



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 140 OF 2013

**CECILIA KADZO EMMANUEL (*suing as the administrator of the estate of*
JONATHAN M. KARISA (DECEASED).....PLAINTIFF**

=VERSUS=

MIRIAM CHEA MUNGAI.....DEFENDANT

R U L I N G

Introduction

1. The Application by the Plaintiff is the one dated 12th August 2013. In the said Application, the Plaintiff is seeking for the following reliefs:
 - a. **Pending hearing and final hearing of this Application inter-partes, this Honourable Court be pleased to issue a temporary injunction restraining the Respondent, whether by herself, servants and/or agents from evicting, interfering with the Applicants quiet enjoyment of plot No. 490 situated at Mabirikani, Kilifi (hereinafter referred to as the suit land) and from selling, alienation or in any manner dealing with the suit land until hearing and final determination of this suit.**
 - b. **The Orders issued herein be served upon Town Clerk of Kilifi/Kilifi county Government so that they do not proceed with the intended demolition of the Applicant's developments on the suit land.**
 - c. **The costs of this Application be provided for.**
2. The Application is supported by the Affidavit of Cecilia Kadzo Emmanuel, the administrator of the Estate of the late Jonathan M. Karisa on whose behalf she has filed the suit.
3. According to the deponent, the suit property was allocated to her late husband and that they have been residing on the suit property since 1982; that she has partly developed the plot and that her occupation, use and possession of the suit plot has been uninterrupted until September 2012 when the Defendant sent people to the suit property and cut down trees.
4. The Plaintiff further deponed that the Defendant's plot is L.R. No. 5054/328 formally unsurveyed plot number 16 Kilifi which is situated next to the Old Ferry and which is not the same area as Mabirikani where the suit plot is situated.
5. It is the Plaintiff's deposition that the County Physical Planning Office has confirmed that plot number 5054/328 is not in Mabirikani in his Part Development Plan.
6. The Plaintiff finally deponed that even if plot number 5054/328 was the same as the suit property, the Defendant is barred by operation of law from recovering the suit plot.

7. The Plaintiff filed a Further Affidavit on 20th September, 2013 which I have considered.

Defendant's Case

8. The Defendant filed her Replying Affidavit on 13th September 2013 and deponed that whereas the Plaintiff's claims that plot number 490 was allocated to her late husband, she indicated in her previous suit being Mombasa ELC No. 104 of 2012 that she is the one who bought the plot from one Jumaa Msuko for Kshs.700 on 23rd November 1982.
9. The Defendant has further deponed that the Mombasa ELC No. 104 of 2012 which is similar to the current suit was struck out at the Application stage for want of merit and consequently the suit is an abuse of the court process.
10. It was the Defendant's further deposition that she was initially allocated unsurveyed residential plot number 16 Mabirikani within Kilifi Township on 4th November 1987; that the said plot was surveyed and the Defendant was issued with a grant for Land Reference number 5054/328 and that on 26th September 2012, she caused the Kilifi District Surveyor to erect beacons clearly marking the boundaries of the property.
11. The Defendant finally deponed that parcel of land number 5054/328 has nothing to do with the alleged plot no. 490; that the court in Mombasa ELC NO. 104 of 2012 already made a finding of fact that there is no nexus between plot number 490 Kalolo and L.R. NO. 5054/328; that Kalolo Kibaoni Bayamagonzi should arbitrate on the location of the Plaintiff's plot and that after the allocation of the plot to her, she took physical possession of the same in 1991 and fenced it.
12. The counsels for the Plaintiff and the Defendant appeared before me on 26th September 2013 and made oral submissions. I have considered the said submissions.
13. Before I consider if indeed the Plaintiff has met the principles that were set down in the *Giella Vs Cassman Brown EA 1973 358* case for one to be granted the equitable remedy of injunction, I need to address the issue of whether the current suit and Application is an abuse of the court process in light of the decision by Mukunya J in Mombasa ELC No. 104 of 2012.
14. The Plaintiff and the Defendant have annexed on their Affidavits a Ruling by Mukunya J in Mombasa ELC No.104 of 2012. The parties in the said suit are the same parties in the current suit. The issues in the said suit are also the same issues that have been raised in this matter.
15. Indeed, at paragraph 16 of the Plaintiff's Complaint, the Plaintiff has averred that there was HCCC No. 104 of 2012 at Mombasa which was struck out between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaintiff's Complaint.
16. In the said Ruling, Mukunya J dealt with an Application for injunction in respect to the land that the Plaintiff was occupying. At paragraph 7 of the said Ruling, the judge held as follows:

