



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 341 of 2010

JANE NJERI MAINA PLAINTIFF

=VERSUS=

MWANAJUMA MOHAMED MWAJINGA 1ST DEFENDANT

YAHYA MWINYI MWAKURAUKA 2ND DEFENDANT

BARBARA MUENI GIDEON 3RD DEFENDANT

MARY MWELU GIDEON 4TH DEFENDANT

ABDILAH I BRAHIM 5TH DEFENDANT

SAID HASSAN KABANGI 6TH DEFENDANT

ABDILLAH I HURI I BRAHIM 7TH DEFENDANT

MUHER FRANCIS MATANO 8TH DEFENDANT

MOHAMED JEMBE 9TH DEFENDANT

A.A. MUTUA 10TH DEFENDANT

RULING

Before this court is the Chamber Summons application dated 31st July 2012 brought under Certificate of Urgency in which the Applicant **JANE NJERI MAINA** seeks inter alia the following orders:

- “(a)**
- (b)**

(c) The proceedings, decisions and orders issued by Honourable Justice M.K. Ibrahim on 17th July 2012 be set aside and the Plaintiffs application dated 23rd September, 2010 be reinstated for fair hearing on the merits.

(d) In the interest of justice an interim injunction be issued restraining the sale, transfer, disposition

dealings in or erection of buildings on all that property known as Kwale/Diani/101 and any or all titles/parcels of land created therefrom including Kwale/Diani/1985, Kwale/Diani/1986, Kwale/Diani/1987, Kwale/Diani/1988, Kwale/Diani/1989, Kwale/Diani/1990, Kwale/Diani/2195, Kwale/Diani/2196, Kwale/Diani/2197, Kwale/Diani/2198, Kwale/Diani/2107, Kwale/Diani/2108, Kwale/Diani/2109, Kwale/Diani/2057, Kwale/Diani/2058 pending hearing and determination of the suit

(e) Costs”

MR. MIYARE Advocate appeared and argued the application on behalf of the Applicant. The same was strenuously opposed by **MR. MOGAKA** for the 1st Respondent, **MR. KOLI** for the 2nd, 4th and 8th Respondents, **MR. LEWA** for the 6th Respondent and **MR. OMOLLO** for the 5th and 7th Respondents.

At the basis of this application/suit is the parcel of land originally known as **PLOT NO. KWALE/DIANI/101** measuring approximately 2.2 hectares and located in the Diani Settlement Scheme. The Plaintiff claims ownership of that parcel of land by virtue of being the registered proprietor thereof. Sometime in 2008 the Plaintiff claims that her name was replaced by that of the 9th Defendant/Respondent at the Kwale District Lands office. Thereafter the suit property was sub-divided into several sub-plots which were registered in the names of the 1st to 8th Respondents.

The Defendants on their parts all filed defences in which they deny all the wrongdoings alleged by the Plaintiff. The Defendants each claim to be bonafide purchasers for value from the 1st Defendant.

On 23rd September 2010 the Plaintiff filed a notice of motion seeking an interim injunction to prevent any transfer and/or interference in the suit property (including the several sub-plots) pending the hearing and final determination of the main suit. This application was heard by **HON. JUSTICE MOHAMED K. IBRAHIM** who gave his decision in his ruling dated 17th July 2012, which was delivered on his behalf by **HON. JUSTICE RICHARD MWONGO** on 26th July 2012. In that ruling Hon. Justice Ibrahim dismissed the Plaintiff's application for an injunction pending the hearing on the basis that a prima facie case had not been established, since some of the Defendants had titles over their properties and were in possession of their individual portions. The learned judge added that ***“The validity of those certificates or otherwise can only be investigated in a full trial”***.

The Plaintiff/Applicant being dissatisfied with that decision proceeded to file this present application dated 31st July 2012. They seek an interim injunction on all dealings on the suit property and further seek to have all the proceedings, decision and orders made by Justice Ibrahim set aside and the application dated 23rd September 2012 be reinstated for a hearing on merits. The main grounds on which this second application is being made by the Applicants are as follows:

- (i) The applicant is the rightful proprietor of the suit property.
- (ii) Hon. Justice Ibrahim failed to deliver his ruling as scheduled and that the applicants were not informed and therefore were not present on the date when the ruling was eventually delivered.
- (iii) In the intervening period one of the Defendants entered and commenced and completed construction on the suit property.
- (iv) The plaintiffs were unable to institute proceedings for contempt or to take any other relevant action as against that defendant as the court file was with the Honourable Judge.
- (v) The decision dismissing the application for an injunction in effect sanctions as fraud as against the Applicant.

As stated earlier the Defendants did file Grounds of Opposition raising the following issues:

- (i) The issues raised in the present application are **'Res Judicata'** having already been conclusively heard and determined by Justice Mohamed Ibrahim.
- (ii) This present court has no jurisdiction to reverse the orders of a court of concurrent jurisdiction.
- (iii) The present application is incompetent, frivolous, misconceived and amounts to an abuse of the court process.

All counsel on record did make comprehensive oral submissions in respect of this application. I have given careful consideration to the submissions so made.

