom. A decree followed and in his report on the eviction process and which is annexed to the Respondent’s replying affidavit (annexture SHM5) **SAMSON ITONDE TUMBO** the Auctioneer has stated as follows:

“The execution / eviction started exactly at 12.07p.m. and lasted upto 2.30p.m. Total of nine(9) families were affected by the eviction. The total of 12 houses were left without any properties in them. All houses due to execution of a Court order were

pointed out to the Auctioneer by the (sic) Mr. SASAKA HENRY MAKOKHA. The OCS MBAKALO POLICE STATION provided sufficient security to the Auctioneer in order to carry execution in a peaceful manner. No person was injured or assaulted and no properties were damaged during the execution / eviction”

In paragraph 14 of his replying affidavit the Respondent has deponed as follows:

14: “The claimants were evicted on 17th April 2018 pursuant to the decree in the said suit under the supervision of the OCS MBAKALO POLICE STATION and DOMINION YARD AUCTIONEERS. Attached is the report on execution of order of eviction filed in this Court by the Auctioneer on 18th April 2018 marked SMH 5.”

The above averment was never rebutted. The claimants being referred to are the Applicants in this case who were obviously well known to the Respondent. And in paragraph 20 of the same replying affidavit, the Respondent has deponed as follows:

20: “That when the claimants and other people were evicted on 17th April 2018, they went and conspired, led by one Mr. ZEPHANIA INGOSI and came back to the parcel on Saturday 21st April 2018 and burned down my house, destroyed and looted properties worth thousands of shillings, land.”

That being the case, it is difficult to see what prima facie case the Applicants have demonstrated to warrant the grant of the orders sought in the Notice of Motion dated 30th April 2018. For as long as the order for their eviction remains in force, it is contemptuous for the Applicants to re-enter the suit land. That order has not been set aside on appeal or vacated on review. A party who flouts a Court Order cannot be the beneficiary of the equitable remedy of injunction. The Applicants therefore remain trespassers on the suit land and it is them, and not the Respondent, who must give way. In **JAJ SUPER POWER CASH AND CARRY LTD V NAIROBI CITY COUNCIL & OTHERS C.A. CIVIL APPEAL NO.111 of 2002**, the Court said:

“This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

In paragraph 5 of his affidavit in support of the application for injunction, the 1st Applicant has deponed as follows:

“That all the Applicants herein are in occupation and use of 13.35 acres from plot 153 and that such occupation has been in excess of 12 years and in an open peaceful and uninterrupted manner.”

This has of course been rebutted by the Respondent who has deponed as indicated above that the Applicants re-entered the suit land forcefully on 21st April 2018 following their eviction therefrom on 17th April 2018. To grant the Applicants the order sought will amount to circumventing the clear orders of **MUKUNYA J.** This Court cannot do that and as is now obvious, the Applicants have failed to establish a prima facie case which is the first hurdle that they had to surmount and having failed to do so, no purpose will be served in considering the other tests set out in the **GIELLA** case (supra). This is because, as was held by the Court of Appeal in **KENYA COMMERCIAL FINANCE COMPANY LTD V AFRAHA EDUCATION SOCIETY & OTHERS C.A. CIVIL APPEAL NO.142 of 1999**, the conditions set out in the **GIELLA** Case (supra) are to be considered sequentially so that the second condition can only be addressed if the first one is satisfied and if in doubt, then the third condition will be addressed. In this case, it is clear that the Applicants have failed to satisfy the first condition and I need not address the third condition as I am not in doubt.

It follows therefore that even if the Applicants Notice of Motion dated 30th April 2018 were to be considered on its merits, it would not pass the test set out in the **GIELLA** Case (supra).

Having said so, however, it is my finding that this suit is res-judicata. It must therefore be struck out together with the Notice of Motion dated 30th April 2018 upon which it is founded. The Respondent shall have the costs of both the suit and the application.

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018

Ruling dated, delivered and signed in open Court at Bungoma this 4th day of October 2018.

Mr. Milimo for Mr. Wetsutsa for Applicant present

Mr. Khaoya for the Respondent present

Applicants present

Respondent present

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018