



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 167 OF 2017

GRACE RUGURU MWANGI.....PLAINTIFF

VS

FRANCIS MWANGI KANYURU.....1ST DEFENDANT

JOSEPH MWANGI MANA.....2ND DEFENDANT

SIPHIRA WAMBUI NDAIRE.....3RD DEFENDANT

MARY WANGARI MAINA.....4TH DEFENDANT

CHIEF LAND REGISTRAR, MURANGA.....5TH DEFENDANT

RULING

1. Grace Ruguru Mwangi, the applicant herein brought an application dated 21.09.2017 seeking to enjoin Peter Mwangi Njuguna as a defendant in this suit, secondly to restrain Peter Mwangi Njuguna, his agents servants and anyone authorized by him from interfering, trespassing upon, dealing with, wasting away, transferring and or in any other way adversely touching L.R NO. LOC2/KANGARI/443 and any purported subdivision thereof and lastly that SPMCC No. 73 of 2015 at Kigumo be transferred to High Court at Muranga to be consolidated with this suit.

2. The application is premised on the following grounds; That injunctive orders were issued in SPMCC No. 73 of 2015 at Kigumo against the 4th defendant and the parties herein had an agreement for the orders to subsist pending determination of ELC No. 239 of 2015 at Nyeri High Court (now current suit). Those two suits relate to the same subject matter. That Lady Justice Waithaka stayed ELC No. 239 of 2015 pending the determination of the Kigumo suits. That the intended party has since acquired title documents to the suit property therefore he has become a party whose presence is necessary in this suit.

3. The application is supported by the affidavit of Grace Ruguru Mwangi the applicant herein in which she largely reiterates the grounds on the face of the application. She deposes that the 4th defendant and the intended party have come to the suit land with the intention of subdividing or wasting the land in order to defeat the objective of this case. She has invited the Court to consider principles of equity to grant the prayers sought in order to preserve the subject matter.

4. The 1st to 4th defendants jointly with the intended 6th defendant filed their grounds of opposition and replying affidavits dated 15.11.2017.

5. The 1st defendant on behalf of the 2nd to 4th defendants deposes that his understanding was that the current suit was declared res judicata then stayed pending determination of the Kigumo SPMCC no. 73 of 2015 by the ELC Court at Nyeri. Based on that understanding the applicant cannot seek to enjoin new parties to a res judicata suit. Further that the applicant has concealed material information from this Court on the fact that the Kigumo SPMCC no 73 of 2015 was successfully withdrawn and the applicant herein has since appealed to this Court against that withdrawal therefore the withdrawn suit cannot be transferred. He contends that the conduct of the applicant amounts to gross abuse of Court process and should be stopped.

6. The intended party in his replying affidavit in addition to reiterating the main grounds of opposition raised by the 1st to 4th defendants, contends that the applicant herein has admitted he is the sole registered owner of Land Parcels No. LOC2/KANGARI/5048 and 5049, that being so he enjoys full rights of ownership unless and until the said titles are cancelled by a Court of law. That the applicant is seeking injunctive orders against a non-existent parcel of Land No. LOC 2/KANGARI/443. That the applicant on the 18.8.2017 sent goons to his property who destroyed his iron sheets, building and encroached on the boundary. He maintains that the applicant has come to Court with unclean hands and should be stopped.

7. When the matter came up for hearing parties agreed to dispose of the application by way of written submissions. Parties also recorded a consent to maintain the status quo pending determination of the application.

8. The applicant filed her submissions dated 5th December 2017. She maintains that the intended party is a necessary party in this suit as he is the current holder of title documents to the suit property. That the transfer to the intended party by the 4th defendant was done during the subsistence of a Court order restricting such dealings. Further that the final orders sought in this suit will adversely affect the titles of the intended party. She claims to be in possession of the suit property hence she stands to suffer irreparable loss should the orders sought be denied. Further that the intended party has upset the status quo by trespassing on the suit land. She contends that the ruling delivered in Nyeri on 25.02.2016 did not declare the suit *res judicata* but stayed the suit thus she claims the suit is still alive. She has referred the Court to various case authorities in support of her claim. I have looked at the authorities to wit; Enock Kirao Muhanji Vs Hamid Abdalla Mbarak ELC No 58 of 2012 and Nancy Mwangi T/A Worthline Marketers Vs Airtel Networks (K) Limited and 4 others HCCC No. 275 of 2013 and my finding is that the authorities are that save for *res judicata* the gravamen of the cases are on striking out and dismissal of a case. They are distinguishable from the issues in this case.

9. The 1st to 4th defendants together with the intended 6th defendant filed their joint submissions dated 11.12.2017. They firmly maintain that the current suit was declared *res judicata* and as such no further reliefs can be granted to the applicant by this Court unless she prefers an appeal. Further that new parties cannot be enjoined to a suit that is *res judicata*. That the application is devoid of merit as the injunctive orders have been sought against a non-existent parcel of land. The application is also bad in law as it seeks to transfer the Kigumo SPMCC no. 73 of 2015 to the High Court in Murang'a instead of the ELC Court. That the Kigumo suit was indeed withdrawn such withdrawal was not in exception to the injunctive orders.

Determination

10. Having carefully reviewed the application, the responses and the rival submissions of the parties herein the issues for determination are whether the suit is *res judicata*; whether the order staying proceedings in this case is still in force; whether Peter Mwangi Njuguna can be enjoined as a defendant in the suit; whether SPMCC No. 73 of 2015 at Kigumo can be transferred to the ELC Court Muranga; whether an injunction can issue against the said intended defendant.

11. The question whether the suit herein is *res judicata* requires to be addressed. Section 7 of the Civil Procedure Act states; -

“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”.

