



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC ELC CASE NO. 3 OF 2012

SALESIO NJAGI NTHIRIMANOAPPLICANT

VERSUS

ROSALINE RUGURU WAWERU1ST RESPONDENT

THE SENIOR PRINCIPAL MAGISTRATE EMBU2ND RESPONDENT

I.M. RUTERE T/A GIANT AUCTIONEERS3RD RESPONDENT

SALESIO GANA NJERU 4TH RESPONDENT

RULING

By his miscellaneous application filed herein on 16/10/2012, the applicant sought various orders against the four respondents. The application itself was founded on the provisions of **Section 3, 13 and 18 of the Environment and Land Court Act, Articles 19, 20, 22, 23, 35, 40 and 60 of the Constitution and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.**

Having been served, the 1st and 4th respondents filed grounds of opposition to the said application as well as preliminary objections to the same and when the counsels appeared before me on 27/3/2013, it was agreed that the said preliminary objections be canvassed first by way of written submissions which have now been filed by the applicant and the 1st respondent. The said preliminary objection is the subject of this ruling.

The preliminary objections by the 1st and 4th respondent are on the following issues:-

1. ***The application is fatally and incurably defective***
2. ***The application is res-judicata and bad in law***
3. ***The application lacks any merit whatsoever***
4. ***The application is an abuse of the process of the Court***
5. ***The application is frivolous and vexatious***
6. ***The application does not lie***
7. ***There is no suit before the Court.***

The application itself sought the following substantive orders:-

1. ***That the application be certified as urgent.***
2. ***That the (sic) interim preservation orders specifically staying any further proceedings in Embu CMCC No. 151 of 2006 Rosaline Ruguru Waweru Vs Salesio Njagi Nthirimano until further***

orders of this Court

3. *That there be an interim injunction restraining the defendants from selling, transferring, disposing off, alienating or in any other manner dealing with land parcel No. NGANDORIKI/KIRIGI/1196 or the crops therein until further orders of this Court.*
4. *That there be an order calling for the record and/or entire file of the proceedings before Embu CMCC No. 151 of 2006 Rosaline Ruguru Waweru Vs Salesio Njagi Nthirimano to this Court.*
5. *That there be a declaration that the proceedings in the said Court and particularly the judgment made on the 14th May 2009 and the Decision made on 29th February 2012 and the subsequent Auction were defective, bad in law, irregular, unfair and un-procedural.*
6. *That there be a declaration that the purported Auction held on 24th August 2012 was and is null and void and of no legal consequences*
7. *That there be an order that the applicant do pay to the 1st respondent the sum of Ksh. 190,000/= within such period as the Court may deem appropriate and in default of doing so, normal execution process to issue for the same.*
8. *That the 1st and 3rd respondent do refund to the 4th respondent the sum of Ksh. 520,000/=*
9. *That the costs of this application be provided for*
10. *That there be any other order as Court may deem just and appropriate.*

I have considered the submissions made by counsels on the preliminary objection as well as the other pleadings herein.

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit – **MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E. A 696.** A preliminary objection cannot be raised if any fact has to be determined or if what is sought is the exercise of Judicial discretion.

Looking at the issues raised in the preliminary objection field by the 1st and 4th respondents, the issue of res-judicata is one such issue that can properly be said as a preliminary objection.

Res-judicata is a complete bar to proceedings and is provided for in **Section 7 of the Civil Procedure Act** 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 the 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”.

I have looked at the judgment delivered by the Resident Magistrate on 14/5/2009 in Embu CMCC No. 151 of 2006. The parties therein were the 1st respondent as plaintiff and the applicant as defendant. The subject matter was parcel of land No. L.R. NGANDORI/KIRIGI/1196 and the trial Court made orders. Those orders were as follows:-

- (a) ***Transfer of 1 ½ acres of land out of NGANDORI/KIRIGI/1196 to the plaintiff***
- (b) ***The balance of Ksh. 35,000/= be paid upon getting Land Control Board consent to transfer the land***
- (c) ***In the alternative, the defendant to refund Ksh. 190,000/= to the plaintiff***

with interest from date of judgment.

(d) No order as to costs.

In my view, the plea of res-judicata cannot be properly raised in the matter now before me for the simple reason that the 2nd, 3rd and 4th respondents were not parties in Embu CMCC No. 151 of 2006 and secondly, the issues raised in the previous suit are not directly and substantially the issues being raised in this application now before me. Accordingly, the issue of res-judicata does not arise.

The preliminary objection is however also founded on the ground that the application being a Notice of Motion dated 15/10/2012 and filed on 16/10/2012 is incurably and fatally defective. I have reproduced above the orders sought by the applicant in this Notice of Motion and it is clear that the said application is essentially an appeal against the decision of the magistrate in Embu CMCC No. 151 of 2006. Counsel for the respondents have submitted that the filing of an appeal is provided for under **Order 42 of the Civil Procedure Rules.** The said **Order 42 (1)** is worded as follows:-

“Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading”.

