REPUBLIC OF KENYA

IN THE HGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO.747 OF 2011

YELLOW HOURSE INNS LTD.....PLAINTIFF

-VERSUS-

A.A. KAWIR TRANSPORTS LIMITED.....1ST DEFENDANT

PHILMA FARM PRODUCE & SUPPLIERS LTD.....2ND DEFENDANT

THE COMMISSIOENR OF LANDS.....3RD DEFENDANT

CITY COUNCIL OF NAIROBI.....4TH DEFENDANT

THE HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

Introduction

1. The instant ruling relates to a Preliminary Objection filed by the Plaintiff on 1st October, 2014. The Plaintiff has raised objection to the 1st Defendant's application brought by way of motion filed in court on 24th September, 2014. The 1st Defendant motions the court for a negative injunctive order.

2. When the 1st Defendants notice of motion first came up for hearing on 6th October, 2014 the learned counsel for the Plaintiff Mr. Machira appearing together with Mr. Kimondo Mubea informed the court that the Plaintiff had filed a preliminary objection to the Notice of Motion. The court then directed counsel to file their respective submissions for highlighting on 4th November, 2014. The court further directed that as a similar objection had been raised in ELC Case No. 746 of 2011 (Brookside Studios Ltd –v- A. A. Kawir Transporters Ltd and others) where a similar notice of motion had been filed touching and concerning land adjoining the subject property, orders made in this suit would also obtain in the said ELC Case No. 746 of 2011 ("the related suit"). The pleadings in the related suit and those in the current suit are similar save the subject parcels of land and the Plaintiffs. The parties have however attorned the same counsel. The paths the two suits have taken is also exceedingly similar. The issues are also similar.

The Path

3. Before disposing of the preliminary objection, it would be appropriate to relay the path the proceedings in this, and if it may be added, the related suit have taken. By a plaint running some 13 pages, the Plaintiff filed suit against the Defendants seeking an order for injunction to restrain the Defendants from alienating, entering, subdividing, taking possession of or interfering with the suit premises known as LR No. 209/11803/2 or registering a new title in favour of the 1st Defendant. The Plaintiff also sought a declaratory order to affirm the Plaintiff's professed proprietorship of the suit property. As is the norm with such suits, the Plaintiff also filed an application for an interlocutory injunction. The application for interim relief was heard and disposed of on 20th September, 2013 by Lady Justice Gitumbi who in her reserved ruling dismissed the application. Dissatisfied, the Plaintiff promptly moved to the Court of Appeal for injunctive orders pending an intended appeal. The application before the Court of Appeal was determined some five months later in February, 2014. The Court of Appeal granted injunctive orders against the Defendants. The substantive orders issued by the Court of Appeal in Civil Application No. Nai 270 of 2013 (UR) as consolidated with Civil Application No. Nai 269A of 2013 read as follows:-

> *"2. The Respondent by themselves, their agents, servants and/or employee or any other person or group of person purporting to act on their behalf be and are hereby restrained from alienating, entering into, subdividing, taking possession and or interfering with the suit premises known as LR. No. 209/11803/3 and LR No. 209/11803/2 in any manner whatsoever and or registering a grant and or title or any other document whatsoever relating to the suit premises in favour of the first respondent or any other person whomsoever pending the hearing and determination of the Applicant's intended Appeal.*
>
> *2.....*
>
> *4. The Applicant do file an undertaking as to damages within thirty (30) days of the ruling".*

4. Six months or so after the ruling by the Court of Appeal, the 1st Defendant was back in court. Not the Court of Appeal but this court. The 1st Defendant now sought orders "to restrain the Defendants (sic) by themselves, their agents, servants and or employees or any other person or group of persons purporting to act on their behalf from developing, constructing or alienating, entering into, sub diving, taking possession and/or interfering with the suit premises known as L.R. No. 209/11803/2 in any manner whatsoever pending the hearing and determination of this suit". A similar application seeking analogous relief was also filed in the related suit. The Plaintiff quickly filed a Replying Affidavit by Mary Njuku and also a Notice of preliminary objection the subject of this ruling. The Plaintiff also filed Grounds of objection.

The Preliminary Objection.

5. Stripped to detail, the rather prolix preliminary objection is to the point that the court lacks the jurisdiction to entertain the current application as the Plaintiff has in force an injunction issued by the Court of Appeal. Entertaining the application would amount to entertaining and considering an appeal from the Court of Appeal's decisions of 14th February, 2014. Secondly, the Plaintiff holds the view that the 1st Defendant is issue-estopped. The 1st Defendant according to the Plaintiff should have raised any and all issue concerning the injunction application before Hon. Lady Justice Gitumbi as the Plaintiff's application was being heard but cannot do so now via a fresh application for an injunction. For these two reasons the Plaintiff contends that the application dated 24th September, 2014 is an abuse of the process of this court and should be struck out.