The first ground of opposition raised by the Respondents was that this matter *is 'Res Judicata'*. Section 7 of the Civil Procedure Act provides:

"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"

The provisions of Section 7 apply equally to applications as they do to suits. This was established in the case of **UHURU HIGHWAY DEVELOPMENT LIMITED –VS- CENTRAL BANK OF KENYA & 2 OTHERS 1996 eKLR** wherein it was held:

"wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation"

Therefore a party who is dissatisfied by the ruling of a court in one application cannot go on filing numerous subsequent applications on the very same issue – the res judicata rule prevents this. In this case the first application heard by Justice Ibrahim sought an injunction against all dealings with the suit land. That application was heard and determined. The fact that the decision was not favourable to the Applicant in no way entitles her to raise the issue again. This present application seeks exactly the same prayers as per prayer (d) of the earlier application. This application offends the res judicata rule and as such cannot be entertained by this court.

The Applicant in prayer (c) [which for some unexplained reason Mr. Miyare chose **not** to canvass] the Applicant prayed that:

"the proceedings, decisions and orders issued by Honourable Justice M.K. Ibrahim on 17/7/2012 be set aside and the Plaintiffs application dated 23rd September 2010 be reinstated for fair hearing on the merits"

Although I do note that the ruling of Justice Ibrahim was actually made on 26th July 2012 **not** 17th July 2012, however this may have been a mere typographical error which in my view does not affect the merits of the case. However this court can only interfere with the ruling of a brother judge where a review is being sought. No review is being sought here and no error on the face of the record is alleged and no new evidence has arisen to warrant such a review.

The application dated 23rd September 2010 was fully heard and determined on its merits. All parties made written submissions and it was after duly considering these written submissions that the learned Judge gave his ruling. Each party therefore was granted an opportunity to exhaustively ventilate their issues. This court has no jurisdiction to set aside or in any way interfere with the decision of a brother Judge of concurrent jurisdiction. This was very clearly stated in the Nigerian case of **ELDER S.A. SOYINKA –VS- OLAIYAONI & OTHER (2011) LPELR** where it was held that:

“where a case is transferred from one judge to another, all final decisions and orders of the previous court remain binding on the parties and can only be the subject of an appeal. The second judge has no jurisdiction to set aside directly or indirectly the decision of the former judge as that would mean sitting on appeal against the decision of his brother judge of concurrent jurisdiction. It is indeed an abuse of court process for a party before the second judge to seek to revisit a matter already decided by the previous court”.

Closer to home the same view was upheld by the Kenyan Court of Appeal in the case of **MBURU KINYUA –VS- GACHINI TUTI [1978] KLR 69** where the court held:

“In our jurisprudence and with the greatest respect to Mulwa J. He himself had absolutely no jurisdiction to declare unlawful and unacceptable the orders made by a brother Judge of equal and concurrent jurisdiction. If this kind of thing was to be allowed to take root, there will in my view be total chaos and confusion in the High Court and there would even be no need for the appeal process”

I agree entirely with this decision. If judges of concurrent jurisdiction were to be allowed to upset and/or set aside decisions of brother judges then **‘forum-shopping’** would become the order of the days as there would arise a deluge of applications by litigants seeking judges sympathetic to their causes. There exists a hierarchy of courts in this country for a reason. That is to allow a dissatisfied litigant to file an appeal before a court of superior jurisdiction. In this case the Applicant ought to have filed an appeal against the decision of Justice Ibrahim before the Court of Appeal.

Mr. Miyare for the Applicant sought to persuade this court to rely on Article 159 of the Constitution of Kenya which exhorts courts to administer justice **“without undue regard to technicalities”**. With respect the rule against judges upsetting the decision of a judge of concurrent jurisdiction cannot be termed a **‘mere technicality’**. As stated earlier this rule is what allows sanity to prevail within our court system. I have no doubt that the reason Mr. Miyare failed to actively canvass prayer (c) of the application was that he too was well aware that legally the Applicant’s position was totally untenable. This court cannot purport to sit on appeal over the decision of a fellow Judge and on this basis too the application must fail. Jurisdiction is everything and here this court has none.

The fact of the matter is that this is a case where both parties hold title to the suit land. Each party contends that the title in their hand is true and valid. In declining to grant the injunction sought in the first application Hon. Justice Mohamed ruled that **“The validity of these certificates or otherwise can only be investigated in a full trial”**. I am in full agreement with this finding. I find that this application has no merit and indeed amounts to an abuse of the court process. The Applicant was merely attempting to have a second bite at the cherry by raising identical issues before a different court under the guise of a fresh application. For these two reasons the application being res judicata and lack of jurisdiction this application must fail. I hereby dismiss the application dated 31st July 2012 in its entirety and order that the Applicant be condemned to pay costs

Dated and Delivered in Mombasa this 2nd day of November, 2012.

**M. ODERO
JUDGE**

In the presence of:

Mr. Miyare for Plaintiff/Applicant

Mr. Koli for 2nd, 3rd, 4th & 8th Respondent