REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 278 OF 2013

JASON GITIMU WANG'ARA ....PLAINTIFF/APPLICANT

VERSUS

MARTIN MUNENE WANG'ARA..............1ST DEFENDANT/RESPONDENT

JOHN MUTUGI..2ND DEFENDANT/RESPONDENT

SIMON MUCHIRI.......................................3RD DEFENDANT/RESPONDENT

FRANCIS GITHAKA..................................4TH DEFENDANT/RESPONDENT

JOHN KARATU...5TH DEFENDANT/RESPONDENT

JOSEPH MUCHIRI.....................................6TH DEFENDANT/RESPONDENT

JOSEPH MURIITHI WANG'ARA.............7TH DEFENDANT/RESPONDENT

LAZARIUS GITHAKA..............................8TH DEFENDANT/RESPONDENT

CHARLES WARUI.......................................9TH DEFENDANT/RESPONDENT

SIMON NDEGE..10TH DEFENDANT/RESPONDENT

FRANCIS MUTURI....................................11TH DEFENDANT/RESPONDENT

FRANCIS GACHOKI................................12TH DEFENDANT/RESPONDENT

PETER KAGIRI...13TH DEFENDANT/RESPONDENT

ONESMUS MATHIKE...............................14TH DEFENDANT/RESPONDENT

RULING

I have before me the plaintiff's Notice of Motion dated 17th August 2017 in which he seeks the following orders:

1. Spent.

2. Spent.

3. That this Honourable Court be pleased to issue inhibition orders against the defendants, their agents and servants from entering, selling, transferring, and/or dealing with land parcels No. MWEA/TEBERE/B/4291, 4292, 4293, 4294, 4295, 4296, 4297, 4298, 4299, 4300, 4301 and 4302 (the suit lands) pending the hearing of this application.

4. That this Honourable Court be pleased to set aside wholly the ruling and orders of HON. B.N. OLAO J. delivered on the 28th July 2017 pending the hearing and determination of this application and the intended appeal.

5. That this Honourable Court be pleased to set aside the judgment and order of HON. B.N. OLAO J. delivered on 26th August 2013 and 20th March 2015 in the Environment and Land Court at Kerugoya ELC No. 278 of 2013 pending the hearing and determination of this application and the intended appeal.

6. That this Honourable Court be pleased to make such further orders as are necessary for the ends of justice in the matter.

7. The costs of this application be in the cause.

The application is premised on the grounds set out therein and is also supported by the affidavit of **JASON GATIMU WANGARA** the plaintiff herein.

The gravamen of the application is that the plaintiff being aggrieved both by this Court's judgment delivered on 26th August 2013 and the ruling delivered on 20th March 2015 has filed Civil Application No. 29 of 2017 at the Court of Appeal in Nyeri. Meanwhile, the defendants, pursuant to the judgment aforesaid, have sub-divided the original land parcel No. MWEA/TEBERE/61 and intend to dispose off the resultant sub-divisions being the suit lands herein. If the orders sought are not granted, the plaintiff's Constitutional right to recover his land which he has held since 1959 will be frustrated. That the plaintiff has an arguable appeal with good chances of success.

The application is opposed and the 1st defendant **MARTIN MUNENE WANGARA** has filed a replying affidavit on behalf of the other defendants in which he has deponed, inter alia, that there is no proof that they intend to dispose off the suit lands where they have lived since birth and where they live with their children and grand children and have even buried their father and his six wives. That an inhibition cannot therefore be issued to restrain them from entering their homes. That this prayer was canvassed before and was dismissed and is therefore an abuse of the Court process and in any case, the Court is being asked to sit on appeal over its own rulings. That the defendants have not been served with the Civil Application No. 67 of 2017 pending at the Court of Appeal and the ruling of this Court dated 20th March 2015 has been effected and the plaintiff is now the registered proprietor of land parcels No. MWEA/TEBERE/5004 and 4925 jointly with his brother. That the plaintiff has falsely reported this Court to the Ombudsman that it has refused to supply him with typed proceedings and has therefore come to Court in bad faith.

