



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 73 OF 2016

1. JONATHAN BAYA MKETTA.....1ST PLAINTIFF

2. RAYMOND KARISA NGUMBAO.....2ND PLAINTIFF

3. ABIBA SHABAN(Suing as officials of

NYONGORO FARMERS CBO.....3RD PPLAINTIFF

VERSUS

1. WITU NYONGORO RANCH (DA) CO. LTD.....1ST DEFENDANT

2. BETTER GLOBE FOREST LTD.....2ND DEFENDANT

3. NATIONAL LAND COMISSION.....3RD DEFENDANT

4. COUNTY GOVERNMENT OF LAMU.....4TH DEFENDANT

RULING

1. On or about 16th June 2017, the Plaintiffs herein filed a Notice of Motion application dated 14th June 2017 seeking an order of injunction to issue restraining the Defendants from evicting, dispossessing and/or interfering with the Plaintiff's use and possession of LR No. 29274, Lamu pending what they term as regularization process of the allocation of the said property. In addition they are seeking to have the Ruling and order issued by this Court on 12th May 2017 reviewed.

2. On 11th June 2018 before the Plaintiff's application could be heard the 1st Defendant herein Witu Nyongoro Ranch (DA) Co. Ltd filed a Notice of Preliminary Objection stating that the said application is res judicata by dint of the Court's Ruling delivered on 12th May 2017 and urging that the application dated 14th June 2017 be consequently dismissed with costs.

3. The said Preliminary Objection which was supported by the 2nd and 3rd Defendant was argued and the parties made oral submissions thereon. I have considered the objection and the response thereto by the Plaintiffs.

4. The Ruling delivered by this Court on the said 12th day of May 2017 was in relation to an application filed by the Plaintiffs and dated 24th March 2016. In the said application the Plaintiffs sought orders as follows:-

a) That this Honourable Court be pleased to issue an order of injunction restraining the Defendants from either by themselves, their agents, servants, attorneys or any other person acting under their instructions from evicting, dispossessing and/or interfering with the Applicants' use and possession of the parcel of land known as LR No 29274 in any manner whatsoever pending the hearing and determination of the main suit;

b) That the costs of this application be provided for.

5. A perusal of the Plaintiff's application dated 16th June 2017 reveals that it is similar word for word with the earlier application save that the earlier application for injunction was sought pending the hearing and determination of the main suit while the later one is sought pending what the Plaintiffs term the "regularization process of the allocation" of the suit property.

6. In addition the Plaintiffs pray for a review of the orders of 12th May 2017 on account that there is new evidence that the process of regularization of titles for this suit property has now commenced as recommended by the 3rd Defendant –the National Land Commission.

7. In this regard, it was submitted by Mr. Miller, Learned Counsel for the Plaintiffs that the basis upon which the two applications were filed are different as they arise from circumstances that are all together different as well as the fact that there was new information which was previously not available to the Plaintiffs.

8. The principle of res judicata is captured in Section 7 of the Civil Procedure Act as follows:-

"7. 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 Court."

9. Explanation No. 4 of that Section provides that:-

"Any matter which might and ought to have been made ground of defence or attack in such a former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

10. As to whether the said Section 7 of the Civil Procedure Act applies to interlocutory proceedings within a suit, the Court of Appeal in **Uhuru Highway Development Ltd -vs- Central Bank of Kenya & 2 Others(1996) eKLR**, held that:-

"...there must be an end to applications of similar nature; that is to say further, 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. It is this precise problem that Section 89 of our Civil Procedure Act caters for,"

11. In the matter before me, the Plaintiffs applied for an order of injunction vide their application dated 24th March 2016. That application was considered and was dismissed by this Court on 12th May 2017. According to the Applicants, there was now new evidence which was unavailable to them earlier to the effect that the process of regularization of titles by the National Land Commission had now commenced. It was their case that this new evidence warranted a fresh consideration of the issues with a view to granting the order of injunction.

12. As it were, there is no indication in the application dated 14th June 2017 when if at all the Plaintiffs

came across this new information to warrant the filing of another application for injunction just a month after the first attempt was dismissed by this Court. Be that as it may, it is clear from a reading of paragraph 4 and 5 of the Honourable Justice Angote's Ruling delivered on 12th May 2017 that the issue of regularization of the titles was a matter in issue and was given due consideration by the Learned Judge in arriving at the impugned decision.

13. In the circumstances, I am in agreement with Mr. Kilonzo and Mr. Makhandia Counsel for the Defendants that the issues arising in the instant application belonged to the subject matter of the dismissed application and cannot be litigated afresh herein.

14. As the Court of Appeal stated in *John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR:-*

“...where a given matter becomes the subject of litigation in an adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not, except under special circumstances, permit the same to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time...”

15. Arising from the foregoing, I find merit in the 1st Defendants Preliminary Objection. The Plaintiffs' application dated 14th June 2017 is accordingly struck out with costs to the Defendants.

Dated, signed and delivered at Malindi this 28th day of March, 2019.

J.O. OLOLA

JUDGE