6. The law on preliminary objections is effectively well settled in Kenya. I need not restate the same herein save to point out that every preliminary objection which must be a point of law should be

argued on the premise and assumption that the facts as laid out by the other party are true. The point contested as a preliminary point is not to be obscured and clouded with factual details liable to be contested and proved through the process of evidence: see **Oraro –v- Mbaja [2005] eKLR.** Of course, I must also be alert to the probability that certain preliminary objections are best settled at the trial or hearing and determination of the substantive suit or application. As was stated by Newbold P in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributors Ltd [1969] E.A**.

> *"The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues."*

7. I do hold the view that in the circumstances of this case the preliminary objection is well prompted. The facts relevant to the objection as outlined above are not contested. I am only perhaps to add that going by the ruling of the Court of Appeal, the Plaintiff has been in possession of the suit property at all material times. Consequently, the likelihood of the facts blurring the preliminary objection, a fear expressed by Ojwang J (as he then was) in **Oraro –v- Mbaja *(supra)*** is therefore unlikely and improbable.

Considering the Parties' submission

8. The Plaintiff's submissions filed on 21st October 2014 are clear. The Plaintiff submits as follows: This court lacks the jurisdiction as the Court of Appeal, a court of higher hierarchy, is now seized of the matter which has been brought before the court. In the Plaintiff's view the effect of the Court of Appeal's Order of 14thFebruary 2014, already reproduced substantially elsewhere in this ruling, was to grant an unfettered right to of the suit premises to the exclusion of the 1stDefendant, amongst others. In the Plaintiff's submissions, the same documents and arguments which were availed and advanced respectively before the Court of Appeal are the same ones the 1st Defendant now seek to use and rely on to obtain an injunction before this court. The Court of Appeal "disregarded" the documents and arguments and instead affirmed the Plaintiff's rights to occupy use and possess the suit property. To entertain the current application would amount to entertaining an appeal or review of a decision of the Court of a higher stratum, so states the Plaintiff.

9. The Plaintiff cited various decided case law to support the contention that this court should not entertain any application on a matter similarly being handled or already handled by the Court of Appeal,even though I hasten to add that most, if not all of them related to the doctrine of *stare decisis*.

10. The Plaintiff also contends that by dint of the provisions of Section 7 of the Civil Procedure Act, the application is *res judicata*. In the Plaintiff's view the application for injunction having been determined first in favour of the 1st Defendant by the High Court and next in favour of the Plaintiff by the Court of Appeal the matter must be put to rest. To the Plaintiff, the 1stDefendant is seeking to relitigate that which has already been determined by a court of concurrent jurisdiction. The Plaintiff, to buttress the point, has cited no less than three decided cases.

11. I may add that on 4th November, 2014 when the submissions were presented and confirmed to court, the Plaintiff's counsel also added that the 1st Defendant had filed another application before the Court of Appeal seeking negative injunctive orders against the Plaintiff to restraint the Plaintiff from alienating, entering, subdividing, taking possession of, developing, constructing on or interfering with the suit property pending the hearing of the Appeal filed by the Plaintiff. A copy of the said application minus the voluminous exhibits was availed to the court at the court's request by counsel for the Plaintiff. It is to be noted that the application was filed on 27th October, 2014 by another firm of lawyers and not the law firm acting for the 1st Defendant in this suit. that application awaits determination by the Court of Appeal.

12. For the 1st Defendant, the written submissions were filed on 4th October, 2014. After detailing the facts, counsel for the 1st Defendant Mr. J. Gitau Singh set the 1st Defendant's case by contending that the issue of interlocutory injunction is not *res judicata* as between the Plaintiff and the Defendants or any of them. Counsel submitted that as a defendant with a counterclaim, the Plaintiff could file its own application for an injunction and the Defendant could also file one on the same property to be determined separately. This is so as the counterclaim is an independent suit. In support of that contention the 1st Defendant cited several treatises and case law. The 1st Defendant is further aggrieved, so submits counsel, that the Plaintiff is taking advantage of the decision of the Court of Appeal to impose itself as the owner of the suit property yet the Court of Appeal itself is yet to adjudicate on the issue of ownership of the suit property as well as on the issue as to whether the Plaintiff is entitled to an injunction. The latter issue is to be determined in Civil Appeal No. 347 of 2013 filed by the Plaintiff in the Court of Appeal. Finally, the 1st Defendant is of the view that since the principle of *res judicata* does not generally apply to interlocutory injunctions, it would certainly not apply in the instant case.

