



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**E.L.C CASE NO. 80 OF 2012**

**PURITY WANJIKU NDERITU.....1<sup>ST</sup> PLAINTIFF**

**PETER NDERITU JULIUS (Suing as Personal Representatives of the**

**Estate of NDERITU JULIUS (Deceased).....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HUMPREY WANG'OMBE KAHARIRI.....1<sup>ST</sup> DEFENDANT**

**SIMON WACIRA MURIUKI .....2<sup>ND</sup> DEFENDANT**

**RULING**

By their Notice of Motion dated 31<sup>st</sup> May 2012, the plaintiffs citing **Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules** sought the main order that the 2<sup>nd</sup> defendant, his relatives, agents or anyone else claiming under him be restrained by an order of injunction from up-rooting, cultivating, taking occupation, developing, or in any other way interfering with the land parcel No. KIINE/SAGANA/3721. That order of injunction was granted by this Court vide its ruling dated 9<sup>th</sup> September 2013. To-date, (over four (4) years later), the suit is yet to be heard. The record shows that on 12<sup>th</sup> July 2017, the plaintiffs' suit was dismissed for want of prosecution but was later reinstated on 4<sup>th</sup> December 2017 by consent following an application dated 14<sup>th</sup> July 2017.

I now have before me the plaintiffs Notice of Motion dated 20<sup>th</sup> November 2017 brought under the provisions of **Order 40 Rule 10 (1) (b)** and **Order 50 Rule 1 of the Civil Procedure Rules** and **Section 3A and 63 (e) of the Civil Procedure Act** seeking the following orders:

- 1. That this Honourable Court be pleased to reinstate the injunction orders granted on 8<sup>th</sup> September 2013 for preservation of the suit property pending the hearing and determination of the reinstated suit.***
- 2. That this Honourable Court be further pleased to order that the plaintiffs who were on the suit property at the time of the injunction orders were made and which status was disturbed after the dismissal of the suit to enter upon or into the land now in the possession of the 2<sup>nd</sup> defendant.***

The application is based on the grounds set out therein and is also supported by the affidavit of **PURITY WANJIKU NDERITU** the 1<sup>st</sup> plaintiff herein.

The gravamen of the application is that prior to this Court's ruling dated 9<sup>th</sup> September 2013 which granted the plaintiffs an order of injunction pending the hearing and the determination of the suit, the plaintiffs were in possession of the suit land where they were doing farming. However, the suit was dismissed on 12<sup>th</sup> July 2017 after which the defendants forcefully entered the land and started developing a fence with the intention of disposing it. Following the reinstatement of the suit, the plaintiffs seek the reinstatement of the injunction orders in order to protect the suit land from being wasted and disposed off pending the determination of the now reinstated suit.

The application is opposed and in his replying dated 5<sup>th</sup> December 2017, the 2<sup>nd</sup> defendant **SIMON WACHIRA MURIUKI** has deponed, inter alia, that there is no pending suit upon which any injunctive orders can be granted and therefore this application is incompetent, bad in law and lacks merit, that the plaintiffs are not in possession and the 2<sup>nd</sup> defendant has since taken possession of the land peacefully and has fenced it. Further, that the 2<sup>nd</sup> defendant has no intention of selling the suit land and an order of injunction would amount to evicting him at an interlocutory stage.

The application has been canvassed by way of written submissions which have been filed both by **Mr. GACHIE** advocate for the plaintiffs and **Mr. MAGEE WA MAGEE** advocate for the 2<sup>nd</sup> defendant.

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

As indicated at the start of this ruling, this Court had on 9<sup>th</sup> September 2013 granted the plaintiffs an order of injunction restraining the defendants from interfering with the land parcel No. KIINE/SAGANA/3721. This followed an application made under **Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules** which means that the order was an interlocutory injunction pending the disposal of the suit or until further orders. That order could therefore only last for a period of twelve months unless the Court decides otherwise. **Order 40 Rule 6 of the Civil Procedure Rules** is couched in the following terms:

***“When a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise”*** Emphasis added

It is common ground that this suit is yet to be determined and therefore, the orders granted on 9<sup>th</sup> September 2013 automatically lapsed after 9<sup>th</sup> September 2014 and could only be extended, for sufficient reason, before they lapsed. That was the position that I took in the case of **SIMON NJAGI NJOKA VS JAMES GATIMU MURIITHI & OTHERS KERUGOYA ELC CASE No. 414 of 2013** where I said:

