



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

ELC NO 479 OF 2013

WANJIRU THUO.....1ST PLAINTIFF

WANGUI MUNGAI.....2ND PLAINTIFF

FRANCIS THUO KABUGO.....3RD PLAINTIFF

MUTHAMA KABUGO.....4TH PLAINTIFF

KENNEDY MUNGAI.....5TH PLAINTIFF

VERSUS

BERNARD NDUNGU MWAURA.....1ST DEFENDANT

JOSEPH NJUGUNA MWAURA.....2ND DEFENDANT

PETER NJUGUNA MWAURA.....3RD DEFENDANT

RULING

The application before this court for consideration is the Notice of Motion dated 19th April 2013, brought under **Order 40 Rule 1 & 3, Order 51 Rule 1 of the Civil Procedure Rules and Sections 3, 3A and 63 (e) of the Civil Procedure Act**, seeking for these orders;

- i. That pending the hearing and determination of this suit this court be pleased to grant the Defendant/Respondents by themselves, their agents, employees, servants or any person acting under their authority from using, occupying, surveying, subdividing, developing, clearing, claiming or in another manner interfering with the plaintiffs /applicants' quiet and peaceful possession or parcel of land known as Kiambaa/Kanunga/111, Kiamba/Kanunga/11 and Kiambaa/Kanunga/1119.*
- ii. The applicants are also seeking for costs of this application.*

This application is premised on the grounds stated on the face of the application and the supporting affidavit of **Wanjiru Thuo**, the 1st Plaintiff herein who stated that the plaintiffs have been occupying the suit property known as Kiambaa/Kanunga/498A for over 30 years. That this land was originally in the name of the Native Land Trust Board and was family land which belonged to the **Mbari ya Kuria family**. It is her averment that this property was allocated to her grandmother **Teresia Wambui** and upon her

death the land was to devolve to her father, **Francis Thuo**. She further averred that instead of the land being allocated to her father, it was fraudulently allocated to **Kagia Kimani**, who later transferred the same to **Mwaura Njuguna** in 1993 upon which new titles numbers **Kiambaa/Kanunga/1117** to **Kiambaa/Kanunga/1119** were issued in the names of the Defendants/Respondents. She further stated that the plaintiffs and their deceased parents have invested heavily on the suit land and have built houses on it. It is her averment that the Defendants/Respondents filed SRMCC No 234 of 2009, in Kiambu seeking to evict the plaintiffs whereby an order was made by the Magistrate that the dispute be referred to the Land Dispute Tribunal at Karuri. That thereafter an award was delivered by the Panel of Elders, in which they ordered that the plaintiffs should not be evicted from the said land having lived there for over 10 years. That this award was adopted as an order of the court on 9th August 2011, and a Decree issued which was never appealed. The suit was later dismissed for want of prosecution after the Defendants failed to prosecute their case. She stated that since the Plaintiff's have lived on the said land for over 30 years it was fair for the Plaintiff's to be allowed to have title through adverse possession adding that the Plaintiff have been living on the suit land in an open manner and do not know any other home. She stated that the defendants/Respondents have not had the use of the said parcel of land for a period that the Plaintiffs have been residing on the suit land and the Plaintiffs verily believe that the Defendants do not deserve the suit land.

This application is opposed. The Defendants through Peter Njuguna Mwaura deposed and filed their Replying Affidavit on 21st June 2013, stating that this suit is *res judicata* and therefore contravene sections 6 and 7 of the Civil Procedure Act and Order 1 Rule 12 of the Civil Procedure Rules. He further added that the Defendants are the absolute and legal proprietors to all those parcels of land known as LR No Kiambu/Kanunga/1117, LR No. Kiambu/Kanunga/1118, LR No. Kiambu/Kanunga/1119 and that they have held the titles for the past 20 years. He further averred that the Defendants are the absolute owners of land in accordance with section 24 and 25 of the Land Registration Act 2012 and the certificates confer 1st registration to the Defendants and there has been no aspect of any mistake, omission and or fraud having been raised by anyone including the plaintiffs in the cause of ownership to warrant for either rectification nor cancellation of the certificate of titles as is stipulated by the provisions of sections 143 (1) of the Registered Land Act [now repealed]. He also stated that initially times way in 1958, the three parcels of land were derived from Kiambaa/Kanunga/498A, and registered in the names of Kagia Kimani. That subsequently they got into a sale agreement and sold the land to Mwaura Njuguna Kuria, who is the biological father of the defendants. That prior to his demise, he apportion the parcel of land to his sons who are the Defendants. He added that the reasons why the Plaintiffs were holding to the suit property was because the Defendants' father allowed their grandmother, **Teresia Wambui** to occupy the land but only as a licensee for a while and upon acquiring her own land to vacate it. That on getting her portion of land at Ruiru, Teresia Wambui shifted and started living in her land until her death. Therefore the allegation that he defendants fraudulently transferred the property and /or caused the same to be registered in their names as being parcels No Kiambu/Kanunga/1117,1118 and 1119 respectively is denied because the Plaintiffs have not provided any particulars of fraud as required by law and the extract of the Green Card to the suit land shows that the land was registered in the names of Kagia in 1958. He also added that the suit land has continuously been interrupted by a series of litigation as follows:-