Analysis

13. I have read the written submissions and duly considered the same. I have also read through the application filed herein as well as the Replying Affidavit. Both contain a clear history of this matter from its inception through to the Court of Appeal and back. The dispute concerns, once again a now familiar feature in the Environment and Land Courts, a claim over the same parcel of Land allegedly allocated by the government of the Republic of Kenya through the 3rd Defendant herein to two different parties. The Plaintiff seeks a declaration that the Plaintiff is the true, lawful owner of the suit property. The Defendant seeks a similar declaration, a declaration that the 1st Defendant is the true legal and bona fide owner of the suit property. Two rivals, they are, who also continue to seek damages from one another as well as injunctive orders against each other. One must sink and the other swim, as only one declaratory order can issue. Determination of the rival claims is however not before this court now. That will be for the trial court and not even the Court of Appeal. What is before the court now for determination is whether in filing the application for injunction the 1st Defendant acted in abuse of the court's process in light of the fact that an interlocutory application for injunction had previously been determined by this court and also, to an extent, by the Court of Appeal at the Plaintiff's prompting.

Abuse of process

14. In civil courts the concept of abuse of process is well understood. It is ordinarily a common law plea (see: **Fraser –v- HLMAD Ltd [2007] 1 All ER 383)** now enshrined in most Civil Procedure Rules. It applies in different context with the resultant power to strike out or stay proceedings or any process at any time for abuse not only expressly conferred under Order 2 Rule 15 and Order 11 (generally), but also inherent under Section 3A as well as 1A & 1B of the Civil Procedure Act.

15. The species of misconduct to establish abuse of process are however unlimited. It is in my view, not possible to list all possible forms of abuse. Likewise it is not possible to lay any hard and fast rules to determine whether on a given statement of facts there has been or there is abuse. Suffice it to state that the court must view the facts to point to the conclusion that it is manifestly unfair to one party that a line of litigation or process continues. It will also amount to abuse if the process simply is bound to bring the administration of justice into disrepute.

16. Thus relitigation of issues already determined or the misuse of court process by raising issues which could have been raised in earlier proceedings will equate abuse of process. Filing persistent unmeritorious suits or applications before the court will also equate abuse of process as was held in the case of **Perotti –v- Collyer Bristow (a firm) [2004] 4All ER 53** where the appellant made 25 applications for permission to Appeal all which were rejected. Parallel litigation of the same matter is also a specie of abuse of process. The list cannot be closed and it all depends on the facts of each case. The result is however always the same. It is striking out or staying of the proceedings

or process, unless the abuse can be excused: see **Johnson –v- Gorewood [2001] 1 All ER 481, 499**.

17. Keeping in mind the above, I will now consider the abuse alleged by the Plaintiff.

It is the Plaintiff's contention that the fact that the application for injunction had been determined by this court the 1st Defendant ought to have then litigated and ventilated all its concerns then but not wait and open up the contest after the determination even by way of the 1st Defendant's own application for injunction. The Plaintiff further makes the point that the application was further litigated in the Court of appeal and an order as between the parties issued for an injunction. That order, to the Plaintiff, is binding upon both and indeed all parties to the suit. I would agree. The Court of Appeal having rendered itself and issued an injunction in favour of the Plaintiff all parties including this court are bound and must take cognizant of the same. It is a court of a higher echelon and all its decisions ought to be treated with civility. Until the order is vacated or set aside by the same court or, perhaps, a higher court, this court hands as well as of the parties to the proceedings are tied.

18. In my view, it matters not that the injunctive order was granted by the Court of Appeal following an application by the Plaintiff under Rule 5(2) (b) the Court of Appeal Rules. As the Court of Appeal has so severally expressed, Rule 5(2) (b) gives the said court an independent discretion far and separate from that of the High court. It also matters not that the substantive appeal as to whether or not an injunction ought to have been granted by at the High Court is still pending. The hard fact is that there is an injunction in place which restrains the Defendants from interfering with the suit property in any manner whatsoever. That said order did not restrain the Plaintiff from doing the same things the Defendants were restrained from doing. Certainly, when one reads through the ruling of the Court of Appeal, which is the annexure marked "Exh AA-12" in the supporting affidavit of Abdi Ahmed Abdi sworn on 24th September 2014, at page 4 of the said ruling as well as pages 14-15 it is easily noted that the Court of Appeal was clear that the Plaintiff's proprietary rights needed to be protected. The net effect of the injunction in my view was to confirm, temporarily the Plaintiff's proprietary rights until the determination of the intended appeal. That is the position that obtains currently.