12. The 1-5th defendants and the intended 6th defendant have submitted that this suit is *res judicata*. That the plaintiff's application dated 4/9/15 offended section 6 of the Civil Procedure Act (i.e was *res judicata*). I have looked at the ruling delivered by my Sister Judge Lady Justice L Waitthaka on the 25/2/16 where on Para 17 she held that the injunction issued against the 4th defendant in Kigumo SPMCC No 73 of 2015 rendered the then application for injunction against the 1-5th Defendants *res judicata*. Further under Para 18 the learned Judge pronounced herself that having found that the current suit offends the provisions of section 6 of the Civil Procedure Act, the orders were declined and stayed this suit pending the determination of the previously instituted suits. The two paragraphs are reproduced as follows;

“Para 17 -The fact that an injunction was issued against the 4th respondent in Kigumo SPMC'S Civil Case No. 73 of 2015 renders the current application *res judicata*. In this regard see section 7 of the Civil Procedure Act which provides as follows; -

“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.”

Para 18-Having found that the current suit offends the provisions of Section 6 of the Civil Procedure Act, I decline to grant the Orders sought and stay the suit pending the hearing and determination of the previously instituted suits”. **[emphasis is mine]**.

13. It is my understanding that the ruling declared the application for injunction *res judicata*. It is not the suit. In my respectful view this suit is still existing and alive. The suit was stayed pending the hearing and determination of the other previously instituted suits. I have looked at the record and the following suits relating to the matter are pending to wit; Civil suits No.s 7 of 2003 Muranga, No 23 of 2003 at Thika, No 652 of 2004 , Thika , No 59 of 2004 , Thika , No 252 of 2009 Kigumo, No. 48 of 2004 Kigumo and No 73 of 2012 Kigumo.

14. Are the orders of stay of proceedings still in force? Stay of proceedings as stated in section 6 of the Civil Procedure Act says;

“No Court shall proceed with the trial of any suit or proceeding 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 any other Court having jurisdiction in Kenya to grant the relief claimed”.

The language of section 6 above is mandatory. It is a bar to a jurisdiction of a Court

Blackstone dictionary, 9th Edition defines stay of proceedings as;

“A stay is a suspension of a case or a suspension of a particular proceeding within a case. A judge may grant a stay on the motion of a party to the case or issue a stay sua sponte, without the request of a party. Courts will grant a stay in a case when it is necessary to secure the rights of a party. A stay of proceedings is the stoppage of an entire case or a specific proceeding within a case. This type of stay is issued to postpone a case until a party complies with a Court order or procedure.

The meaning of “proceeding” is given as;

“Proceeding ‘is a word much used to express the business done in Courts. A proceeding in Court is an act done by the authority or direction of the Court, express or implied. It is more comprehensive than the word ‘action’ but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgement. As applied to actions, the term “proceeding” may include – (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest , attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in the action; (7) the trial; (8) the judgement; (9) the execution;(10) proceedings supplementary to execution, in code practice; (11)the taking of the appeal or writ of error; (12) the *remittitur*, or sending back of the record to lower Court from the appellate or reviewing Court; (13) the enforcement of the judgement, or a new trial, as may be directed by the Court of last resort.” **Edwin E.Bryant, *The Law of Pleading Under the Codes of Civil Procedure 3-4(2d ed.1899)***.

15. A Court may stay a proceeding for a number of reasons. In this instance case the parties have about 7 other pending cases in the Lower Courts involving the same subject matter and closely related parties. In this situation this Court issued a stay in deference to the other Court. Proceeding is a word used to describe the business of the Court.

A stay of proceedings generally being a bar to a Court’s jurisdiction, there is no evidence tendered before Court that the above ruling has been appealed or set aside. The applicant has also not produced evidence before this Court that all the previously instituted suits have been heard and determined to pave way for this suit to be heard. In that regard it is my respectful view that the prosecution of this suit still stands stayed and any attempt to circumvent the ruling of the Honourable Court is moot. The act of the plaintiff filing this application amounts to an abuse of the process of the Court. This application is a proceeding in the definition given above.

16. The 1st Defendant has alluded in his replying affidavit that the suit to wit Kigumo SPMCC No 73 of 2015 was withdrawn and an appeal has been preferred by the applicant to this Court. A copy of the Memorandum of Appeal was enclosed. This has not been controverted by the Applicant. The applicant neither disclosed it in her application. In view of this disclosure the application for transfer of the SPMCC No 73, Kigumo then fails on account of the withdrawal. In view of the pending appeal it would only be fair and just that the appeal is allowed to run its natural course. Be that as it may, it would appear that the suit has not been determined with finality.

17. As regards the matter of joinder of the 6th Defendant, it is the case of the applicant that the 6th defendant Peter Mwangi Njuguna has become a necessary party to the suit having been registered as the owner of the resultant subdivisions of LR No.s Loc 2/Kangari /5048 & 5049. It has not been explained to the Court how these parcels relate to Loc 2 /Kangari/443. Copies of titles for LR No.s Loc 2/Kangari /5048 & 5049 in the name of the intended 6th Defendant have been enclosed, however the application refers to parcel Loc 2 /Kangari/443 or any purported subdivisions. Order 10(2) of the Civil Procedure Rules permits joinder as thus;

“ The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

18. In view of the stay of proceedings in this suit granted by the Court on the 25.2.2016 new parties cannot be enjoined while stay orders subsist. The application further offends section 6 of the Civil Procedure Act. The same is declined.

19. In respect to the application for injunction against the 6th defendant, the same is declined on account of the stay aforestated.

20. In the end the Applicants application is devoid of merit and the same is dismissed with cost to the Respondents.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 23RD DAY OF FEBRUARY 2018.

J.G. KEMEI

JUDGE