REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

ELC CASE NO. 285 OF 2014

GERALD MUNENE MUGO................................PLAINTIFF/RESPONDENT

VERSUS

MURIITHI MAGANJO................................1ST DEFENDANT/APPLICANT

LAND REGISTRAR, KIRINYAGA........2ND DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.......3RD DEFENDANT/RESPONDENT

RULING

This is in respect to the 1st defendant/applicant's Notice of Motion dated 3rd December 2015 seeking the following orders:-

1. ***Spent.***

2. ***Spent.***

3. ***That the whole suit be dismissed and/or struck out as being a sham, frivolous, vexatious and an abuse of the Court process.***

4. ***That all orders previously granted in this matter including the order issued on 1st December 2014 and 13th January 2015 be set aside, vacated and/or lifted.***

5. ***That the plaintiff/respondent be declared a vexatious and perjurious litigant who has obtained and is attempting to obtain judgment by fraud.***

6. ***That the plaintiff/respondent be condemned to pay the costs of this application and the whole suit.***

The application is based on the grounds set out therein and supported by the applicant's affidavit. The gist of the application is that this matter is infact res-judicata having been conclusively decided in **NAIROBI HIGH COURT SUCCESSION CAUSE NO. 982 OF 1982** (hereinafter the Nairobi Succession Cause) and the plaintiff/respondent, being aware of the said Nairobi Succession Cause deliberately mischievously and with intent to defraud mislead this Honourable Court to issue the orders dated 1st December 2014 and 13th January 2015. In his affidavit in support of this application, the 1st defendant/applicant has deponed, inter alia, that the land subject of this suit i.e. MUTIRA/KIAGA/845 (the suit land) is part of the Estate

of his late father **NATHANIEL MAGANJO KUREKIA** and was subject of the Nairobi Succession Cause in which one **MONICAH MAITHA MAGANJO** now deceased had been granted letters of administration which were later confirmed but the grant was subsequently revoked by **Hon. Lady Justice Mary Ang'awa** (as she then was) on 20th September 1999 following an application by the 1st defendant (applicant's mother **EUNICE NJERU MAGANJO** (now deceased). That nullification included the purported sale to the plaintiff/respondent of a portion of the suit land by one **JOHNSON KIURA MAGANJO** and the effect of that judgment was to have the suit land revert back to the Estate of the said **NATHANIEL MAGANJO KUREKIA**. That the plaintiff/respondent has never occupied, utilized and/or developed any part of the suit land and it was therefore mischievous for the plaintiff/respondent to obtain the said orders sought to be set aside and which he used to demolish the 1st defendant/applicant's house leading to a fracas in which one person died.

In opposing the application, the plaintiff/respondent filed a replying affidavit dated 26th January 2016 in which he deponed, inter alia, that sometime on 26th June 1997, he purchased the suit land from one **JOHNSON KIURA MAGANJO** who had been given the said land by one **MONICAH MAITHA MAGANJO** the beneficiary and administrator of the Estate of **NATHANIEL MAGANJO KUREKIA** and at the time of the purchase, the said **JOHNSON KIURA MAGANJO** was the registered owner of the suit land. That he utilized the same until sometime in 2014 when the 1st defendant/applicant started interfering with it and so he moved to Court to obtain the orders subject of this application. That the 1st defendant/applicant failed to comply with the said orders thereby necessitating the plaintiff/respondent to seek the intervention of the Officer Commanding Sagana Police Station. That he was not a party to the Nairobi Succession Cause and there was no order that his title to the suit land be vacated and further the revocation of the grant did not affect his interest in the suit land.

The 2nd and 3rd defendants did not file any responses to that application.

What is the genesis of this application?

The suit herein was filed by the plaintiff/respondent on 28th October 2014 seeking the following substantive orders against the defendants:-

> a. ***Permanent injunction against the defendants from further interfering with the suit (sic) must have meant the suit land.***
>
> b. ***Cancellation of the title certificate and reinstatement of the plaintiff as the registered proprietor.***
>
> c. ***General damages.***
>
> d. ***Costs of the suit.***

The plaint is as is required, accompanied by a verifying affidavit to which I shall revert later in this ruling. The plaintiff/respondent's case, as per his pleadings, is that he had purchased the suit land from one **JOHNSON KIURA MAGANJO** free from any encumbrances and has proceeded to develop it until on or about October 2014 when the 1st defendant/respondent started encroaching thereon and when he did a search, he discovered that the suit land had undergone a series of transfers resulting in a title being fraudulently issued in the names of the deceased **NATHANIEL MAGANJO** the original owner.The plaintiff/respondent therefore pleaded fraud on the part of the defendants.

