



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 175 OF 2019

LUCY WANJIKU MUCHAI T/A BELLAVIN INVESTMENTS....PLAINTIFF/APPLICANT

VERSUS

WINNIE MUKOLWE (*Sued as the Administrator of the Estate of*

David Nyambu Jonathan Kituri(deceased).....1ST DEFENDANT/RESPONDENT

JULIA KIRIRA (*Sued as the Administrator of the Estate of*

David Nyambu Jonathan Kituri(deceased).....2ND DEFENDANT/RESPONDENT

HOPE MUTUA (*Sued as the Administrator of the Estate of*

David Nyambu Jonathan Kituri(deceased).....3RD DEFENDANT/RESPONDENT

CLARA KITAO.....4TH DEFENDANT/RESPONDENT

DELINA NASIBU.....5TH DEFENDANT/RESPONDENT

FLORA NYANGE.....6TH DEFENDANT/RESPONDENT

EMILY MWARO.....7TH DEFENDANT/RESPONDENT

IRENE KITURI.....8TH DEFENDANT/RESPONDENT

DAMARIS KITURI.....9TH DEFENDANT/RESPONDENT

HENRY KITURI.....10TH DEFENDANT/RESPONDENT

ASWANI NZEE.....11TH DEFENDANT/RESPONDENT

MERCY NZEE.....12TH DEFENDANT/RESPONDENT

CECILIA MZEE.....13TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated **18th November 2019**, by the Plaintiff/ Applicant seeking for orders that;

1. THAT this Honourable Court be pleased to grant temporary injunction restraining the Defendants/ Respondents or any of them, by themselves their servants . agents, any person claiming through them or otherwise howsoever from selling,

transferring, charging alienating, gifting, disposing, subdividing, developing or dealing with the suit property known as L.R No. 10090/24 in any manner whatsoever pending the hearing and determination of the instant suit.

2. THAT the costs of this Application be borne by the Defendants/ Respondents.

The Application is premised on the grounds that on **14th February 2008**, the Plaintiff/Applicant entered into an agreement for purchase of the suit property with the Defendants/ Respondents. Further that on **2nd April 2008**, the parties reaffirmed the agreement for sale over the suit property by signing another agreement for sale over the suit property wherein **Kshs. 5,000,000/=** had already been paid. That the agreement was executed by all the Defendants/Respondents on one side as the vendors and the Plaintiff/Applicant on the other side as the purchaser, which agreement contained similar terms as the one executed on **11th February 2008**.

Further that on **29th April 2008**, before completion date, other third parties instituted proceedings in Nairobi **ELC No. 199 of 2008 Mwangi Koi...Vs...Winnie Mukolwe & 2 others(sued as the administrators of the Estate of David Jonathan Kituri)** which suit was against the Respondents and the third parties were claiming ownership over the suit property through purchase. That the Plaintiff in the said suit passed away and his administrators withdrew the suit and filed **ELC 544 of 2009**, being a claim for adverse possession over the suit property. Further that the Plaintiff/Applicant successfully applied to be enjoined as an Interested Party in the said suit that was determined on **27th January 2017**, by the trial Court and the suit was dismissed. Further that the Plaintiffs in **ELC 544 OF 2009**, lodged an appeal which was further dismissed on **16th February 2018**.

That the trial Court in Nairobi **ELC 544 of 2009**, and the Court of Appeal in **Nairobi Appeal 218 of 2017**, having dismissed the third parties claim, the Plaintiff/ Applicant through her Advocates communicated to the Defendants/Respondents her intention to conclude the sale transaction over the suit property, but that the Defendants/Respondents ignored the numerous correspondences. The Plaintiff/Applicant contends that the Defendants/ Respondents intend to sell the suit property to other third parties in total disregard to the earlier and still subsisting sale agreement between them and the Applicant and without the Applicant's knowledge. That the Plaintiff/Applicant has been compelled to institute legal proceedings against the Defendant/Respondent to safeguard her interests over the suit property.

