



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 58 OF 2008

NYWERI DEVELOPMENT & 16 OTHERS PLAINTIFF/APPLICANT

VERSUS

1. MATUMAINI VENTURES LIMITED
2. KENYA COMMERCIAL BANK LIMITED ... DEFENDANTS/RESPONDENTS

RULING

1. The application dated 4/9/2012 and filed in court on 5/9/2012, is brought under **Cap 8 rule 3, Order 40 Rules 1, 2 & 4** of the **Civil Procedure Rules** and **Section 1A, B, 3A, 63** of the **Civil Procedure Act** and all other enabling provisions of the law. The application seeks orders to temporarily restrain the Defendants/Respondents from transferring the land the subject of this suit to any third party until the hearing and determination of this suit.
2. The application is supported by the affidavit sworn by **Gerald Kijogi Rukaria** the 2nd Applicant on 4/9/2012. According to the said affidavit, one **Mr Wanjihia** has purchased the suit property from the Advocates of the proposed Third Defendant and the said buyer has fenced the property. That efforts made by the Applicants to lodge a caveat on the suitland have been unsuccessful as the Deed title at the Lands Registry, **Nairobi** has been missing.
3. In opposition to the application, the 1st Defendant filed the grounds of opposition dated 19/9/2012. The 2nd Defendant also filed grounds of opposition dated 1/11/2012. The issues raised in the said grounds of opposition can be summarized as follows:-
 - a. **THAT the application is *Res judicata* as a similar application herein dated 4/9/2012 has already been determined by the court.**
 - b. **THAT the suit property is a subject of Nairobi HCCC No. 30 of 2006 and the other parties in Nairobi HCCC No. 30 of 2006 are not parties herein.**
 - c. **THAT the Applicants preferred an appeal vide a notice of appeal dated 13/5/2009 which appeal has never been prosecuted nor the record of appeal compiled.**
 - d. **THAT the application is an abuse of the court process due to the filing of unnecessary and frivolous applications dated 9/2/2011 and 13/5/2009 which have never been prosecuted.**
 - e. **THAT the Applicants have not satisfied the grounds for a grant of an injunction.**
4. The 3rd Defendant, **Gachiri Kairuki** and **Kiai Advocates** were enjoined in these proceedings and orders for the amendment of the plaint granted vide a ruling delivered herein on 15/10/12. It is noted that the said 3rd Defendant was not a party to this suit by the date of the filing of the

application at hand and neither was the application subsequently amended to include the 3rd Defendant. Consequently, the Third Defendant is not a party in the said application nor was the 3rd Defendant served or participated in the application.

5. The application dated 14/5/2008 was filed by the Applicants on 15/5/2008 and sought orders of injunction to restrain the 1st and 2nd Defendant from dealing with the suit property. The application was heard and determined by **Hon. Lenaola J**, who delivered his ruling dismissing the application on 12/5/2009. The matter is now *res judicata*. **Section 7** of the **Civil Procedure Act** 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.”

6. It is also noted that there is on record a similar application dated 13/5/2009 filed in court on 14/5/2009 by the Applicants on the same subject matter. That application remains unprosecuted. It is an abuse of the court process to file three applications herein on the same subject matter. Indeed the suit has been the subject of many applications as observed by **Hon. Makhandia J**, (as he then was) in his ruling dated 15/10/2012. Taking into account the ruling by **Hon. Lenaola J**, made on the 12/5/2009 which ruling still stands to date, the Plaintiffs ought to move to fix the case for the hearing of the main suit. The Plaintiffs are silent on what transpired after the filing of the Notice of Appeal dated 13/5/2009 against the said ruling by **Hon. Lenaola J**, dated 12/5/2009. It is not clear how **HCCC 30/06 Nairobi** is related to the suit herein as the pleadings in the said suit have not been exhibited herein.
7. With the foregoing, I dismiss the application with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **6th** day of **February** 2014.

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B. THURANIRA JADEN

JUDGE