Simultaneously with the filing of that plaint, the plaintiff/respondent filed a Notice of Motion under **Order 40 of the Civil Procedure Rules** seeking a temporary injunction to restrain the defendants from interfering with his quiet possession of the suit land pending the hearing of this suit. That order was granted on 1st December 2014 and was later amended on 13th January 2015

to include an order that the Officer Commanding Sagana Police Station do provide security. Those two orders, as I have indicated above, are the subject of this application. The 1st defendant/applicant is yet to

file any defence to the suit. The 2nd and 3rd defendants have however filed a defence denying all the plaintiff'/respondent's averments and adding that if they ever dealt with the suit land , such dealing was lawful, regular, reasonable and procedural in furtherance of their statutory duties.

Submissions have been filed by Mr. Gacheche wa Miano advocate for the 1st defendant/applicant, Mr. Maina Kagio advocate for the plaintiff/respondent and Mr. Makori Litigation Counsel for the 2nd and 3rd defendants.

I have considered the application, the rival affidavits and the submissions by counsel.

The submissions of the 1st defendant/applicant is that this suit is res-judicata having been conclusively decided in the Nairobi Succession Cause and further, the plaintiff/respondent sought an equitable remedy based on a false complaint and therefore did not approach the Court with clean hands. Those submissions are supported by the 2nd and 3rd defendants who also allege material none disclosure on the part of the plaintiff/respondent and secondly, that this suit contravenes the provisions of the **Law of Succession Act** specifically **Sections 45, 53, 71 and 82.** On behalf of the plaintiff/respondent, it is submitted that no defence having been field by the 1st defendant/applicant, this suit cannot be dismissed or struck out and in any case, the 1st defendant/applicant was aware about the orders sought to be impugned and he did oppose them. And with regard to the Nairobi Succession Cause, it is submitted that the plaintiff/respondent was not a party and obtained his title in compliance with all the required formalities.

Whereas the orders dated 1st December 2014 were obtained in the presence of Mr. Makori counsel for the 2nd and 3rd defendants and Mr. Ngigi holding brief for Mr. Nduku counsel for the plaintiff/respondent, there was no appearance by the 1st defendant/applicant though served. It is also clear from the record that on 13th January 2015, only Mr. Nduku counsel for the plaintiff/respondent was present when the orders sought to be set aside were granted.

I shall now consider all the prayers sought in the Notice of Motion the subject of this ruling which are:

> ***1. Spent.***
>
> ***2. Spent.***

3. That the whole suit be dismissed and/or struck out as being a sham, frivolous, vexatious and an abuse of the Court process: The remedy of striking out a pleading is a draconian remedy to be exercised very sparingly and cautiously because it is a remedy that is exercised by the Court without being fully informed of the merits of the case through discovery – ***D.T DOBIE VS MUCHINA 1982 K.L.R 1.*** In the same case, **MADAN J.A** (as he then was) said:-

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment"***

In ***FREMAR CONSTRUCTION CO. LTD VS MINAKASH N SHAH C.A CIVIL APPEAL NO. 845 of 2002 (NAIROBI)*** the Court of Appeal also addressed the issue of striking out pleadings and said:-

> ***"This Court has stated many times before, and the learned Judge of the Superior Court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules and exists inherently for the Court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process"***

Guided by the above principles, I do not see how the plaint herein can be described as disclosing no reasonable cause of action and neither is it so weak as to be beyond redemption or incurable by amendment. Clearly, this is not among those clear cases that the draconian power of striking out a pleading was meant for. The plaintiff/1st respondent has pleaded that he bought the suit land and obtained

a title thereto which was fraudulently reverted to the original owner. As of now, the 1st defendant/applicant has filed no response to that pleading which this Court is entitled to consider as admitted by virtue of ***Order 2 Rule 11(1) of the Civil Procedure Rules.*** Only the 2nd and 3rd defendants have filed a defence in which they have pleaded, inter alia, that what they did was in furtherance of their statutory obligations. In light of all the above, I do not see how the plaintiff/1st respondent's suit can be a candidate for dismissal or striking out. It certainly raises serious triable issues. That prayer is accordingly dismissed.