***“My understanding of this provision is that once an interlocutory injunction is granted, the suit upon which that injunction is premised must be heard and determined within a period of twelve months. If for some reason the suit cannot be heard and determined within that period, then the onus is on the party in whose favour it was issued to go back to the Court with sufficient reason seeking an extension of the said order otherwise it shall lapse automatically by effluxion of time. The mischief that this rule was intended to cure was the practice whereby a party moves to Court, obtains an interlocutory injunction and while enjoying that relief, takes no steps towards prosecuting the suit. Indeed in some cases, such a party will employ all tactics to ensure that the main suit drags on ad infinitum. Such a situation is clearly not in keeping with the overriding objective of the Court under Section 1A and 1B of the Civil Procedure Rules which include the expeditious disposal of cases. Article 159 (2) (b) of the Constitution also provides that justice shall not be delayed. That is the statutory underpinning of Order 40 Rule 6 of the Civil Procedure Rules and notwithstanding the manner in which an order of interlocutory injunction is worded, it ‘SHALL LAPSE’ if the suit upon which it was made is not determined within twelve months unless, for sufficient reasons, the Court decides otherwise”.***

The **BLACK'S LAW DICTIONARY 9<sup>TH</sup> EDITION** defines the word lapse as:

***“The termination of a right or privilege because of a failure to exercise it within some time limit or because a contingency has occurred or not occurred”***

The order issued on 9<sup>th</sup> September 2013 could therefore only be extended by the Court before it had lapsed and only ***for “sufficient reasons”***. Counsel for the plaintiffs has, in urging me to reinstate the order of temporary injunction issued on 9<sup>th</sup> September 2013, referred me to the decision of Justice NJUGUNA in the case of ***RUMBA KINUTHIA & OTHERS VS NAIROBI CITY COUNCIL CIVIL APPEAL No. 200 of 2013 NBI (2015 e K.L.R)*** where the Court took the view that the overriding objective in civil litigation is to do substantive justice without undue regard to technicalities of procedure. JUSTICE NJUGUNA made the following observations while reinstating temporary injunctive orders that had lapsed:

***“Article 159 (2) of the Constitution makes it abundantly clear that the Court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say the procedural improprieties are to be ignored altogether. The Court has to weigh the prejudice that is likely to be suffered by the offending party if the Court grants the orders sought. The Court in that regard exercises judicial discretion”***

Counsel for the defendants has however submitted that by the time this suit was dismissed on 12<sup>th</sup> July 2017, there was no injunction in force and the order issued on 9<sup>th</sup> September 2013 had lapsed. In any case, counsel has added that this application is res-judicata.

In the case of ***DIRECTOR OF PUBLIC PROSECUTION VS JUSTUS MWENDWA KATHENGE & OTHERS C.A CIVIL APPEAL No. 201 of 2014 (2016 e K.L.R)***, the Court of Appeal reiterated the position that whereas orders of temporary injunction are vital in the preservation of properties in dispute, such orders are susceptible to abuse and certain guidelines have been developed in considering the grant of such orders. One such consideration is that a suit in respect of which an interlocutory injunction has been granted is not determined within twelve months from the date of the grant, the injunction lapses unless for some sufficient reasons the Court orders otherwise. The import of the above, in my view, is that such an order can only be extended upon application before it lapses because after twelve months, there is nothing to extend.

The plaintiffs herein seek reinstatement of the order that has since lapsed. To reinstate is defined in the same ***BLACK’S LAW DICTIONARY*** as:

