



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 29 OF 2019**

**ZAKAYO MWANGI.....1<sup>ST</sup> APPLICANT**

**MARY WANJIKU.....2<sup>ND</sup> APPLICANT**

**NANCY WANJIRU.....3<sup>RD</sup> APPLICANT**

**CATHERINE NYAKIO.....4<sup>TH</sup> APPLICANT**

**PETER KARIUKI.....5<sup>TH</sup> APPLICANT**

**VERSUS**

**JANE WAINOI KINYUA.....RESPONDENT**

**RULING**

The application before me is the Notice of Motion brought under certificate of urgency dated 23<sup>rd</sup> April 2020. The Applicants seeks the following orders:-

**(1) Spent.**

**(2) That the Honourable Court be pleased to issue a temporary injunction restraining the respondent from destroying crops, cutting down trees, picking tea leaves, spraying pesticide on the compound and destroying the applicants' residential house on land parcel MUTIRA/KAGUYU/5671 pending the hearing and determination of this application.**

**(3) That the Honourable Court be pleased to issue a temporary injunction restraining the respondent from destroying crops, cutting down trees, picking tea leaves, spraying pesticide on the compound and destroying the applicants residential house on land parcel MUTIRA/KAGUYU/5671 pending ruling of the application dated 26<sup>th</sup> July 2019.**

**(4) That the costs of this application be in the cause.**

The application is premised on three grounds apparent on the face thereof and the affidavit of the applicant sworn the same date. The applicants also filed a supplementary affidavit in further support of the application sworn on 24<sup>th</sup> June 2020. Attached to the said supplementary affidavit are numerous annexures.

On 24<sup>th</sup> June 2020, the respondent filed a replying affidavit opposing the said application. The respondent also annexed numerous documents in further opposition to the said application.

**APPLICANTS CASE**

The applicants in their affidavit in support of the said application stated that they have a similar application dated 26<sup>th</sup> July 2019 pending ruling for a temporary injunction and that the pandemic which has ravaged the country has affected the ruling which has not been delivered to-date. The applicants contend that the respondent has started destroying banana trees and threaten to demolish their houses. They stated that the destruction of crops, fence, trees and houses by the respondent is tantamount to destruction of the subject matter which is meant to defeat justice. They contend that the subject matter ought to be preserved pending the hearing and determination of the suit and that the respondent will not suffer any prejudice should the application be allowed.

In their supplementary affidavit, the applicants stated that contrary to the allegations by the respondent, the suit land parcel No. MUTIRA/KAGUYU/305 was not registered in the name of Zakayo Mureithi Munge but was registered in the name of 4 people namely Lucy Kariko Njiraini, Jane Wainoi Kinyua, Margaret Karima and Jane Karugu. The applicants further stated that a succession cause does not deal with issues concerning trust and that explains why they filed this suit to seek redress. The applicants further stated that in ELC No. 186/2016, the 2<sup>nd</sup> to 5<sup>th</sup> applicants were never part of proceedings and were never evicted. They stated that this application is not overtaken by events in that they are still on the ground and that the respondent ought to wait for the matter to go for a full hearing and stop interfering with the subject matter until the matter is finalized. They contend that the reason this Court dismissed the application dated 26<sup>th</sup> July 2019 is because they never filed a supplementary affidavit which is a technicality issue and not a substantive issue. The applicants also stated that the main reason they were unable to file their supplementary affidavit on time was because their advocate on record was proceeding on maternity leave and that they were unable to give her the materials on time before she left for maternity leave.

#### RESPONDENT'S CASE

The respondent stated that land parcel MUTIRA/KAGUYU/5671 is a resultant of the partition of land parcel No. MUTIRA/KAGUYU/305 which was initially registered in the name of Zakayo Mureithi Munge (deceased). She stated that the aforesaid partition was as a result of the succession of the Estate of the aforesaid Zakayo Mureithi Munge (deceased) and that the said succession cause was dealt with up to the Court of Appeal level vide Nyeri Civil Appeal No. 2 of 2016 which was dismissed on the 13<sup>th</sup> day of March 2017. The respondent deponed that in the aforesaid succession cause, the interests of all the applicants herein were ably represented by their aunt, Lucy Kariko Njiraini.

