



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 270 OF 2018**

**FAIZA OSCAR MEULI**

**Suing as the Administrator of the Estate of**

**AISHA ALI MOHAMED.....PLAINTIFF**

**VERSUS**

**GIDEON NASSIM KITI**

**THE REGISTRAR OF TITLES, MOMBASA.....DEFENDANTS**

**RULING**

1. This ruling is in respect to the Notice of Motion dated 3<sup>rd</sup> September, 2019 by the Plaintiff seeking orders of mandatory injunction directing the 1<sup>st</sup> defendant to vacate all the properties known as PLOT NOS.2057/III/MN, 2058/III/MN, 2059/III/MN, 2060/III/MN 2061/111/MN and 2062/MN, all being subdivisions of the PARCEL NO.284/III/MN pending the hearing and determination of this suit. The application is premised on the grounds that the plaintiff is the registered owner of the suit properties and that the High Court and the Court of Appeal have rendered themselves on the ownership of the suit properties and upheld the plaintiff's interest thereof.

2. The application is supported by the affidavit of Faiza Oscar Meuli, the plaintiff sworn on 3<sup>rd</sup> September, 2019. The deponent is the administrator of the Estate of Aisha Ali Mohamed, (deceased) who is the registered owner of the suit properties. It is deposed that the deceased had many protracted cases with the 1<sup>st</sup> defendant herein all of which were decided in favour of the deceased, except CMCC No.1108 of 1996 which was dismissed on grounds that the matter ought to have been filed in the Land Disputes Tribunal in accordance with the Land Disputes Tribunal Act No.18 of 1990 (repealed). It is deposed that after the said dismissal, the deceased filed a dispute in the Tribunal which later ruled in favour of the deceased.

3. The plaintiff has deposed that the 1<sup>st</sup> defendant fraudulently used the award in Land Disputes Tribunal Case no. 9 of 1992 to obtain a prohibitory order in his favour, yet the same was set aside on 1<sup>st</sup> March, 1993 and a fresh arbitration ordered which ended in favour of the deceased in September 1999. The plaintiff has annexed a copy of **Judgment in Mombasa High Court Misc. Civil Application No.104 of 1999 (OS) Gideon Nassim Kiti –v- Aisha Ali Mohamed & 2 Others**, and a copy of judgment in **Civil Appeal No.35 of 2013, Gideon Nassim Kiti –v-Faiza Oscar Meuli & Another**. In both cases, the 1<sup>st</sup> defendant lost. It is the plaintiff's contention that in view of the said decisions, the 1<sup>st</sup> defendant has no right to continue staying in the suit properties. That the moment the court pronounced itself on the fact that the 1<sup>st</sup> defendant had no recognizable right over the suit properties, the 1<sup>st</sup> defendant ought to have promptly vacated the suit properties. That as the matter now stands, the continued stay of the defendant in the suit properties is contrary to the finding of the High Court which was also confirmed by the Court of Appeal. The plaintiff contends that to allow the 1<sup>st</sup> defendant to continue staying in the plaintiff's suit properties would be an affront to the plaintiff's constitutional right to own property and to have such ownership recognized and protected by law as provided for under Article 40 of the constitution.

4. In opposing the application, the 1<sup>st</sup> defendant filed grounds of opposition dated 29<sup>th</sup> October, 2019 on the following grounds:

**1. The plaintiff's motion dated 3<sup>rd</sup> September is res judicata the plaintiff's motion dated 19<sup>th</sup> November, 2018 that was dismissed by the court. The issue of injunction raised in the present application is an issue that has already been heard and determined by this court. Both applications, however couched, all seek an injunction order.**

**2. The court is debarred by a jurisdictional injunct from entertaining an application that is res judicata by virtue of Section 7 of the Civil Procedure Act.**

**3. In any event, no special circumstances and no clear case has been demonstrated by the plaintiff to warrant the court to grant a mandatory injunction at an interlocutory stage. As such, the prayer for mandatory injunction as sought by the plaintiff is misguided.**

