



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 1176 OF 2010

(FORMERLY H.C.C.C NO. 19 OF 2010)

CHEPKOECH DAUDI TEREWA.....PLAINTIFF

VERSUS

FRANCIS KIMAYO TEREWA (Sued as the administrator of

the estate of Shikuku Ole Terewa- Deceased).....DEFENDANT

MOSES LEKAKENY TIEREWAAPPLICANT

RULING

INTRODUCTION

1. Through his application dated 2nd June 2020 the Applicant seeks to be enjoined in the proceedings herein. He further seeks that pending the hearing and determination of Kilgoris PMELC Case No. 12 of 2020, there be a stay of proceedings as well as execution of the orders issued by Hon. Mutungi J on the 6th March 2019 in Kisii ELC Case No. 1176 of 2016. The main ground upon which the application is based is that the Applicant has filed suit against the Respondents vide **Kilgoris PMELC Case No. 12 of 2020 Moses Lekakeny Tierewa v Daudi Ole Terewa Chepkoech & Other** in which he seeks to protect his interest in land parcel No. NAROK /TRANSMARA/OSUPUKO/62 and he fears that if execution proceeds, he will be rendered homeless. The application is anchored on the Applicant's supporting affidavit sworn on the 27th May 2020 in which he gives the background of his claim.

2. The application is opposed by the Plaintiff/Respondent through his Replying Affidavit sworn on the 30th June 2020 in which he depones that the prayer for joinder is res judicata. He further depones that there is no provision in law allowing the Applicant to seek a stay of execution of a High Court decree to enable him re-litigate by filing a fresh suit in the lower court over the same subject matter.

3. The Defendant filed a Replying affidavit sworn on the 30th June 2020 in which he depones that he does not oppose the application.

4. The application was canvassed by way of written submissions and the Applicant filed his submissions on 3rd June 2020 while the Plaintiff/Respondent filed his submissions on 22.7.20.

BACKGROUND

5. Before delving into the issues raised in the application it is important to give a brief background of this case. The Plaintiff and Defendant's father Sikuku ole Terewa (deceased) who were brothers were jointly registered as the owners of land parcel No. TRANSMARA/OSUPUKO/62 measuring 31 Hectares with each party owning half share thereof. Both parties have lived on the suit property with their families. However, the Plaintiff and the Defendant were unable to agree on an equal division of the suit property, prompting the Plaintiff to file suit herein seeking inter alia an order that the suit property be sub-divided into two equal portions so that the Plaintiff and Defendant could be registered as the owners of their respective half shares. The Defendant filed a defence admitting that the suit property was jointly registered in his name and that of the Plaintiff but denied that the registration was in equal shares. He raised a preliminary objection that the suit was statute barred but the same was dismissed. The suit was then set down for hearing and the parties agreed to have the same settled out of court. The court directed that Land Registrar to establish the acreage of the suit property which turned out to be 18.21 hectares. Thereafter, on 9th March 2019, the court entered judgment for the Plaintiff that the suit property be shared between the Plaintiff and the Defendant on a 50:50 basis.

6. The Applicant was all along aware of the suit between the Plaintiff and the Defendant as he recorded a statement as the Defendant's witness on 23rd March 2011. After the suit was determined, the Applicant filed an application dated 28th August 2019 seeking leave to be enjoined in the suit and that the orders of 9.3.2019 be reviewed and set aside. He also sought that in the alternative the suit property be divided amongst the parties and that a portion measuring 6 acres be given to him. In its ruling dated 28th November 2019, the court declined to enjoin the Applicant to the suit and dismissed the Applicant's application in its entirety.

7. It is against this background that the Applicant has filed the instant application. The Applicant claims that he had bought a portion of land measuring 6 acres from one Olesere Oletut in 1996 and he was put in possession thereof. He therefore wishes to be given an opportunity to pursue his claim against the Plaintiff.

APPLICANT'S SUBMISSIONS

8. In his submissions, learned counsel for the Applicant submitted that the court arrived at a decision that was devoid of the true situation on the ground. It is his further submission that in order to assert his claim the Applicant obtained leave to file suit out of time vide Kilgoris Misc Application No. 8 of 2019 and he subsequently filed Kilgoris PMELC Case No. 12 of 2020. It is counsel's submission that the court should invoke its inherent jurisdiction to order a stay of execution and the proceedings herein so that the Applicant can pursue his case against the Plaintiff in the lower court. Counsel has cited the case of **Hunter Trading Company limited v ELF Oil Kenya Limited Nai Civil Application No. 6 of 2010 (UR32010) cited in Abok James Odera T/A A.J Odera & Associates v John Macharia & Co. Civil Appeal No. 161 of 1999** where the court held that the overriding objective gives the court latitude to overcome any past technicalities which might hinder the attainment of the overriding objective. He argued that it was in the interest of justice to grant the orders sought.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