***“To place again in a former state or position; to restore”.***

I think the inherent jurisdiction donated to this Court by ***Section 3A of the Civil Procedure Act*** can be invoked in a situation such as this where, a party is seeking reinstatement of an order of temporary injunction. However, such power must be exercised judicially on sound basis and not capriciously and some of the factors that this Court must take into consideration is the likely prejudice to be caused to the other party, any delays and the reasons for the same. In the ***RUMBA KINUTHIA*** case (supra), the Court found that the balance of convenience tilted in favour of the Applicant as he stood to be evicted from premises that he had occupied for some twenty years. The Court therefore took the view that no prejudice would be caused to the other party. In this case however, it is clear from the pleadings that following the lapse of the orders issued on 9<sup>th</sup> September 2013 and the dismissal of the suit on 12<sup>th</sup> July 2017, the 1<sup>st</sup> defendant took possession of the suit land and has been in peaceful open and un-interrupted occupation thereof and has fenced it for his use. He has deposed further that he has no intention of disposing it and in paragraph ten (10) of his replying affidavit, he makes the following important averment:

***“That I have no intention to dispose off the land, and indeed I have no objection to an order of inhibition being lodged at the Lands office pending the hearing of the case”.***

In view of that averment, this Court will make an appropriate order at the end of this ruling. What is clear however is that as the defendants are now in occupation of the suit land, any reinstatement of the order of

temporary injunction will be highly prejudicial to them as it will amount to an order of eviction. The plaintiffs are not therefore deserving of any exercise of this Court's discretion in that regard.

Secondly, there has been inordinate and un-explained delay in filing this application. The order sought to be reinstated was issued on 9<sup>th</sup> September 2013 and lapsed on 9<sup>th</sup> September 2014. This application was filed on 21<sup>st</sup> November 2017 some three (3) years after the initial order had lapsed. No explanation has been offered for that delay and as is now clear from the record, this suit was in fact dismissed on 12<sup>th</sup> July 2017 which clearly shows that the plaintiffs went to sleep having obtained the order of temporary injunction. Equity, it is said, aids the vigilant and not the indolent. A Court will therefore refuse its aid to a party who has slept on his rights and is guilty of laches. That is the position in which the plaintiffs find themselves in the circumstances of this case where it took the dismissal of their suit to jolt them into activity. I am not persuaded that they deserve the reinstatement of the orders issued on 9<sup>th</sup> September 2013 and I must reject any invitation to do so.

Counsel for the 2<sup>nd</sup> defendant has also submitted and rightly so in my view, that this application is res-judicata. The doctrine of res-judicata applies to both suits and applications whether they be final or interlocutory – **KANORERO RIVER FARM LTD & OTHERS VS NATIONAL BANK OF KENYA LTD 2002 2 K.L.R 207**. This Court by its ruling dated 9<sup>th</sup> September 2013 granted the plaintiffs an order of temporary injunction as sought in paragraph (b) of the Notice of Motion dated 31<sup>st</sup> May 2012. To grant prayer (2) of the Notice of Motion dated 20<sup>th</sup> November 2017 would be contrary to the rule of res-judicata provided for under **Section 7 of the Civil Procedure Act**. Further, as I have already stated above, to grant the plaintiffs the order that they

***“..... enter upon or into the land now in the possession of the 2<sup>nd</sup> defendant”***

would amount to evicting the 2<sup>nd</sup> defendant from the suit land before the suit is determined. This Court cannot do that at this interlocutory stage and that prayer must also be dismissed.

Having said so however, the 2<sup>nd</sup> defendant has in paragraph ten (10) of his replying affidavit deponed that he has no intention of disposing off the suit land and has no objection to an order of inhibition being lodged at the Lands office. This Court will therefore make the following orders:

- 1. The plaintiffs Notice of Motion dated 20<sup>th</sup> November 2017 is dismissed with costs to the 2<sup>nd</sup> defendant.***
- 2. An order of inhibition be placed on land parcel No. KIINE/SAGANA/3721 restricting any transfer and/or charge of the said land until the suit is heard and determined or until further orders by this Court.***
- 3. The plaintiffs to ensure that this suit is heard and determined within the next six (6) months otherwise that order shall lapse.***

**B.N. OLAO**

**JUDGE**

**28<sup>TH</sup> FEBRUARY, 2018**

Ruling dated, delivered and signed in open Court this 28<sup>th</sup> day of February, 2018 at Kerugoya

Mr. Khayega for Mr. Gachie for Plaintiffs present

Ms Kiragu for 2<sup>nd</sup> Defendant and also holding brief for Mr. Ndeda for 1<sup>st</sup> Defendant present.

**B.N. OLAO**

**JUDGE**

**28<sup>TH</sup> FEBRUARY, 2018**