The application has been canvassed by way of written submissions which have been filed both by **MR. MUTINDA** advocate instructed by the firm of **E.K. MUTINDA & ASSOCIATES ADVOCATES** for the plaintiff and **MS THUNGU** advocate instructed by **ANN THUNGU & CO. ADVOCATES** for the defendants.

I have considered the application, the rival affidavits and the submissions by counsel.

I must commence by commenting on the allegation raised by the defendants that the plaintiff has falsely reported to the Ombudsman that this Court has refused to supply him with typed copies of the proceedings. That complaint has not been brought to my attention until I perused the defendants' replying affidavit in the cause of drafting this ruling. I have however perused the record herein and have taken note of a letter from the plaintiff's then counsel **MR. NDUKU** dated 17th September 2013 under reference JNN/C/041 requesting for certified copies of the proceedings. There is in response a letter reference JUD/KER/ELC 278/2013 dated 5th December 2013 by the Deputy Registrar of this Court confirming that the proceedings are ready for collection. That should bring that issue to a close.

Going back to the application at hand, I think it is important that I give a summary of this dispute to-date.

The plaintiff had filed this suit seeking the eviction of the defendants from land parcel No. MWEA/TEBERE/B/61. The defendants in their counter-claim pleaded that the plaintiff held the land in trust for them and sought its sub-division between both the plaintiff and the defendants with separate titles for each. In a judgment delivered on 26th August 2013, the Court found that the plaintiff was indeed a trustee and ordered the sub-division of the original land parcel between the parties. The Court further ordered that if the plaintiff does not facilitate such sub-division, the Deputy Registrar of this Court would be at liberty to do so on his behalf.

The plaintiff did not facilitate that sub-division and by an application dated 13th January 2014, the defendants sought and obtained orders on 20th March 2015 authorizing the Land Registrar Kirinyaga to dispense with the production of the original title to land parcel No. MWEA/TEBERE/B/61. This gave rise to the suit lands. An application to review this Court's ruling dated 20th March 2015 and which had also sought the issuance of inhibition orders with respect to the suit lands, which orders are also the subject of this application, was dismissed in a ruling delivered on 28th July 2017. It is in the context of the above history that this application should be considered.

It must be clear by now that other than the not so elegant drafting, some of the remedies sought herein are infact res-judicata while the others are simply not available to the plaintiff for reasons that I will give shortly.

With regard to the pleadings, a party cannot seek the setting aside of a judgment pending an appeal. Perhaps counsel meant to seek a stay of execution of this Court's judgment dated 26th August 2013 pending appeal. Indeed that must have been what counsel for the plaintiff had in mind because among the provisions upon which this application is premised is ***<u>Order 42 Rule 6 (1) of the Civil Procedure Rules</u>***. That provision provides as follows:

> ***6: (1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for <u>sufficient cause</u> order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court to***

which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside" Emphasis added

Sub-rule (2) on the other hand states that:

(***2) "No order for stay of execution shall be made under sub-rule (1) unless –***

(a) the Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant" Emphasis added.

Therefore, if what is sought by the plaintiff is a stay of this Court's judgment dated 26th August 2013 and also the ruling dated 20th March 2015, that remedy is not available for the simple reason that the judgment and ruling were delivered some four (4) and two (2) years ago respectively and this application which was filed on 17th August 2017 has not been brought "***without unreasonable delay***" as required by ***Order 42 Rule 6 (2) (a).*** Secondly, substantial loss is the cornerstone of such an application – ***KENYA SHELL LTD VS KIBIRU 1986 K.L.R 410***. No evidence of such loss has been placed before this Court by the plaintiff. All that he has pleaded in paragraphs 10 and 11 of his supporting affidavit is that the defendants have signified their intention to dispose off the suit land and that there is a real danger of them doing so. That issue was, in any event, dealt with both in my judgment dated 26th August 2013 and in my subsequent ruling dated 28th July 2017 wherein I made a finding that there was nothing to suggest that the defendants had any intention to dispose of the suit land lands where they have lived all their lives and have even buried their father and his six wives. Finally, it is common knowledge that following this Court's judgment dated 26th August 2013, the original land parcel No. MWEA/TEBERE/B/61 has since been sub-divided to give rise to the suit lands and the plaintiff is a beneficiary of some of the resultant sub-divisions. There is therefore nothing for this Court to stay. That prayer must be rejected in the circumstances.