4. That all orders previously granted in this matter including the order issued on 1st December 2014 and 13th January 2015 be set aside, vacated and/or lifted: Those orders were issued pursuant to the plaint and Notice of Motion filed herein on 28th October 2014 under Certificate of urgency seeking an ex-parte interlocutory order of injunction and among the issues raised by the 1st defendant/applicant is that the plaintiff/respondent did not disclose to this Court that this matter is res-judicata having been conclusively decided in the Nairobi Succession Cause and thereby misleading the Court to issue the orders subject of this application. ***Order 40 Rule 7 of the Civil Procedure Rules*** grants the Court the power to discharge, vary or set aside an injunction. It states:-

> ***"An order for an injunction may be discharged, or varied, or set aside by the Court on application made thereto by any party dissatisfied with such order".***

A party approaching the Court for an ex-parte order has a duty to make full disclosure of all relevant information in his possession whether or not it will assist his application. This is important in assisting the Court exercise its discretion whether or not to grant the relief sought. If that duty is not observed by the applicant, the Court may exercise its discretion by discharging, varying or setting aside the order so obtained. One of the known grounds for discharging or setting aside such an order is concealment of material facts of material non-disclosure. In the case of ***THE KING VS THE GENERAL COMMISSIONER FOR THE PURPOSE OF INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON: EX-PARTE PRINCESS EDMOND DE PLIGAC (1917) 1 K.B 486, WARRINGON L. J*** said as follows:-

> "***It is perfectly well settled that a person who makes an exparte application to the Court that is to say, in the absence of the person who will be affected by that which the Court is asked to do – is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it"*** - emphasis added

In opposing the application an particularly with reference to the allegation that the plaintiff/respondent did not disclose about this matter being res-judicata in view of the Nairobi Succession Cause, the plaintiff/respondent deponed at paragraph 11 of his replying affidavit as follows:-

> ***"That the applicant has annexed a copy of the judgment issued in Nairobi Succession Cause No. 962 of 1989 on 29th September 1999. It is clear from that judgment that I was not a party in that matter. Equally, in that judgment, there was no order that my title be cancelled, yet by that time, I had obtained title to the land"***

It is correct from the order issued by **Okubasu J**. (as he then was) in the Nairobi Succession Cause on 26th November 1998 that the plaintiff/respondent was not a party in that cause and the Judge said as much. However, on 27th May 2004, **Waweru J.** made an order in the said Nairobi Succession Cause enjoining the plaintiff/respondent in those proceedings. That order is part of the plaintiff/respondent's own documents – annexture **GMM 5**. It cannot therefore be true that the plaintiff/respondent was not a party to the Nairobi Succession Cause. He may not have been a party thereto when it was initially filed but by the time he was moving this Court by his plaint and Notice of Motion on 28th October 2014, an order had been made some ten (10) years earlier enjoining him in the Nairobi Succession Cause. Yet, when he filed this suit, he deponed at paragraph 3 of his verifying affidavit as follows:-

"That there is no other suit pending between the parties herein relating to the issues in question"

A similar pleading was made in paragraph 12 of his plaint. All this notwithstanding that in the orders granted by **Waweru J**. on 27th May 2004, there was a clear reference to the suit land. Mr. Makori counsel for the 2nd and 3rd defendants has submitted that had the

plaintiff/respondent disclosed this, the Court would have warned itself accordingly. There is merit in that submission and this Court finds that the plaintiff/respondent concealed from the Court relevant material fact to warrant the setting aside of the orders dated 1st December 2014 and 13th January 2015.

But that was not the only material non-disclosure by the plaintiff/respondent. When he moved this Court by his Notice of Motion dated 28th October 2014 seeking injunctive reliefs, the plaintiff/respondent pleaded in paragraph 6 of his supporting affidavit that:-

> ***"…. I have been in active utilization of the said land and have since made major developments in value to the said land"***

What was conveyed to the Court was that he was in occupation of the whole suit land. It would appear that when he obtained the orders, he tried to use them to evict the 1st defendant/applicant using the Police at Sagana. This prompted the Officer Commanding Sagana Police Station to write to the Deputy Registrar of this Court vide his letter ref **C/CRI/6/7 VOL 11/90** dated 16th February 2015 in the following terms:-

> ***"The facts of the matter is that there is a land case Dispute as indicated above which is before the High Court Kerugoya waiting to be heard and a determination of the suit concluded.***
>
> ***Sir, for a period of time, the family of the plaintiff has been using half of the land parcel for farming while on the contrary, the family of the 1st defendant has been living and using part of the land for farming. On the night of 21st December 2014 at around 2.00 a.m. unknown number of hired thugs invaded the farm and forcefully demolished three houses of the 1st defendant in an attempt to effect an illegal eviction"***

When an attempt was made by the plaintiff/respondent to cite the Officer Commanding Sagana Police Station Mr. Musyoka Mumo for contempt in failing to comply with the two orders subject of this application, he swore a replying affidavit dated 26th May 2015 to which he annexed a copy of a letter dated 12th February 2015 (annexture **MM 4**) addressed to him by **Mr. Kinuthia Wandaka** advocate then acting for the 1st defendant/applicant. The relevant paragraph of that letter reads:-