In her supporting Affidavit, **Lucy Wanjiku Muchai** reiterated the contents of the grounds in support of the Application and further averred that the Defendant/Respondents confirmed and affirmed the terms of the agreement for sale and its validity during the earlier trial. It was her contention that she was ready and willing to conclude the terms of the agreement for sale and that the said sale agreement could not have been completed earlier because of the **status quo orders** issued by the Court. Further that all through the trial in **ELC 544 of 2009**, the Defendants/Respondents never disowned the said sale agreement and therefore there was no need to institute any suit for enforcement of specific performance of the terms of the agreement for sale. That without following due process of serving her, with an Application, the Defendants/Respondents obtained **Court orders** to vacate caveats placed over the suit property that had been placed by the Applicant to protect her interests. Further that the Defendant/Respondents have misrepresented facts to the Land Registrar to claim loss of title in order to obtain a provisional title, despite the fact that they handed over the original title to her as part of the completion documents. She contended that unless the Application is allowed, she stands to suffer irreparable prejudice that cannot be compensated by way of damages and/or costs.

The Application is opposed and **Winnie Mukolwe**, swore a Replying Affidavit on **11th December 2019**, on behalf of all the other Defendants/ Respondents. She averred that she has been advised by her Advocates that the Application suffers an incurable defect since it is **res judicata** as the suit property was subject of **Nairobi ELC 544 of 2009(OS)** wherein the Plaintiff/ Applicant was enjoined as an interested party and she ought to have asserted her rights if any in that suit. Further that the suit went to the Court of Appeal in **Nairobi Civil Appeal 218 of 2017**, where one of the issues for considerations was the sale of the suit property to the **2nd Respondent**, which was also challenged as illegal, **null and void** for lack of consent of the relevant Land Control Board. That the Court of Appeal held that for a controlled transaction involving agricultural land is **null and void** without the consent of the Land Control Board.

She further averred that she has been advised by her advocates, which advise she believes to be true that the doctrine of **res judicata** applies not only to situations where a specific matter between the same persons has previously been determined by Court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in as in the instant case. It was her contention that the Plaintiff/ Applicant having participated in the suit at the **Environment & Land Court** and at the **Court of Appeal**, ought to have raised the issues raised in the instant suit. That the instant suit is an attempt to appeal the finding of the Court of Appeal and it ought to be struck out.

It was the Respondent contention that the suit property is registered in the name of **David Nyambu Jonathan Kituri** (deceased) and the Defendants/ Respondents as the named beneficiaries of the property are the absolute owners with unfettered rights to use and dispose the suit property. It was her further contention that the impugned sale agreements dated **14th February 2008** and **2nd April 2008** are **null and void** ab initio as the agreement dated **14th February 2008**, was not signed by all the beneficiaries named in the Certificate of Confirmation of grant; the agreement dated **2nd April 2008**, was signed by third parties who are not the named beneficiaries in the certificate of confirmation of grant dated **27th June 2006**. Further that the Plaintiff/ Applicant has not adduced evidence of having paid the full purchase price as per the terms. Further that the agreements had an express completion date of **30th August 2008**, and there being no evidence of completion period being extended, the agreements ceased to have legal effects due to effluxion of time. She further contended that a court of law cannot issue an injunction against a title holder unless the title is challenged on grounds of fraud.

She alleged that in **2007**, the title to the suit property got lost and they applied for issuance of a new one and the Land Registrar advertised that he was going to issue a new one, but that they did not receive the provisional title deed despite there being no objection. That the RespondentS made a fresh Application and the Plaintiff/ Applicant objected on the grounds that they had been given the title pursuant to the sale Agreements entered into in **2008**. She averred that it was curious that **Joseph Kimani Mbugua**, through the Plaintiff's claims that the Respondents gave him the title, yet the impugned agreements were never completed. She alleged that the said **Joseph Kimani Mbugua** has demanded that the Respondents pay him **Kshs. 200,000/=** for him to forego claims on the suit property. She contended that an injunction cannot issue in favour of the Plaintiff/ Applicant as she has no interest over the suit property.

