



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**ELC NO.48 OF 2013**

**NJUGUNA GATHOO.....PLAINTIFF**

**VERSUS**

**SAMUEL GATHUKA NJUGUNA.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated **28<sup>th</sup> January, 2013** the plaintiff brought the current suit seeking the following orders against the defendant:-

**a) A declaration that Land parcel LOC.4/Gakarara/2166 solely belongs to him to the exclusion of the defendant;**

**b) General damages for trespass to private land;**

**c) Costs of the suit.**

2. The plaintiff who claims to be a registered owner of Land parcel **LOC.4/Gakarara/2166** measuring approximately 1.5 acres (hereinafter referred to as “the suit property”) contends that on **20<sup>th</sup> October, 2011** the defendant, who is his relative, entered into the suit property and maliciously sprayed chemicals on the Napier grass growing on the suit property causing it to dry up. The plaintiff also accuses the defendant of having unlawfully cultivated a portion of the suit property and growing crops thereon.

3. The plaintiff has averred that there is a pending suit before the Kandara Law Courts Civil Case No.141 of 2011 between the same parties and concerning the suit property herein. He however, contends that the said lower court does not have jurisdiction to adjudicate on matters of registered land.

4. It is further contended that despite the defendant having been served with summons to enter appearance he failed to do so within the time stipulated in law and at all.

5. Following the defendant’s failure to enter appearance within the time stipulated in law, the plaintiff applied for and obtained interlocutory judgment against the defendant. The said judgment was entered on **14<sup>th</sup> April, 2014**. Thereafter the suit was fixed for formal proof.

6. When the matter came up for hearing on **18<sup>th</sup> February, 2015** the plaintiff informed the court that the defendant is his nephew; that he brought the suit because the defendant sprayed his Napier grass with chemicals causing it to dry and that he reported the incident to the police who failed to assist him. Explaining that he is currently growing Napier grass on the suit property which is not developed, the plaintiff urged the court to order the defendant to compensate him for the Napier grass he destroyed and

the trees he cut down.

7. On proof of ownership of the suit property, he explained that in **2011** he conducted a search which showed that he was the registered owner of the suit property: That when he did another search on **12<sup>th</sup> February, 2015** he found an entry showing that the owner of the suit property is deceased.

8. In a bid to prove that he was the same person named in the search certificates and that he was not dead as indicated in the second search, he produced his original Identity Card which showed that his full names are Benson Njuguna Gathoo, the alleged deceased person in the second search.

9. At the close of hearing of the case, the plaintiff's advocate filed submissions reiterating the plaintiff's contention that the defendant maliciously sprayed the plaintiff's napier grass with some unknown chemical causing it to dry up.

10. Maintaining that the plaintiff has proved his case against the defendant, the plaintiff's counsel has urged the court to grant the plaintiff the orders sought in the plaint.

### **Analysis and determination**

#### **Pendency of Civil Suit No. 141 of 2011 Kandara Court impleaded:**

11. The plaintiff has acknowledged that there exists civil suit No. 141 of 2011 in the Kandara law Courts but contended that the lower court lacks jurisdiction to adjudicate on matters of registered land under the Environment and Land Court Act, 2011.

12. From the pleadings filed in this suit, it appears the question as to whether the lower court has jurisdiction to hear and determine the suit filed before it was not raised before the lower court to enable it make a determination thereon. The plaintiff based on his own interpretation of the law decided to lodge a fresh suit when the suit filed at the lower court was and is still pending. Filing a fresh suit without first seeking the determination of the alleged lack of jurisdiction, makes it necessary for this court to determine the question of the alleged lack of jurisdiction.

13. Determination of that question is necessary because **Section 6** of the Civil Procedure Act prohibits this court from proceeding with the trial of any suit which is pending before another court. The section provides as follows:-

**“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed.”**

14. Despite the instant suit having been heard and concluded, should it be found that the lower court had jurisdiction to hear the suit filed before it, this court would by operation of law be prohibited from proceeding with the proceedings began in this court by way of entering.

15. In determining whether the lower court has jurisdiction to hear and determine the suit pending before it, I take note of the provisions of **Section 30** of the Environment and Land Court Act and the Practice directions issued thereunder, in particular the practice directions issued on **17<sup>th</sup> July 2014** vide Gazette Notice No.5178 which in the relevant parts provides as follows:-

**“6. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. All proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to be heard and determined by the same courts.”**

16. It is clear from the foregoing practice directions that the Land and Environment Court Act did not absolutely remove the jurisdiction of the lower courts to hear and determine land and environment disputes. It only limited their jurisdiction to those matters they have pecuniary jurisdiction to hear and determine.