9. On the other hand, counsel for the Plaintiff/Respondent has submitted that the prayers sought by the application are an abuse of the court process as the Applicant has moved to the lower court to give life to a dead suit. He contends that this court gave its final judgment and the Applicant is now seeking another judgment before the lower court which could be at variance with this court's judgment. It is his submission that the Applicant ought to have appealed against the ruling of this court declining to enjoin him in the suit and finding that his claim against the Plaintiff was time –barred. He submits that the prayers sought by the Applicant are unknown and strange in law as there is no rule allowing a stay of the High Court's decree to allow for filing of a fresh suit in the lower court.

ISSUES FOR DETERMINATION

10. Having considered the application, affidavits and rival submissions, the following issues arise for determination:

- i. Whether the application is res judicata
- ii. Whether the Applicant ought to be granted a stay of execution
- iii. Whether the Applicant has made out a case for stay of proceedings
- iv. Whether it is in the interest of justice to grant the orders sought.

ANALYSIS AND DETERMINATION.

11. The doctrine of res judicata is contained in **Section 7 of the Civil Procedure Act** which provides 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 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.”

12. Akiwumi, Tunoi and Shah JJA in the case of **Uhuru Highway Development vs Central Bank [1996] LLR CAK 2126** summarized the test in res judicata as follows:

- (i) **There must be a previous suit in which the matter was in issue;**
- (ii) **The parties must be the same or litigating under the same title;**
- (iii) **There must be a competent court which heard the matter in issue;**
- (iv) **The issue must have been raised once again in a fresh suit;**

13. The Court of Appeal in the case of **John Florence Maritime Services Ltd & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** held as follows:

“The rationale behind res judicata is based on 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 the 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.

It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the Courts and predictability which is one of the ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

14. It is not in dispute that the Applicant filed an application dated 28th April 2019 seeking inter alia a stay of execution and review or setting aside of the orders issued on 6th March, 2019 pending the hearing and determination of the suit herein. He also sought to be enjoined in this suit as an Interested Party. The parties in the said application were the same as the ones in the instant application. The said application was heard and dismissed by the court in its ruling dated 28th November 2019. The Applicant has neither applied to have the said orders reviewed nor set aside. It is therefore obvious that the matter is res judicata as the court is being asked to revisit the same issues that were canvassed in the application dated 28.4.20 between the same parties without any proper basis.

15. On whether the Applicant is entitled to the orders sought, it is clear that the Applicant has chosen an unusual way of seeking justice. This court declined to grant the Applicant leave to be enjoined in the suit on the grounds that he had made the application rather late in the day when judgment had been entered. The court also noted that his claim was statute- barred as it was being made 23 years after the purported sale of the suit property to the Applicant. Rather than appeal against the court’s ruling, the Applicant went to the lower court and applied for leave to file suit out of time. After the said leave was granted, he filed suit in the lower court and now wants this court to stay its proceedings so that he can prosecute the said suit in the lower court. This is not only mischievous but it is an abuse of the court process. The Applicant is trying to correct his mistakes by arm-twisting the court to grant him orders he does not deserve.

16. In his submissions counsel for the Applicant has argued that the court ought to invoke its inherent jurisdiction to do justice between the parties. He has also cited the case of **Hunter Trading Company Limited (supra)** where the court held that the principal aim of the overriding objective is to give the court greater latitude to overcome past technicalities which might hinder the attainment of the overriding objective.

17. The application is largely hinged on Sections 1A and 1B of the **Civil Procedure Act**. The said sections provide for the overriding objective of the **Civil Procedure Act** and state as follows:

1A(1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.

(2) The Court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

18. The overriding objective is intended to save expenses, achieve expedition and avoid the court’s resources being used on a multiplicity of cases. The Applicant’s action in filing multiple applications is not in furtherance of the overriding objective as is clearly an abuse of the court process. Nowhere in sections 1A and 1B of the **Civil Procedure Act**, is there a power to stay execution in a matter that has been heard and determined pending the determination of a new or any other suit.

19. While I agree that the overriding objective is intended to achieve justice, it is trite that justice looks both ways and as correctly submitted by counsel for the Respondent, execution is a lawful process and a successful litigant is entitled to reap the fruits of his judgment. See the case of **Machira T/A Machira & Company Advocates v East African Standard No. 2 (2002) KLR 63**.

20. In view of the foregoing, I find no merit in the instant application and I dismiss it with costs to the Plaintiff/Respondent.

Dated, signed and delivered at Kisii via video link this 9th day of October, 2020.

J.M ONYANGO

JUDGE.