19. For any party, including the Plaintiff, to act in any way to suggest that the orders of the Court of Appeal in favour of the Plaintiff were being challenged other than by an application before the same Court of Appeal would be tantamount to bringing the administration of justice into disrepute. The instant application by the 1st Defendant apparently seeks to do exactly that. Going by the submissions of both counsel, I believe it was slip or kindergarten error of a typographical nature to state in the application that the 1st Defendant was seeking orders to restrain its Co-Defendants. The 1st Defendant actually meant to type the "Plaintiff". That being so what the 1st Defendant was asking the court to do was to undo exactly what the Court of Appeal had done, given that the Court of Appeal was very conscious of the fact that the Plaintiff could have been in possession. The circumstances point towards one line: if the 1st Defendant was not happy with the Court of Appeal's decision it could not move the High Court but could very well move the same Court of Appeal: see **R –v- Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 1) [2000] A. C 6.** Indeed the 1st Defendant has since moved the Court of Appeal perhaps with hindsight and appreciation that the application for a similar injunction ought not to have been filed in this court in the first place.
20. I have said enough. The court is of the view that the instant injunctive application amounts to an abuse of the process as it seeks to challenge in a silhouetted manner the orders granted by the Court of Appeal.

Res Judicata

21. In view of the preceding, it may appear superfluous to address the issue as to whether or not the principle of *res judicata* applies to interlocutory applications but I feel constrained in the

circumstances of this case to do so.

22. The Plaintiff's view is that the principle of *res judicata* applies. The 1st Defendant holds the contrary view. Answering that issue, I would subscribe to the views expressed by Ringera J (as he then was) in the case of **Kanorero River Farm Ltd & 3 others –vs- National Bank of Kenya Ltd [2002]2 KLR 207** where at page of the law report 213 the learned judge had this to say:

> *"As I understand the law, the doctrine of res judicata applies to both suits and applications, whether they be final or interlocutory. Indeed, Section 2 of the Civil Procedure Act defines a suit to mean any civil proceedings commenced in any manner prescribed. And 'prescribed' is defined as prescribed by the rules. Applications for temporary injunction are prescribed for by the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would in appropriate circumstances operate as the plea in bar called res judicata. And I would have no difficulty in accepting that even a determination on the basis of a consent of the parties would have the same effect as a determination made after hearing and arguments"* **(emphasis mine)**

My understanding of the Judge and the decision in that case is that the appliance or employment of the doctrine of *res judicata* is not unqualified when it comes to interlocutory applications. A judge seized with the matter and faced with the plea of *res judicata* must not only first ascertain whether the requirements of the doctrine have been met but must also ascertain whether the circumstances of the case allow the application of the doctrine to be invoked. An investigation into the circumstance may reveal an occurrence of fresh or new facts upon which the application would be grounded. The investigation may also reveal grounds which could not have been advanced or challenged earlier. The circumstances ought however to be special even though not in the nature of a Devon Loch situation.

23. The circumstances of this case, in my view, are such that an objection on the basis of *res judicata* would not have held sway in limine to an application properly made by the 1st Defendant. The applicant was no longer the Plaintiff. It was the 1st Defendant who himself had a counterclaim. If the 1st Defendant was to be locked out at the preliminary stage, it would defeat the purpose and intent of Order 40 Rule 1 of the Civil Procedure Rules which is to the effect that the court may by order grant a temporary injunction or any order to restrain or for purpose of staying and preventing the wasting, damaging, alienation sale removal or disposition of the property as the court thinks fit until disposal of the suit. As a defendant with a counterclaim, the 1st Defendant would certainly be within its rights to prompt the court if it became aware of any new facts which if left unattended to would lead to a complete alienation of the suit property. I would, for example, not have hesitated to entertain and hear an application by the 1st Defendant seeking to restrain the Plaintiff from specifically disposing of and transferring the suit premises to a third party.

Epilogue

24. Enough said. The application dated 24th September 2014 constitutes an abuse of the process of the court in so far as it seeks to revisit a matter determined by the Court of Appeal and in so far as the same 1st Defendant/Applicant has moved the Court of Appeal for a variation of the same orders and the granting of similar orders sought before this court. I order that the same be struck out with costs to the Plaintiff. The same orders will obtain in the related suit being ELC No. 746 of 2011 (NBI). A copy of this ruling will be placed in that file.

25. Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

.....for the Plaintiff

..... for the 1st Defendant

.....for the 2nd Defendant

..... for the 3rd Defendant

.....for the 4th Defendant

..... for the 5th Defendant