



**REPUBLIC OF KENYA**

**High Court of Kisii**

**Civil Case 23 of 2012**

NELSON ANYOKA NYAEMA.....PLAINTIFF

**VERSUS**

COUNTY COUNCIL OF NYAMIRA..... DEFENDANT

**RULING**

1. The Plaintiff filed this suit on 13<sup>th</sup> December, 2012 seeking vacant possession of all that parcel of land known as **LR.No.North Mugirango/Bokeira II/432**(hereinafter referred to as “**the suit property**” where the context so admits) and a permanent injunction restraining the defendant by itself or through its servants or agents from re-entering, moving in or in any other manner whatsoever interfering with the suit property. In his plaint, dated 13<sup>th</sup> December, 2012, the plaintiff claims that, at all material times, the Plaintiff was and still is the registered proprietor of the suit property. The Plaintiff claims that in or about June, 2007, the defendant without the Plaintiff’s consent or authority entered the suit property and converted the same to its own use as an open air market. It is the Plaintiff’s contention that the defendant’s entry into the suit property is illegal and that despite demand made upon the defendant, the defendant has refused and/or neglected to vacate the suit property. It is for this reason that the Plaintiff has been forced to come to court.

2. Together with the Plaint, the plaintiff filed an application by way of Notice of motion also dated 13<sup>th</sup> December, 2012 seeking a temporary injunction to restrain the defendant from using the suit property as a market for livestock and from in any other way interfering with the suit property pending the hearing and determination of this suit. The plaintiff’s application is brought on the grounds that the Plaintiff is the registered proprietor of the suit property and that the defendant has entered the same without the Plaintiff’s authority and converted the same into a market an act which amounts to trespass. The Plaintiff claims that unless the defendant is restrained from committing the said act of trespass, the Plaintiff stands to suffer irreparable harm. The Plaintiff has exhibited copies of the title deed and certificate of official search for the suit property to his affidavit sworn on 11<sup>th</sup> December, 2012 in support of the application. The said documents show that the suit property is a sub-division of Plot No.370 and that the Plaintiff was registered as the proprietor thereof on 11<sup>th</sup> April, 2011.

3. The defendant was served with the summons to enter appearance together with the application for injunction. The defendant filed a statement of defence in response to the suit and a Notice of Preliminary Objection in opposition to the application for injunction. In its defence, the defendant has denied the Plaintiff’s claim in its entirety. The defendant claims that the livestock market that the Plaintiff is complaining about is situated on the defendant’s own parcel of land known as LR.No. North Mugirango/Magwagwa II/405 and not on the suit property. The defendant has claimed further in the said

statement of defence that the alleged trespass on the suit property was the subject matter of a previous suit between the Plaintiff and the defendant namely, KISII HCCC NO.107 OF 2003(hereinafter referred to as “**the previous suit**”) which suit was heard and determined by a court of competent jurisdiction. The defendant has contended that the Plaintiff’s suit is *res judicata* and should be struck out. In its preliminary objection, the defendant has sought the striking out of the Plaintiff’s suit on amongst others, the grounds that the same is res judicata, a non-starter and a mounts to an abuse of the process of the court. When the Plaintiff’s application for injunction came up for hearing on 20<sup>th</sup> February, 2013, the defendant sought leave of the court to argue its preliminary objection before the injunction application was heard on merit. The court allowed the defendant to argue the said preliminary objection as requested. Miss. Sagwa who appeared for the defendant relied on the defendant’s notice of preliminary objection dated 7<sup>th</sup> February, 2013 and argued that the Plaintiff’s suit is res judicata. The defendant’s said advocate argued that the issues raised in this suit were raised in the previous suit between the same parties before a court of competent jurisdiction who heard and determined the same on merit. Counsel argued that in the previous suit, the Plaintiff had alleged that the defendant had trespassed on the parcel of land known as LR.North Mugirango/Bokeira II/370 owned the Plaintiff by converting the same into a livestock market. In the present suit, the Plaintiff has once again claimed that the defendant has trespassed on the parcel of land known as LR.No. North Mugirango/Bokeira II/432 owned by the Plaintiff by converting the same into a livestock market. The defendant’s advocate submitted that the Plaintiff’s complaint herein is the same as was in the previous suit since the parcel of land LR.No. North Mugirango/Bokeira II/432 which is the subject of the present suit is a sub-division of LR.No.North Mugirango/Bokeira II/370 which was the subject of the previous suit. In other words, the defendant claims that after the previous suit was determined, the Plaintiff caused the land that was the subject of that suit to be sub-divided and lodged the present suit based on one of the sub-divisions thereof. Counsel prayed for an order striking out the Plaintiff’s suit with costs to the defendant. In response to the preliminary objection, the Plaintiff admitted that he had filed a previous suit on the same subject matter. He contended however that this suit is different from the previous suit in that in the previous suit, he had sued, **The Clerk Nyamira County Council** while in the present suit, he has sued **County Council of Nyamira**. He contended that the court held against him in the previous suit because he had sued the wrong party and that is the reason why he has decided to bring the present suit which has been filed against the party who ought to have been sued in the previous suit. The Plaintiff saw no merit in the preliminary objection.