The Plaintiff/ Applicant swore a Supplementary Affidavit on **17th December 2019**, and averred that the suit in **ELC 544 of 2009**, was instituted by third parties claiming adverse possession and her purchasers interest was not contested then to require her to assert her rights. Further that the Courts of Appeal's utterance on consent of Land Control Board was **obiter dictum** and the said Court in page 20 of its decision went to affirm the Judgment of the trial Court. She alleged that the Respondents and her, were supporting each other to refute claim of adverse possession by other third parties and thereafter complete the suspended sale. It was her contention that there has been no adverse judgment against her rendered by the Court of Appeal and that the sale agreements were executed by all three established administrators of the Estate of the suit property. That she paid substantial part of the purchase price and claims by third parties impeded completion of the sale transaction. She further averred that **Joseph Kimani Mbugua**, was acting as an agents for the Respondents and that the Respondents confirmed the instructions they had given to him in **ELC 544 of 2009**, and that the Court also confirmed the purchaser interest she had.

Winnie Mukolwe swore a further Affidavit on **27th February 2020**, on behalf of the Defendants/ Respondents and averred that the acknowledged interest are **void** on grounds of breach on the Applicants part, illegality in execution of the sale agreements as well as the failure to obtain Land Control Board consent for the subdivision and sale. She further averred that the Plaintiff's/Applicant's interest in **ELC 544 of 2009**, was contested and she acknowledged that her only interest would be **Kshs. 5,000,000/=** deposit. Further that nothing prevented the Plaintiff/Applicant from moving the Court to be enjoined as a Defendant so as to clothe her with **locus** and her legality was visited at the Court of Appeal. She contended that the only recourse for the Plaintiff/Applicant is for refunds of **Kshs. 5,000,000/=** and that the Court in **ELC 544 of 2009**, merely restated their rights .

The Application was canvassed by way of written submissions, which this Court has carefully read and considered together with the pleadings and the supporting Affidavits.

The Court finds the issues for determination are

- 1. Whether the suit is Res Judicata**
- 2. Whether the Plaintiff/ Applicant is entitled to the orders sought**

1. Whether the suit is Res Judicata.

In opposing the Application, Defendants/ Respondents contended that the suit is **Res Judicata** to another suit being **ELC 544 of 2009**. The principle of *res judicata* is found in Section 7 of the Civil Procedure which provides that:

“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.”

The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.***
- b) That former suit was between the same parties or parties under whom they or any of them claim.***
- c) Those parties were litigating under the same title.***
- d) The issue was heard and finally determined in the former suit.***
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”***

The Court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

It is the Defendants/ Respondents submissions that the issues being litigated in the present suit could have been raised in **ELC 544 of 2009**, and since the legality of sale agreement was equally revisited the matter is *res judicata*.

It is not in doubt that in **ELC 544 OF 2009**, the Plaintiffs were seeking for declarations that the title to the suit property had been extinguished by way of adverse possession and they sought to be declared owners of the suit property by virtue of adverse possession. Further from the said proceedings, it is not in doubt that the Plaintiff/ Applicant claimed purchaser's interest. From the proceedings in **ELC 544 of 2009**, DW2 **Winfred Mularia Mukolwe**, testified that the suit property had indeed been sold to the Interested party, who is the Plaintiff/ Applicant herein.

The Court has perused the instant Complaint and notes that the Plaintiff/ Applicant is seeking for **specific performance** and for time to be extended within which to apply for the **Land Control Board** is consent. Therefore, it is not in doubt that though the subject matter of the suit is the same, the orders sought are not the same and the issues raised cannot be said to have been decided in **ELC 544 of 2009**.