1. SRMCC No. 234 of 2009
2. SRMCC No 3384 of 1993
3. HCCC No 1972 of 1995
4. CMCC No 5876 of 1993(O.S)
5. ELC No 479 of 2013

He averred that the Civil Suit No CMCC No 234 of 2009 in Kiambu was filed by the 3rd Defendant seeking to evict the plaintiffs from the suit property and accordingly the matter was referred to the elders which he believes that there is no such provision in law as directed by the court. That the award referring the issue to the Land Dispute Tribunal was erroneous as under the provision of section 3(1) of the Land Dispute Act 1990 (now repealed) the tribunal had no such jurisdiction to make such decisions as the land in question was a

registered land with certificate of Title Deeds. Further the Chief Magistrate in Kiambu on 9th August 2011 erred in law and fact by adopting an erroneous award and issuing a Decree which are already challengeable in law.

The deponent also stated that the plaintiffs have not resided on the suit land for over thirty(30) years, and therefore the Plaintiffs are not entitled to any claim of adverse possession as the fundamental legal ingredients have not been fulfilled and that the Plaintiffs have not been utilizing the land being their home and that the plaintiff do not have a prima facie case with any chance of success as the claim is not equitable in law. However, the Plaintiffs have continued with no justifiable cause or good reason to enjoy the proceeds of land which legally belongs to the Defendants who are suffering irreparably and therefore the balance of convenience is to have the Plaintiffs evicted from the suit land upon praying the mesne profits to the Defendants. The Deponent urged the Court to dismiss the Plaintiffs/Applicants application.

I have now considered the Notice of Motion in general and the written submissions and the authorities relied on by the parties. The issues for determination are:-

1. *Whether this suit is res judicata*
2. *Whether the Plaintiffs have made out a case to warrant them the prayers for injunction sought.*

The law pertaining to the doctrine of res judicata is captured under the provision of **Section 7 of the Civil Procedure Act** which 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.”

A comparison of the prayers sought by the Plaintiffs in the present Application as outlined above are clearly a duplicate of the parties in that the parties in Civil Suit No 234 of 2009. Furthermore the parties herein and the parties in Civil Suit No 1972 of 1995 are the same parties. Again the Parties in Civil Suit No 5876 of 1993 are the same as the parties in this suit The Plaintiffs herein have sought for injunction against the suit property. It is not in dispute that in the previous Application, the plaintiffs’ injunction was not extended. The Plaintiffs neither have nor appealed that dismissal neither have they sought for a review. While the above legal provision seems to address similar suits as opposed to similar applications as in this matter, the following decision sheds light on whether interlocutory findings on matters of fact will constitute res judicata where a similar application is filed in the future. This is what the Court of Appeal had in mind when it held in **Uhuru Highway Development Ltd -Vs- Central Bank Of Kenya & 2 Others Civil Appeal No. 36 of 1996** that,

“There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature That is to say, 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.”

The reasoning of this decision is clear. If there was no bar to filing of related applications, the courts would be swamped with similar applications, or applications raising same or similar issues. There would be no end to this, defeating the cardinal principle of justice that there must be an end to litigation. It is therefore my opinion that the application that the applicants have filed now were adequately considered in the Civil Suit No 5876 of 1993.

Having now considered the instant application and for the reasons that I have outlined above, I find the application dated 19th April 2013 is without merit. The court finds and holds that the instant application is res-judicata.

Having found that this application is res judicata, I find no need of dwelling into to the merits of the prayers of injunction as sought by the applicants.

For the above reasons, the application is not merited and I dismiss the same with costs in the cause.

It is so ordered.

Dated, Signed and Delivered this *4th day of September,2014*

L.N. GACHERU

JUDGE

In the Presence of:-

Mr Kimathi holding brief Kabaiku for the Plaintiff/Applicant

M/s Kitonga holding brief Naikuni for the 1st, 2nd, and 3rd Defendant/Respondent

Kamau: Court Clerk

L. GACHERU

JUDGE