> ***"It does not ask you or anybody to evict Muriithi Maganjo from the land. The plaintiff and his advocates are deliberately misusing and misinterpreting the Court order to imply the Court has ordered eviction of our client from the land. The plaintiff and my client both use a portion of the land and our client has not interfered with the portion the plaintiff is using"***

Both the letter dated 16th February 2015 from Mr. Musyoka Mumo the Officer Commanding Sagana Police Station and the letter dated 12th February 2015 from Mr. **KINUTHIA WANDAKA** advocate then acting for the 1st defendant/applicant form part of the record herein and have not been rebutted. The contents thereof show that both the plaintiff/respondent and the 1st defendant/applicant occupy a portion of the suit land yet the plaintiff/respondent while moving the Court on 28th October 2014 created the impression that he utilizes the whole suit land. That was also material non-disclosure on his part and had this Court been properly informed that infact both parties occupy part of the suit land, the orders it should have made would have been a reflection of what was on the ground. Indeed if both parties occupy their respective portions of the suit land as of now, those orders would not have been necessary. There was therefore no full disclosure of all material facts on the part of the plaintiff/applicant and this Court must therefore deprive him of the orders that he obtained in the previous proceedings. The 1st defendant/applicant is therefore entitled to prayer 4 of his Notice of Motion.

5. That the plaintiff/respondent be declared a vexatious and perjurious litigant who has obtained and

is attempting to obtain judgment by fraud: The statute which governs vexatious proceedings is ***The Vexatious Proceedings Act Chapter 41 Laws of Kenya*** which empowers the Court, by ***Section 2*** thereof, to declare a person a vexatious litigant. However, such declaration would need to be made in an application filed at the instance of the Attorney General. Secondly, the orders to declare one a vexatious litigant can only be made after the Court grants that person an opportunity to be heard in those proceedings. Having said so, a vexatious proceeding refers to a claim which is pursued where there is plainly no prospect of success or where the motive of the plaintiff is aimed solely at harassing the defendant. Such a proceeding is usually instituted without good or just cause. It is also synonymous with what can be termed as an abuse of the process of the Court. My view of the plaintiff/respondent's pleadings herein is that they do not amount to what can be described as vexatious proceedings. It must be noted that the plaintiff/respondent did not initiate the proceedings in the Nairobi Succession Cause but was only enjoined therein later to protect his interest in the suit land. It would be harsh for this Court to declare him as a vexatious litigant. That prayer is similarly rejected.

I have also considered whether this suit is infact res-judicata in view of the proceedings in the Nairobi Succession Cause. Under ***Section 7 of the Civil Procedure Act***, for a matter to be considered res-judicata, there must be previous proceedings involving the same parties or those under whom they litigate and the previous suit must have been heard and finally decided. This Court has been referred to previous orders issued by **Okubasu J.** and **Ang'awa J**. in the Nairobi Succession Cause. Those orders were issued on 26th November 1998 and 29th September 1999 respectively. The plaintiff/respondent only became a party in these proceedings following the orders issued by **Waweru J.** on 27th May 2004. It is also not clear if any final orders conclusively determining the Nairobi Succession Cause have been issued from the time the plaintiff/respondent became a party therein. This suit is therefore not res-judicata. However, this suit may probably be sub-judice and there may be need to stay it in terms of the provisions of ***Section 6 of the Civil Procedure Act***. I will be asking counsel to address me on that issue in due course.

Ultimately therefore, upon considering the 1st defendant/applicant's Notice of Motion dated 3rd December 2015, I make the following orders:-

> *1.* ***This suit is not a sham, frivolous, vexatious or an abuse of the process of the Court and it cannot therefore be dismissed or struck out on that basis.***
>
> *2.* ***The orders previously granted in this matter dated 1st December 2014 and 13th January 2015 were obtained through non-disclosure of relevant and material facts and are hereby set aside.***
>
> *3.* ***There is no basis upon which to declare the plaintiff/respondent to be a vexatious and perjurious litigant who is attempting to obtain judgment by fraud.***
>
> *4.* ***Each party shall meet their own costs of this application.***
>
> *5.* ***This suit shall be mentioned on 30th August 2016 so that the Court can decide what orders to make in lieu of the Nairobi Succession Cause once I have heard what the parties have to say on the same.***

It is so ordered.

B.N. OLAO

JUDGE

12TH MAY, 2016

Ruling delivered, dated and signed in open Court this 12th day of May, 2016

Mr. Macharia holding brief for Mr. Kagio for Plaintiff present

Mr. Gacheche wa Miano for Defendants absent.

B.N. OLAO

JUDGE

12TH MAY, 2016