4. In its bundle of documents filed in court on 14<sup>th</sup> January, 2013, the defendant did submit to court copies of all the pleadings in the previous suit together with the Judgment that was made therein by Justice Makhandia on 14<sup>th</sup> May, 2010. I have considered the defendant’s preliminary objection and the Plaintiff’s response to it. Having reviewed the pleadings in the previous suit and the judgment of Justice Makhandia aforesaid, I have come to the conclusion that the defendant’s preliminary objection has no merit. In the previous suit, the Plaintiff had sought a permanent injunction to restrain the defendant herein by itself or through its agents or servants from interfering with the Plaintiff’s quiet enjoyment of the parcel of land known as LR.No. North Mugirango/Bokeira II/370, then registered in the name of the Plaintiff. Although the defendant in that suit was indicated as The Clerk Nyamira County Council, the suit was for all intents and purposes mounted against the defendant herein and was treated as such at the trial. Nothing therefore turns out on the Plaintiff’s contention that the defendant in the previous suit is not the same as the defendant herein. In the said suit, the Plaintiff had sought an injunction as the only relief in his plaint. That relief was sought on the ground that

**“on or about 1<sup>st</sup> July, 2003, the defendant had threatened in writing to demolish buildings and other improvements on the Plaintiff’s land rendering the filing of this suit necessary”.**

That was the Plaintiffs only complaint in the previous suit. When the Plaintiff lead evidence at the trial about trespass by the defendant that was contrary to the said cause of action that he had pleaded, the court held that he was bound by his pleadings and found that he had failed to prove his case. Justice Makhandia in his judgment dated 14<sup>th</sup> May, 2010 framed the issue in the previous case as follows,

**“the issue for determination in this suit is fairly simple and straightforward; whether or not the defendant in or 1<sup>st</sup> July, 2003, threatened in writing to demolish buildings and other improvements**

**on the Plaintiff's suit premises rendering the filing of this suit for an injunction necessary. That was the crux of the Plaintiff's complaint and indeed the cause of action".**

In conclusion the Judge held that,

**"For all the foregoing, reasons, I would answer the issue framed that it has not been proved that in or about 1<sup>st</sup> July, 2003, the defendant threatened in writing to demolish buildings and other improvements on the Plaintiff's land rendering the filing of the suit for an injunction necessary."**

I agree with the defendant's submission that the parcel of land that was the subject matter of the previous suit is the same one in the present suit save for the parcel number which has changed as a result of the sub-division. However, the subject matter may be the same but the cause of action is without doubt different. Whereas the Plaintiff's cause of action in the previous suit concerned a threat to demolish his buildings, in the present suit, the Plaintiff's complaint is about trespass to land. The cause of action in both cases is therefore different. In the circumstances, I am of the view that the present suit is not res judicata. I am aware that in his Judgment in the previous suit, the judge had pointed out that even if the Plaintiff's case had been based on trespass, he would still have found that it was not proved as there was no credible evidence of trespass or encroachment. I am of the view that, this part of Justice Makhandia's Judgment was *obiter dictum* and cannot amount to *res judicata*. Trespass was not pleaded and was not framed as an issue for determination before the judge. It cannot be said therefore that the issue of trespass was directly and substantially in issue in the previous suit so as to render the determination on it final within the meaning of the provisions of section 7 of the Civil Procedure Act, Cap.21 Laws of Kenya. The previous suit was decided principally on the ground that the Plaintiff had failed to prove that the defendant had threatened to demolish his buildings and other improvements on the suit property. Due to the foregoing, it is my finding that the defendant's preliminary objection is not well taken. The same is dismissed with costs to the Plaintiff.

**Signed, dated and delivered at Kisii this 10<sup>th</sup> day of May, 2013.**

**S. OKONG'O,  
JUDGE.**

**In the presence of:-**

Plaintiff present in person.  
Miss. Sagwa for the defendant  
Mobisa Court Clerk.

**S. OKONG'O,  
JUDGE.**