



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 65 OF 2017

PETERSON MAINA KIMITI.....PLAINTIFF/APPLICANT

VERSUS

ESTHER WACHUKA NJOROGE.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff by a plaint dated 8th March 2013 and filed in court on the 13th March 2013 instituted the instant suit in the capacity as the legal representative of WAMAHIGA NJOROGE MUTITU-Deceased, against the Defendant/Respondent whereby he sought for an order of temporal injunction
2. The Plaintiff further sought orders for A declaration that the mother title in respect of the suit premises and the 15 resultant title deed on the sub-division viz Title Nos LAIKIPIA/MARMANET/2222-2236 (both inclusive) are a nullity in law as the suit premises was and still constitutes part of the Estate of the deceased herein and therefore the said title deeds be cancelled to await the filing of a Succession Cause in respect of the deceased's Estate so as to determine the distribution of the suit premises.
3. Cost of the suit.
4. Simultaneously with the plaint, the Plaintiff filed a notice of motion application seeking orders of temporary injunction against the Defendant/Respondents pending the hearing and determination of the suit.
5. The grounds in support of the application and the affidavit sworn in support disclosed the facts that an agreement between the Plaintiff and the deceased one Wamahiga Njoroge Mutitu was entered into on the 6th June 1996 wherein the Plaintiff purchased 4 acres out of 48 acres of the parcel No 373 Marmanet settlement scheme No 220 in Laikipia District which parcel of land was registered in the name of the deceased herein.
6. That the plaintiff agreed to purchase the said the subject suit from the deceased for Kenya shillings 320,000/=. (Three hundred and twenty thousand shillings) That before a title deed could be executed in terms of the agreement, the Vendor died wherein his wife the Defendant herein fraudulently caused the subdivision of the parcel of land and is on the verge of evicting him.
7. On the 14th March 2013, orders were issued to the effect that service be effected for inter-parties hearing of the said application dated the 8th March 2013.
8. Subsequently the Plaintiff filed an amended Notice of motion dated the 14th March 2013 in which he amended the title of the application to reflect that he was now suing in his own capacity and not as the legal representative of the deceased.
9. The Defendant filed their replying affidavit dated the 19th June 2013 in response to that application, which affidavit was filed on the 20th June 2013
10. The matter was subsequently not prosecuted, from the 8th May 2013, when parties were lastly in court, up to the 4th April 2017 when, the Plaintiff responded to a Notice to show Cause why the same should not be dismissed for want of prosecution.
11. On the said date, Counsel for the plaintiff explained to court that their inability to prosecute the matter had been occasioned by the court itself in that on the various times they had fixed the matter for hearing, the court was not sitting and that on the last attempt to fix the same for hearing, the Court Diary had been full and as such they could not secure a hearing date.
12. The plaintiff further submitted that the defendant had filed a similar case against the Plaintiff being ELC No. 158 of 2017 and pleaded that the matter should not be dismissed but be heard together.

13. Parties were in agreement that both files be mentioned together so that the court could give directions and more so on the consolidation.
14. The court complied and had both matters mentioned on the 29th May 2017 wherein it was noted that both matters touched on the same subject matter and between the same parties.
15. On the 31st May 2017 the court ordered for consolidation of both files with file No 65 of 2017 being the lead file and further that the application dated 14th March 2013, be heard for the expeditious disposal of the suit herein.
16. That before the said application could be heard, another application for injunctive orders dated the 27th September 2017 which was similar to the applications dated 8th March 2013 and 14th March 2013, was filed by the plaintiff herein. The court directed that there be service effected upon the Defendant.
17. Upon being served with the Plaintiff's Notice of Motion dated the 27th September 2017, the Defendant filed a Notice of Preliminary Objection dated 29th September 2017 to the Plaintiff's application, seeking that it be struck out on the grounds that:
- i. The Plaintiff's application was vexatious and an abuse of the court process in view of a similar pending application dated the 14th March 2013 seeking the same orders.
 - ii. That similar orders had been issued in the Nakuru HCCC No 32 of 2004 were discharged by a ruling delivered on the 30th November 2012 attached to the Defendant's replying affidavit were filed on the 29th June 2013.
18. On 18th October 2017, by consent, parties agreed to dispose of the application on the Preliminary Objection first by way of oral submissions which was urged by the Defendant/Applicant's counsel in the absence of the Plaintiff/Respondent's Counsel who were not present in court but who were aware of the hearing date having had taken the same by consent in court.
19. The Defendant/Applicant's oral submission was to the effect that the Plaintiff/Respondent's application dated the 27th September 2017 should be struck out as it was a replica of similar pending applications dated the 8th March 2013 and 14th March 2013 which sought for the same orders and was therefore an abuse of the court process. Counsel submitted that similar orders had been granted in the Nakuru HCCC No 32 of 2004 but were discharged by a ruling delivered on the 30th November 2012. The said ruling was attached to the Defendant's replying affidavit filed on the 29th June 2013.
20. I have gained sight of the Plaintiff/Respondent's applications dated the 8th March 2013, 14th March 2013 and 27th September 2017 and find that the same are a replica of each other and seek similar orders of injunction against the Applicant/Defendant.
21. I also note that vide the ruling delivered in Nakuru HCCC No 32 of 2004 the Plaintiff/Respondent herein had filed a similar application dated the 24th March 2011 wherein the issue of injunction had been canvassed and conclusively determined.
22. Section 7 of the Civil Procedure Act 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.** (Emphasis added).*
23. The provisions of Section 7 of the Civil Procedure Rules, together with the decisions by the various Courts of concurrent and appellate jurisdiction, calls the principle of *res judicata* into play. The facts on which the application dated 27th September 2017 is sought are substantially the same as those on which injunction was sought previously.
24. The learned judges of the Court of Appeal noted that the Plaintiff had filed several suits being **HCCC No 693 of 1996 (OS)**, and **HCCC No 619 of 1999** which were similar in nature to **HCCC No 225 of 1998** and in which the Plaintiff sought similar orders which were dismissed by both Ransley, J (as he then was) and Okwengu, J (as she then was). The Court of Appeal also noted that the Plaintiff had come under different provisions of the law but seeking the same orders that had been denied in other earlier applications by the Court.
25. The sentiments of the Court of Appeal on the incessant and numerous applications that the Plaintiff had filed were:
- It will not escape anybody's observation that although this application was brought under several provisions of the law, the main thrust is that it was essentially an application seeking another injunction order. A rose flower by any other name will smell the same.*
26. It should be noted that although the Plaintiff has been zealous to seek justice, yet the filling of numerous applications seeking the same relief is not an appropriate way of exerting a *bona fide* zeal by a litigant. Such path may be interpreted to be an attempt to confuse the Court and circumvent its clear intellect on justice in this matter.
27. The upshot of all the foregoing is that, the applications by the Plaintiff dated 8th March 2013, 14th March 2013 and 27th September 2017 in so far as they relates to injunctive orders come into the ambit of the provisions of Section 7 of the Civil Procedure Act in that they relate *directly and substantially in issue with a former suit namely Nakuru HCCC No 32 of 2004 which was heard and finally decided.*

28. In the premises thereof I hereby do dismiss applications dated 8th March 2013, 14th March 2013 and 27th September 2017, with cost for being Res judicator.

29. Parties to comply with order 11 of the civil procedure rules within the next 2 days of the delivery of this ruling so that the matter may be set down for hearing and determination.

Dated and delivered at Nyahururu this 8th day of February 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE