



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC CASE NO 503 OF 2017**

**JANE GATHIGIA GATIMU.....PLAINTIFF**

**VERSUS**

**NJOROGE KAMUGA KAIGIRIRI alias**

**STEPHEN NJOROGE KAMUGA.....DEFENDANT**

**RULING**

1. The Applicant filed an application dated the 17<sup>th</sup> October 2017 wherein she sought for injunctive orders against the Respondent. The matter was placed before e on the 18<sup>th</sup> October 2017 wherein the court directed that the same to be served upon the Respondent for inter-parties hearing.
2. Service was not effected upon the respondents but instead the Applicant in her wisdom filed a second application dated the 23<sup>rd</sup> May 2018 wherein she sought for interim orders against the Respondent.
3. The court again directed that the Applicant effect service which was done and the Respondent filed their replying affidavit on the 7<sup>th</sup> September 2018. To that effect thereof, before me for determination are two similar applications dated the 17<sup>th</sup> October 2017 and 23<sup>rd</sup> May 2018 which applications seek for interim orders against the Defendant/Respondent from interfering in any manner with the Plaintiff/Applicant's quiet possession of LR Nyandarua /Ndemi 570 pending the hearing and determination of this suit. In the second application however, the Applicant further sought for an order allowing her to use the uncontested piece of land.
4. The said application was supported by the grounds on the face of it as well as an Affidavit, sworn on the 23<sup>rd</sup> May 2018 by the Applicant herein. The Application was heard orally.
5. Briefly the applicant's application was to the effect that the Respondent's property neighbors the Applicant's property wherein he has hived off part of her land.
6. That there was no dispute as to the ownership and title of their respective properties as both parties have their respective properties. However the Applicant decries that the encroachment by the Respondent has made access to parts of her land which is not in dispute impossible. She therefore sought to be allowed to use the undisputed part so that she can make her livelihood and for the Respondent be restrained from using violence against the Applicant.
7. The Application was opposed by the Respondent's counsel who submitted that vide their uncontroverted replying affidavit dated the 7<sup>th</sup> September 2018, the applications before court are incompetent bad in law and an abuse of the court process for reasons that the issues raised in this suit were substantially are directly in issue in Nyahururu /ELC JR Application No 9 of 2017 where the ruling was delivered by this court on 26<sup>th</sup> April 2018.
8. That since the pronouncement of that ruling, the Respondent had preferred an appeal to the Court of Appeal against the said ruling vide Nakuru CA No 52 of 2018 as annexed thereto, which appeal was pending hearing and determination before the Court of Appeal. The two applications were therefore Res subjudice and cannot be entertained by this court.
9. That in any event, the applications before court were in the nature of mandatory injunctions, principles of granting mandatory injunctions which had not been met.
10. That the Applicant herein had not disclosed that she has never been in possession of the suit land and that the order being sought were

intended to evict the Respondent from the place he has called home since the year 1981.

11. The Respondents thus sought for the proceedings to the case to be stayed to await the outcome from the pending appeal which was between the same parties. Further that the matter before court related to the determination of boundaries and the court would not be in a position to make a determination without finality of the issue where the boundary of the parties lie. It was their submission that the Application be dismissed with costs.

12. In rejoinder, counsel for the Applicant submitted that it was not true that the issues raised in the application had been dealt with in Judicial Review No. 9 of 2017, that what they sought was for the applicant to be allowed to use the uncontested piece of land.

13. That the memorandum of Appeal did not act as stay of proceedings before this court and that the court had jurisdiction to determine the application and render its ruling. That the issue of determination were indeed based on a boundary dispute but that some area was undisputed which area they sought that the Plaintiff be allowed to use and the Respondent be restrained from driving her away from the said undisputed land.

14. After considering the submission herein, I find that the matters for determination as;

i. Whether the present applications are Res subjudice the ELC Judicial Review No. 9 of 2017.

15. The provisions of section 6 of the Civil Procedure Act provides for stay of suits as follows:-

*“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.*

16. The issue of this matter being sub-judice has been pleaded in paragraphs 3 of the Respondents replying affidavit to the effect that it is substantially in issue in Nyahururu ELC Judicial Review Application No. 9 of 2017 in which an appeal is pending in the Court of Appeal pursuant to a ruling by this court delivered on the 26<sup>th</sup> April 2018.