“The Application dated 31st October 2012 and Supporting Affidavit has no property upon which I can make orders. The annexures herein, agreement of 23rd November 1982 has no title of the land that was being purchased for Kshs.700. In fact, it was for the sale of trees. The annexed water bills do not say for what property in respect of which they were paid....There is no relationship shown of Plot Number 490 Kalolo scheme and L.R. 5054/328 Kilifi.

In the pendency of such Application, he filed another application on 25th January 2013 and attempted to get orders against land reference number 5054/328 Kilifi while his annexures in that Application were for plot number 490 Kalolo scheme. This application obviously is an abuse of the process of the court. It is sneaked in to try and introduce L.R. No. 5054/328 as the subject matter of the suit. This application is an abuse of the process of the court.”

17. Mukunya J proceeded to dismiss the Application for injunction with costs. The judge also struck out the Plaintiff's suit with costs in the following words:

“...Leaving the suit to remain in court in the hope that someone may amend it and make it triable is in itself an injustice to the Defendant. I believe the court

has power *suo motto* to strike out a suit that has no subject matter. I do strike out the suit with no orders at to costs.”

18. Taking a cue from the said Ruling, the Applicant filed this suit in this court on 14th August 2013 and introduced the suit property as plot number 490.
19. Whether the introduction of the plot number in respect to the suit property in the Plaintiff in view of the Ruling of Mukunya J can revive the suit in the manner that the Plaintiff has done can only be dealt with at the hearing of the substantive suit or a formal Application. I say so because the judge did not dismiss the suit and the Plaintiff may argue that she was entitled to file a fresh suit.
20. However, the Judge in Mombasa ELC No. 104 of 2012 dismissed the Plaintiff's Application for injunction because the Application did not show the relationship between plot number 490 Kalolo scheme and L.R. 5054/328 and further that the Application did not indicate the suit property. The judge also took cognisance of the fact that the agreement that had been attached on the Supporting Affidavit was in respect to trees and not land.
21. The Plaintiff has now filed a similar Application and purported to “correct” the anomalies that were raised by the Judge. The Applicant has introduced the plot number for the suit property, being plot number 490 and excluded in her affidavit the agreement which had been annexed in the earlier affidavit. The Plaintiff has also introduced copies of the documents that were not in the affidavit that was filed in Mombasa ELC No. 104 of 2012.
22. That kind of practice is not acceptable in this court. It will be a miscarriage of justice and an abuse of court process to allow a party to keep on changing the nature of his/her case every time a Ruling is made in respect to a particular issue as in this case.
23. The rule pertaining to the doctrine of *res judicata* is clear: the court should not try an issue which has already been heard and finally decided. Any matter which might and ought to have been made a ground in a former suit and which was never brought up by a party is always deemed to have been a matter directly and substantially in issue.
24. It therefore does not matter that the Plaintiff has now introduced the plot number pertaining to the suit property in the current Application and has excluded some of the documents which the court in the former suit disparaged. It also does not matter that she has introduced documents which were not in the former Application without explaining why those documents were not introduced in the former Application. The end result is the same, that is, the Application for injunction is *res judicata*.
25. In the circumstances, and for the reasons I have given above, I dismiss the Plaintiff's Application dated 12th August 2013 with costs

Dated and Delivered in Malindi this 1st day of **November**, 2013

O. A. Angote

Judge