There is then the prayer to set aside this Court's ruling dated 28th July 2017 in which I dismissed the plaintiff's application to issue inhibition orders restraining the defendants from selling, charging or transferring the suit lands and which also sought the setting aside and/or review of the ex-parte orders dated 20th March 2015.

The discretion to set aside an order is designed to avoid injustice or hardship resulting from accident, in-advertence or excusable mistake or error. It is a discretionary remedy which is not meant to assist a party who is deliberately, whether by evasion or otherwise, attempting to mislead the Court or to obstruct and delay the cause of justice – ***SHAL VS MBOGO 1967 E.A 116***. It is clear therefore that a party seeking the exercise of the Court's discretion in his favour must approach it with clean hands. In my ruling dated 28th July 2017, this Court made a finding that the plaintiff was not deserving of the order to set aside an earlier order issued on 20th March 2015 because he attempted to mislead the Court that the application dated 13th January 2014 and which resulted in the said order had not been served upon him yet there was incontrovertible evidence that service had been effected upon his counsel. It is also important to note that the ruling dated 28th July 2017 which the defendant seeks to set aside was not as a result of an ex-parte hearing but was arrived at after hearing all the parties. Bearing in mind that the Court has powers to set aside its own orders and further taking into account the plaintiff's own lack of candour which I have already alluded to in this ruling, I am not inclined to exercise my discretion in his favour and set aside the ruling dated 28th July 2017. That prayer is similarly declined.

Finally, the plaintiff seeks orders of inhibition against the defendants, their agents and servants from entering, selling, transferring or dealing with the suit lands. That same prayer was the subject of this Court's ruling dated 28th July 2017 and was dismissed although the range of the land parcels has now increased by the addition of three other parcels being MWEA/TEBERE/4291, 4297 and 4295 which were not the subject of the earlier ruling. Nonetheless, the prayer seeking inhibitory orders with respect to the suit lands is a matter that was directly and substantially in issue in the previous application and was heard and finally determined by the Court's ruling dated 28th July 2017 and which the plaintiff now seeks to set aside. That issue is clearly res-judicata which is provided for under ***Section 7 of the Civil Procedure Act*** in the following terms:

'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"

I agree with **RINGERA J**. (as he then was) that the doctrine of res-judicata applies both to suits and applications – ***KANORERO RIVER FARM LTD & OTHERS VS NATIONAL BANK OF KENYA LTD (2002) 2 K.L.R 207***. See also ***UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA & OTHERS C.A CIVIL APPEAL No. 36 of 1996 (1996 e K.L.R***) where the Court after considering similar provisions in the ***Indian Code of Civil Procedure*** and Indian authorities on the equivalent to our ***Section 7 of the Civil Procedure Act*** said:

"This shows only one intention on the part of the legislature in Indian and our Civil Procedure Act. That is to say, there must be an end to application 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".

The application in so far as it seeks orders of inhibition which were dismissed by this Court on 28th July 2017 is clearly res-judicata. It is also an abuse of the Court process and whereas what constitutes an abuse of the Court process is a matter to be determined on the particular circumstances of each case, there is no doubt that the conduct of filing a multiplicity of similar applications, after previous ones have been dismissed, can only be meant to annoy the other party and certainly does not promote the just, expeditious proportionate and affordable resolution of civil disputes which is the overriding objective of the ***Civil Procedure Act*** and Rules.

Ultimately therefore, the plaintiff's Notice of Motion dated 17th August 2017 lacks merit. It is hereby dismissed. While I am tempted to order the plaintiff to pay costs for what I consider to be an abuse of the Court process, I do not wish to set them any more against each other. I therefore order that each party meets their own costs as this is a family dispute.

B.N. OLAO

JUDGE

26TH JANUARY, 2018

Ruling delivered, dated and signed in open Court this 26th day of January 2018 at Kerugoya

Mr. Mwangi Ndegwa for Ms Thungu for the Defendants/Respondents present

Ms Kiragu for Mr. Mutinda for Plaintiff/Applicant present

Plaintiff present

1st Defendant present

2nd Defendant present

7th Defendant present

9th Defendant present.

B.N. OLAO

JUDGE

26TH JANUARY, 2018