17. **I have gained sight of the** Nyahururu ELC Judicial Review Application No. 9 of 2017 where the court had this to say;

***Briefly, the Respondent in this case filed his application in wherein his grievance was to the effect that upon sub division of plot No. 860 Ndemi Settlement Scheme into six (6) portions, the same gave rise to Nos. Nyandarua/Ndemi/ 4187-4192 wherein he had sold three portions and retained titles Numbers 4187, 4188 and 4189.***

***That in the year 2012 the interested party, the Applicant herein, had lodged a boundary dispute complaint with the land Registrar wherein she had complained that the Applicant had encroached onto her land. After the hearing of the dispute, the Land registrar made a finding that there was no boundary dispute but a land claim and that parties should move to court for determination.***

***That the interested party instead of moving to court, and without informing the Respondent herein, had filed an appeal with the Chief land Registrar (1<sup>st</sup> Respondent) who delivered his ruling on the 10<sup>th</sup> February 2017 without the input of the Applicant who was not made aware of the proceedings, hiving off part of his land and thus rectifying the land Register.***

***The applicant’s submission was therefore to the effect that the 1<sup>st</sup> Respondent had no jurisdiction to sit on appeal against the ruling of the Land Registrar, Nyandarua /Samburu issued on the 10<sup>th</sup> December 2012 which ruling was made in respect of a parcel of land whose title that had already been closed on sub-division.***

***The Applicant therefore came to court seeking that it exercises its supervisory jurisdiction over quassi judicial bodies to issue an order of certiorari against the said ruling of the 1<sup>st</sup> Respondent herein, leave to file judicial review having been granted on the 29<sup>th</sup> March 2017.***

18. Upon consideration if the said application, the court had found that

*Since the law provides an avenue for parties who are aggrieved by decisions made in the registries to ventilate their grievance, through the appeal process, to the Chief Land Registrar, the Applicant herein cannot be heard to say, in my humble opinion, that the 1<sup>st</sup> Respondent had no jurisdiction to sit on an appeal from the Land Registrar herein.*

*The court found no merit in the application dated 30<sup>th</sup> March, 2017 and proceeded to dismiss it with no costs since it was undefended.*

19. I note that the main issue herein is that both parties who own parcels of land adjacent to each other being No. Nyandarua/Ndemi/540 and Nyandarua/Ndemi/860 respectively have had a boundary dispute issue with the Applicant herein claiming that the Respondent has encroached onto her parcel of land and has prevented her from utilizing and or accessing onto the same and has even threatened to dispose of the same by way of sale.

20. The Respondent on the other hand submitted that apart from the matter being sub judice, the prayers sought by the Applicant were mandatory injunctive orders whose intent was to evict him from the suit land as she has never been in possession.

21. The boundary dispute was resolved by the Chief land Registrar in his ruling dated the 10<sup>th</sup> February 2017 which ruling was the subject of the Nyandarua ELC Judicial Review Application No. 9 of 2017 and which is also the subject in the pending Appeal in Nakuru civil Appeal No. 52 of 2018.

22. I find that the issue in this suit is directly and substantially in issue in Nyandarua ELC Judicial Review Application No. 9 of 2017, which is also the subject in the pending Appeal in Nakuru Court of Appeal Civil Appeal No. 52 of 2018 previously instituted between parties under whom they claim. Where the test of res subjudice is established or met, the explanatory notes to the Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined.

23. To this effect, I find that unless the issue of whether or not the chief Land Registrar had jurisdiction to sit on an appeal from the Land Registrar herein which issue will the put the issue on the boundary dispute between the parties herein to an end, is determined, this court will be engaging in a pious exploration of issues which are pending determination before other courts of competent jurisdiction.

24. Accordingly, I find that this matter is res subjudice Nyandarua ELC Judicial Review Application No. 9 of 2017 and find that the appropriate order that comments itself for granting at this stage is to order and I hereby order that orders are to the effect that this suit shall forthwith be stayed pending hearing and determination of Nakuru Court of Appeal Civil Appeal No. 52 of 2018. In the meantime, parties shall maintain the status quo pending the outcome of the said Appeal so as to preserve the pre-dispute state until the determination of the Appeal.

25. The Applications dated the 17<sup>th</sup> October 2017 and 23<sup>rd</sup> May 2018 are hereby struck out with costs to the Respondent.

**Dated and delivered at Nyahururu this 18<sup>th</sup> day of February 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**