The applicant’s counsel has however sought refuge in the provisions of **Section 1A, 1B, 3, and 3A of the Civil Procedure Act as well as Section 3, 13 and 18 of the Environment and Land Court Act and Articles 19, 20, 22, 23, 35, 40 and 60 of the Constitution.** The inherent powers of the Court under **Section 3A of the Civil Procedure Act** cannot be invoked where the law has provided for specific provisions for bringing or challenging a matter and having found that this application is really an appeal, the route available to the applicant was to file a memorandum of appeal under **Order 42 of the Civil Procedure Rules.**

The applicant has also invoked the provisions of **Section 1A and 1B of the Civil Procedure Act.** These are new additions to our **Civil Procedure Act** and embody what are commonly referred to as the **“Oxygen Principles”** or the **“Double ‘O’ principles”.** In the case of **CITY CHEMIST (NBI) AND ANOTHER VS ORIENTAL COMMERCIAL BANK LTD C.A CIVIL APPLICATION NO. 302 of 2008** the Court stated that this new approach which the Court must now adopt and operationalize

“..... is not to say that the new thinking totally up-roots well established principles or precedent in the exercise of the discretion of the Court which is a Judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the Court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and un-ambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in Court. It also guides the lower Courts and maintains stability in the law and it’s application”

And in **MZADULA SURESH KANTARIA VS SURESH KANTARIA C.A CIVIL APPEAL NO. 277 of 2005 (NBI)**, the Court observed that the overriding objective principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation.

I have referred to the said principles because the applicant’s counsel has sought to rely on them in this application but as is clear from the **CITY CHEMIST** case (supra), those principles embodied in **Sections 1A, 1B and 3A of the Civil Procedure Act** are not meant to **“.....up-root well established principles or precedents in the exercise of the discretion of the Court.....”** nor are they a panacea for all ills and in every situation. In my view, this application being clearly an appeal from the decision of the subordinate Court in Embu CMCC No. 151 of 2006, the well established principle is to invoke **Order 42 of the Civil Procedure Rules** and file an appeal. Similarly, **Order 51 Rule 1 of the Civil Procedure Rules** does not aid the applicant because this is really not an application but an

appeal.

And with regard to the provisions of **Sections 3, 13 and 18 of the Environment and Land Court Act**, **Section 3** is really a re-enactment of the principles embodied in **Section 1A and 1B of the Civil Procedure Rules** while **Section 18** provides for the principles that will guide this Court. Both those provisions do not aid the applicant in this case.

Applicant's counsel also invoked this Court's powers under **Section 13 (6) of the Environment and Land Court Act** which grants this Court the powers to call for any proceedings before any subordinate Court, body authority or local tribunal and give orders to ensure the fair administration of justice. However, the powers provided for under **Section 13 (6) of the Environment and Land Court Act** must be read together with Section 13 (7) (b) which means that the Court can only call for such record when the relief sought are prerogative orders. What the applicant seeks herein by his Notice of Motion is really to question the judgment of the subordinate Court and in any event, the manner of seeking a prerogative relief is well provided for under the **Civil Procedure Rules**.

The applicant also relies on **Articles 19, 20, 22, 23, 35, 40 and 60 of the Constitution**. Apart from **Article 60**, the rest of provisions are found in **Chapter four of the Constitution** which provides for the Bill of Rights and I do not see how they aid the applicant herein. **Article 60** deals with the principles of land policy.

Applicant's Counsel has also submitted that this Court is not bound by the procedure laid down in the Civil Procedure Act. However, **Section 19 (2) of the Environment and Land Court Act** was amended by **Act No. 12 of 2012** to provide that this Court will be bound by the procedure laid down in the **Civil Procedure Act**.

It is also the submissions by counsel for the applicant that justice must be administered without undue regard to procedural technicalities. That is provided for under **Article 159 1(d) of the Constitution** which is worded as follows:-

“Justice shall be administered without undue regard to procedural technicalities”.

However, litigants and their advisers must be alive to the fact that justice must also be administered in accordance with the law. The law lays down a specific form in which an appeal to this Court must be instituted and in my view, to insist on that form as provided for **under Order 42 of the Civil Procedure Rules** does not amount to placing ***“undue regard to procedural technicalities”*** as envisaged under **Article 159 1 (d) of the Constitution**. An appeal is very different from other ordinary applications and that is why an elaborate procedure is provided for under the **Civil Procedure Rules**. Therefore, counsel for the applicant cannot be correct when he submits that the defect herein is a mere technicality. It is not. The law does not recognize the filing of an appeal from a judgment of a lower Court through a Notice of Motion as is the case herein.

And even assuming that this application was indeed meant to be a Notice of Motion on its own and not an appeal, it still does not lie because there is no suit pending before me. This Court did call for the record of Embu CMCC No. 151 of 2006 at the request of the applicant's counsel and it is clear from those proceedings that a judgment was delivered by the Resident Magistrate in Embu Court on 14/5/2009.

The applicant herein then filed a Notice of Motion seeking, inter alia, a review of the said judgment. That Notice of Motion is dated 14/4/2011 and it is not clear from the record what became of it. However, on 16/10/2012 the applicant herein again filed another application seeking, inter alia, the annulment of the public auction of 24/8/2012. This is amongst the orders being sought in this application. That application was dismissed in a ruling delivered on 8/10/2012. Therefore, Embu CMCC No. 151 of 2006 has been heard and finalized and there is nothing for this Court to stay in those proceedings.

Ultimately therefore, upon considering all the matters before me, I find this application to be fatally and incurably defective and an abuse of the Court process. I accordingly order it struck out with costs to the 1st and 4th respondents.

B.N. OLAO

JUDGE

6/6/2013

6/6/2013

Before B. N. OLAO – JUDGE

CC – Muriithi

Ms Munene for Ngala for Applicant present

No appearance for Respondent

COURT:

Ruling delivered this 6th day of June 2013 in open Court.

Ms Munene for Mr. Ngala for applicant present

Mr. Mugo for respondents absent

B.N. OLAO

JUDGE

6/6/2013