The Court further acknowledges that a party is required to bring forth its case in order for all the issues to be dealt with. However, the Court concurs with the Plaintiff/ Applicant that the Defendants/ Respondents did not dispute that they had entered into a sale agreement with her, the Respondents even advanced the said argument and cannot have expected the Plaintiff/ Applicant to raise an issue where there was none and therefore the matter might not have been brought forward at that time as it was never in contention. See the case of **Gurbacham v Yowani Ekori [1958] EA 450**, where the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, cited at page 453 a passage from the Judgement of the Vice-Chancellor in **Henderson v Henderson (1)**, 67 E.R.313 at page 319 wherein it was stated that:

“In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

Having analyzed the issues above and considering the available materials placed before this court, the Court finds that the matter herein is not **Res judicata**.

2. Whether the Plaintiff/ Applicant is entitled to the orders sought

The Applicant herein having sought for injunctive orders is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

In determining whether to grant or not to grant the orders sought, the court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, and which were later reproduced in the case of **Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ...Vs...Trufoods (1972) EA 420.”

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success. A *prima-facie* case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

It is the duty of the Plaintiff/ Applicant herein to establish that she has a *prima-facie* case. It is not in doubt that the parties herein entered into two sale agreements over the suit property that would see the Applicant purchase the suit property from the Defendant's/ Respondents. Though there are disputed facts as to whether the said sale agreements are still valid, it is the Court's considered view that at this juncture, it is not called upon to deal with the disputed facts as already held above. Parties are bound by the terms of their contract, and if indeed the Court is to find that the sale agreements are valid, then the Defendants/Respondents will be bound by them/it. They have not disputed the existence of the said agreements and this Court is therefore satisfied that the Plaintiff/ Applicant has interest over the suit property. Whether the same is merited or not or can be sustained, that is a matter that will require the probing of evidence and will be dealt with by the trial Court.

It is the Applicant's contention that the Defendants/Respondents have refused to fulfil their obligation as per the contract. Having held that the Plaintiff/ Applicant has interest over the suit property, any actions going against the said interest are therefore a breach of her rights at the instant. Whether the same will be sustained or not, will depend on the evidence that will be availed at the main trial. For the above reasons, the Court finds and holds that the Plaintiff/ Applicant has established a prima facie case, with probability of success.

On whether the Plaintiff/ Applicant will suffer irreparable loss, it is clear that, ***‘Irreparable loss’*** as described in the case of **Paul Gitonga**

Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015, means *simply injury or harm that cannot be compensated by damages and would be continuous.*

It is not in doubt that the Plaintiff/ Applicant was part of the **ELC 544 of 2009**, claiming purchaser's interest, since 2009. The Plaintiff/Applicant had been following the suit property, since then and it is this Court's considered view that she would suffer harm that cannot be compensated by way of damages. The Applicant has averred that the Defendants/ Respondents intend to sell off the suit property to third parties, and if such happens, then her interest will have been lost. See the case of Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought.”

Further in the case of Olympic Sports House Ltd...Vs...School Equipment Centre Ltd (2012) eKLR, the Court held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction there must be evidence of immediate danger to property or sale or other disposition.”

In this instant suit, the Court finds that if the Applicant's rights are infringed, no amount of money or damages can compensate such infringement. Consequently, the Court finds and holds that the Applicant has established that she is likely to suffer irreparable loss and/or injury which cannot be adequately compensated by an award of damages.

On the third limb, this Court is not in doubt. However, if the Court is to decide on a **balance of convenience**, the same will tilt in favour of maintaining the *status quo* and the *status quo* herein is directing the Defendants/Respondents to desist from carrying out any dealings or actions with the suit properties which would prejudice the Applicant's interests. until the suit is heard and determined. Thus the *status quo* herein should remain what was in existence before the Defendant/Respondents allegedly unlawful actions. See the case of Agnes Adhiambo Ojwang...Vs... Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act.”

Having now carefully considered the available evidence, the Court finds that the Plaintiff's/Applicant's **Notice of Motion** applications dated **18th November 2019**, is merited. The Court allows the said application entirely in terms of prayers **No. 3** with costs to the Plaintiff/Applicant.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of October 2020

L. GACHERU

JUDGE

15/10/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Khisa for the Plaintiff/Applicant

Mr. Kiplagat for all the Defendants/Respondents

L. GACHERU

JUDGE

15/10/2020