17. It is noteworthy that even where the lower court has no pecuniary jurisdiction, the law does not contemplate a situation whereby a fresh suit would be filed in the Environment and Land Court. The law contemplates that where the lower court has no jurisdiction, the suit began in the lower court would be transferred to the Environment and Land Court Act for the purpose of being heard and determined. In this regard see **Section 30** of the Environment and Land Court Act which provides as follows:-

**“30. (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.”**

18. Upon coming into operation of the Environment and Land Court Act, Pursuant to the provision of **Section 30** aforementioned, the Chief Justice made practice directions whose effect was that the pending suits continue being heard by the courts where they had been filed or they be transferred to the Environment and Land Court for purposes of being heard and determined if the court seized of the dispute lacked the requisite pecuniary jurisdiction.

19. In the circumstances of this case, besides there being no evidence that the lower court had no jurisdiction to hear the suit pending before it, I also find that the plaintiff erred in law by filing a fresh suit instead of having the suit filed in the lower court transferred to this court for purposes of being heard and determined.

20. Having determined that there is no evidence that the lower court has no jurisdiction to hear the suit pending before it and the issues raised in that suit and the parties herein being similar, I find the current proceedings to be caught by the provisions of **Section 6** of the Civil procedure Act. Consequently, as directed in that provision of the law, I decline to make any further proceedings in this suit, by way of determining the dispute herein, when a suit filed earlier is still pending concerning the same subject and same parties.

21. Assuming that I am wrong on this determination, I address the other issue pertinent in this suit which is entry of interlocutory judgment:

22. As pointed out herein above, after the defendant allegedly failed to enter appearance within the time stipulated in law, the plaintiff applied for and obtained interlocutory judgment against the defendant. The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only. In this regard see **Order 10 Rule 2** of the Civil Procedure rules which provides as follows:-

**“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of the plaintiff in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.”**

23. Liquidated demand was explained in the case of **Serraco Limited v. Attorney General (2009) eKLR** thus:-

**“JOWITT’S Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found**

**definition for a liquidated demand which is defined as:-**

**“Liquidated demand where an action is brought for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendants pays the amount claimed to the plaintiff, his solicitor or agent or into court.**

**Liquidated on the other hand is defined as: “a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Whereas liquidated damages is defined as:- “ The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.”**

24. The plaintiff’s case being for recovery of land and damages for trespass to land does not fall under the claims for which interlocutory judgment could have been entered in favour of the plaintiff under **Order 10 Rule 2.**

25. The plaintiff ought to have proceeded under **Order 10 rule 9** which provides as follows:-

**“Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.”**

26. In my view it is in the proceedings contemplated under **Order 10 rule 9** where the plaintiff would prove service of summons and failure to enter appearance as contemplated in law, if the trial court is certified that service was effected as by law required, it would proceed and hear the plaintiff’s case for purposes of determining whether the plaintiff has made up a case of being granted the orders sought.

27. In this case owing to the existence of the interlocutory judgment herein, the trial court did not get an opportunity to interrogate the service allegedly effected on the defendant.

28. In the affidavit of service sworn to prove service on the defendant the deponent, **Samson Karau Mutiso**, has, *inter lia*, deposed that:-

**“3. That on 21st February, 2014 I proceeded to Kabati town in Kandara division, Murang’a County;**

**4. That at the said town I called the Plaintiff’s daughter, one Waithera whose cell phone number I had been given by the plaintiff for purposes of pointing to me the defendant.**

**5. That at around 11.00a.m at the defendant’s house after introducing myself and the purpose of my visits I personally served the defendant with the abovementioned documents which service he accepted retained the copies but declined to acknowledge receipt by signing at the reverse of the original summons to enter appearance returned herewith duly served as such.**

**6. That the said defendant become known to me after introducing himself as such.”**

29. Whereas the deponent of the affidavit of service was to rely on the plaintiff’s daughter for the purpose of pointing the defendant to him, it is not clear whether the said person is the one who pointed out the defendant to him. Paragraph 6 of the affidavit shows that he got to know the defendant after the defendant introduced himself as such.

30. Upon reading the affidavit of service herein, I entertain doubt whether the defendant was indeed served with the summons to enter appearance as alleged. This is so because the affidavit of service does not meet the requirements of **Order 5, Rule 15(1)** which provides as follows:-

31. As pointed above, it is not clear who identified or witnessed service of summons to the defendant. In

the circumstances, I find the interlocutory judgment herein to have been entered without any basis in law and I hereby set it aside.

32. Having found the current suit *res sub judice* Kandara Civil Case No.141 of 2011, I decline to consider the other issues raised in this suit. The plaintiff is advised to pursue those issues in the suit pending before the lower court. The upshot of the foregoing is that the current suit is bad in law and is dismissed with no orders as to cost.

**Dated, signed and delivered at Nyeri this 4th day of May, 2015**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

No appearance for the plaintiff.

No appearance for the Defendant.

Lydia - Court Assistant.