**4. That the plaintiff's application is bad in law and an abuse of the court process.**

5. The application was canvassed by way of written submissions which were duly filed by the advocates for the plaintiff and for the 1<sup>st</sup> defendant. In their submissions dated 25<sup>th</sup> August 2020 and filed on 26<sup>th</sup> August, 2020, Messrs O.M. Robinson & Company Advocates submitted that following the decision of the Court of Appeal in Civil Appeal No.35 of 2013, **Gideon Nassim Kiti –v-Faiza Oscar Meuli & Another**, it is no longer a disputable fact that the titles the 1<sup>st</sup> defendant refers to in order to stake a claim to the suit properties were fraudulently obtained, and that the titles held by the plaintiff are genuine. It is therefore the plaintiff's submission that the 1<sup>st</sup> defendant's continued occupation of the suit land on the strength of titles which were found by the Court of Appeal to be fraudulently obtained, is illegal and amounts to trespass. The plaintiff's counsel urged the court to uphold the sanctity of title by granting the orders sought in the application and relied on the case of **Jaj Super Power Cash & Carry Ltd –v- Nairobi City Council & 2 Others, C.A. No.111 of 2000** quoted in the case of **Mwinyi Hamisi Ali Kombe & 2 Others –v- Darius Mbela & 4 Others HCCC No. 64 of 2004** and **HCCC No. 79 of 2008, John Jeremiah Mvoya –v- Kadzo Kenga Kombo & Others**.

6. It was submitted that the application herein is not res judicata as the previous application was for prohibitory injunction unlike the present application which seeks mandatory injunction. The plaintiff's counsel relied on the case of **Kenya Breweries Limited & Another –v- Washington Okeyo (2002)eKLR** and submitted that the principles to be applied in the two applications are different. The plaintiff's counsel submitted that considering the facts of this case, the case meets the threshold for granting the orders sought herein.

7. In their submissions dated 17<sup>th</sup> September, 2020 and filed on 22<sup>nd</sup> September, 2020, Messrs Gikandi & Company Advocates for the 1<sup>st</sup> defendant submitted that the application herein is res judicata the application dated 19<sup>th</sup> November, 2018 which was determined on the merits and dismissed by the court on 8<sup>th</sup> May, 2019. It is the 1<sup>st</sup> defendant's submission that the application is an abuse of the court process.

8. I have considered the application and the submission made. The issues for determination are whether the application herein is res judicata and if not whether the orders sought should be granted.

9. Section 7 of the Civil Procedure Act provides as follows:

**“7. No court shall try any suit 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.”**

10. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties relating to the same issues previously and finally determined by any court of competent jurisdiction. The res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.

11. In the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR**, the Court of Appeal stated that the ingredients of the doctrine of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is a bar, secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title, and lastly, that the court tribunal before which the former suit was litigated was competent and determined the suit finally. The Court of Appeal in that case stated as follows:

**“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.”**

12. It has also been stated that the principle applies to applications with the same force whether the application be final or interlocutory.

13. I have perused the application dated 19<sup>th</sup> November 2018 and the ruling delivered by the court on 8<sup>th</sup> May, 2019. There is no dispute that the parties are the same in all these proceedings. In the application dated 19<sup>th</sup> November, 2018 the plaintiff was seeking orders of temporary injunction as well as an order of mandatory injunction against the 1<sup>st</sup> defendant. Both applications are seeking orders over the same subject matter which are the suit properties herein. This court heard and determined the application also seeking mandatory injunction against the 1<sup>st</sup> defendant to vacate the suit properties. In my considered view, these issues are similar in all forms and this court determined them in the ruling dated 5<sup>th</sup> May, 2019. The plaintiff has not appealed or sought for review against this court's decision of 5<sup>th</sup> May, 2019 and the same still stands. Further, the plaintiff has not set down the suit for hearing so that the matter is heard and determined conclusively.

14. The statutory provisions under Section 7 of the Civil Procedure Act are clear and bars a court from hearing a suit, application or issue if the same was substantially in issue in a former suit (or application) between the same parties, if the issue was determined in a former suit (or application) after a hearing. Whatever issues being raised now could have been raised in the previous application. By virtue of Section 7 of the Civil Procedure Act, this application is barred by the doctrine of res judicata. I find that the Notice of Motion dated 3<sup>rd</sup> September, 2019 is an abuse of the court process as it raises issues which had been substantially litigated and adjudicated upon by a court of competent

jurisdiction. The same is dismissed. Considering the circumstances of this case, I order that each party bear their own costs.

15. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 14<sup>th</sup> day of October 2020.**

.....

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**