She further stated that after the partition, she sued the 1<sup>st</sup> defendant herein vide ELC Case No. 186 of 2016 for forceful eviction whereby she obtained an eviction order and evicted the respondents from land parcel No. MUTIRA/KAGUYU/5611. The respondent further stated that the applicants herein and their properties were evicted from the suit land parcel No. MUTIRA/KAGUYU/5671 and do not occupy and/or utilize the said land or any part thereof. She stated that the current application has already been overtaken by events since it seeks injunctive orders to be issued pending the ruling which was delivered on 30<sup>th</sup> April 2020 and that the application is therefore res-judicata since the applicants had filed a similar application dated 26<sup>th</sup> July 2019 seeking similar orders which application was dismissed on 30<sup>th</sup> April 2020.

In conclusion, the respondent stated that after they were evicted, the applicants are now attempting to stage a come-back in order to justify their claim for adverse possession and that they have even destroyed the barbed wire which she used to fence off her land after they were evicted and she reported the incident to the Police and that the issue is now a subject of a criminal trial.

#### LEGAL ANALYSIS

I have considered the Notice of Motion application dated 23<sup>rd</sup> April 2020 and the affidavit evidence. I have also considered the replying affidavit sworn by the respondent and the submissions by the counsels. The applicants had filed a similar application dated 26<sup>th</sup> July 2019 which this Court dismissed with costs on 30<sup>th</sup> April 2020. Though the present application was filed during the pendency of the ruling in respect of the earlier application dated 26<sup>th</sup> July 2019, the two applications are similar in all respects including the citation of the law under which the Court has been involved and the orders being sought. The respondent in her affidavit evidence stated that this Honourable Court has rendered itself on the issue in controversy vide its ruling on 30<sup>th</sup> April 2020 and that it cannot sit on its own appeal. The respondent is in effect raising a preliminary point to the effect that this application is res-judicata. *Res-judicata* is a *latin* word meaning “*a thing adjudicated*”. The *Black's Law Dictionary Ninth Edition* defines res-judicata as follows:-

*(i) An issue that has been definitely settled by judicial decision;*

*(ii) An affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transaction, or series of transactions and that could have been – but was not - raised in the first suit.*

The issue was put into perspective in the case of *Ukay Estate Ltd & Another Vs Shah Hirji Manek & 2 others (2006) e K.L.R* where **Waki J.A.** stated as follows:-

*“The doctrine is not merely a technical one applicable only on records. It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause”.*

The principle is succinctly captured in *Section 7 of the Civil Procedure Act* where it states as follows:-

*“7. No Court shall try any suit in which the matter 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 Court”.*

An argument may arise whether a matter of interlocutory nature decided in one suit can be subject of another similar application in the same suit. Put it differently whether interlocutory proceedings, appeals or civil proceedings other than suits commenced by plaint are covered under the general principle of res-judicata? The answer can be found in the case of *Uhuru Highway Development Limited Vs Central Bank of Kenya & 2 others (1996) e K.L.R* where it was held thus:-

*“There must be an end to applications of similar nature; that is to say further, wider principles of res-judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought*

*to be an end to litigation. It is the precise problem that Section 89 of our Civil Procedure Act caters for. The word “suit” is defined in Section 2 of our Civil Procedure as:*

*“means all civil proceedings commenced in any manner prescribed”.*

I agree with the decision by Superior Court. On this ground alone, I find the interlocutory application dated 23<sup>rd</sup> April 2020 brought under *Order 40 CPR, Section 1A, 1B and 3A CPA* and seeking injunctive orders similar in all aspects with a previous interlocutory application dated 26<sup>th</sup> July 2019 which was also seeking the same orders. The previous application was heard inter-parties and this Honourable Court rendered itself on 30<sup>th</sup> April 2020 dismissing the same with costs. It is clear to me that the filing of the subsequent application dated 23<sup>rd</sup> April 2020 was in breach of **Section 7 of the Civil Procedure Act** and a matter that satisfies the test for a defence of res-judicata. There must be an end to litigation. For those reasons, I find and hold that the Notice of Motion dated 23<sup>rd</sup> April 2020 has no merit and the same is hereby dismissed with costs to the respondent.

It is so ordered.

***READ, DELIVERED and SIGNED in open Court at Kerugoya this 17<sup>th</sup> day of July, 2020.***

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**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:*