REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 54 OF 2016

CECILIA GATHONI WANGARE.....PLAINTIF

VERSUS

FRANCIS WASHIALI TSALIWA

GOOD SAMARITAN VISION.....DEFENDANTS

RULING

1. Before me for determination is a Notice of Motion Application dated 29th March 2017. The Plaintiff Cecilia Gathoni Wangare is praying for injunctive orders to restrain the Defendants-Francis Washiali Tsaliwa and Good Samaritan Vision from entering, remaining in, trespassing, surveying and/or carrying out any sub-divisions, constructing any access road and/or interfering in any manner with the Plaintiff's Plot No. Kilifi/Mtondia 945 pending the hearing and determination of this suit.

2. The Application is premised on four main grounds listed on the body thereof as follows:-

i) That the Plaintiff is the absolute registered owner of the parcel of land known as Kilifi/Mtondia 945;

ii) That the Defendants have without any colour of right trespassed and entered into the said parcel of land with a view of carrying out sub-divisions forcefully without the consent and express authority of the Plaintiff;

iii) That despite the fact that the Defendants have knowledge that the matter is pending in Court, they still want to go ahead with sub-dividing the land into several portions and clear access roads; and

iv) That since this suit is scheduled for hearing on 12th June 2017, it is only fair and in the interest of justice that this application is granted.

3. In a Replying Affidavit sworn on 10th May 2017 and filed herein on 11th May 2017, one Mwasaha Mwagambo who describes himself as the founder and Director of the 2nd Defendant herein denies that they have trespassed into the Plaintiff's parcel of land as described or at all. The 2nd Defendant avers that the correct position is that it purchased the land it occupies from the 1st Defendant in the year 2002 and it has always occupied the land since the transfer to its name on 10th April 2002. It is accordingly the 2nd Defendant's case that it would be unfair to have an order requiring them to cease from entering or remaining on the land they have always occupied.

4. Further, the 2nd Defendant avers that the Court has had occasion to make a decision in this matter in Mombasa Judicial Review Application No. 64 of 2011; **Republic –vs- The land** ***Registrar Kilifi & Good Samaritan Vision, Ex parte Cecelia Gathoni Wangare***, wherein the Plaintiff's entire application was thrown out with costs. They therefore urge the Court to find that this matter is res judicata as the parties and the subject matter of the dispute is the same.

5. I have considered the Application as well as the response thereto. I have equally considered the submissions filed herein by the Learned Advocates for the parties.

6. The question as to whether or not this matter is res judicata would affect the jurisdiction of this Court to hear and determine this matter and it is therefore apt that I consider it first. The doctrine of res judicata in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act in these terms:-

"7. Res Judicata

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."

7. A perusal of the Judgment of the Honourable Muriithi J delivered on 30th June 2015 in the said Mombasa JR No. 64 of 2011 reveals that the parties therein were essentially the same ones before me. The Plaintiff herein was the ex parte applicant in that matter while the 2nd Defendant was enjoined as the Interested Party. The Land Registrar, Kilifi who is not a party herein was the Respondent in that application. At paragraph 1 of the Judgment, it is evident that the Plaintiff herein sought to be granted Judicial Review orders of:-

(a) Certiorari removing to(that) Court and quashing the decision of the respondent to register and to issue(the) Interested Party a title deed in respect of all that piece of land known as Kilifi/Mtondia/941

(b) Mandamus compelling the respondent to cancel the Interested Party's title deed in respect of all that parcel of land known as Kilifi/Mtondia/941

(c) Mandamus compelling the respondent to register and to issue the Interested Party with a title deed that does not cover the land known as Kilifi/Mtondia/945; and

(d) Mandamus compelling the respondent to restore the registration of the ex parte applicant as the sole registered proprietor of all that parcel of land known as Kilifi/Mtondia/945.

8. As was however stated in ***Karia & Another –vs- the Attorney General & Others(2005)1 EA 83***, even where the parties are the same, it still behoves this Court to carry out an enquiry to find out if the suit was finally determined on merit for the doctrine of res judicata to apply. Declining to grant the Judicial review orders sought in JR N. 64 of 2011 aforesaid, Muriithi J delivered himself at paragraphs 21 and 22 of his Judgment as follows:

"21. Clearly, the dispute as to the existence of the two parcels of land the subject of these Judicial review proceedings calls for (a) determination of the merits of the decision to issue a title to the Interested Party, not merely the process of the exercise by the Registrar of his powers or mandate under (the) then applicable Registered Land Act, Cap 300 Laws of Kenya. For the Court to determine that a parcel of land No. 945 was created by subdivision of original Plot No. 941 and transferred to the applicant prior to a purported transfer and registration of the said original parcel of land No. 941 to the Interested Party, the Court will have to take evidence from the Department of Surveys responsible for the subdivision of land, the private surveyor who made the report attached to the applicant's supplementary affidavit, the owner of the land who purportedly transferred the land to the two disputant parties- the exparte applicant and the Interested Party-the Land Registrar and the parties themselves with possible witnesses of the respective sale agreements and transfers.

22. The need for full trial of the question of existence and ownership of Plot No. 945 and its prior registration in the name of the ex-parte applicant before the subsequent registration of Plot No. 941 in the name of the Interested Party, which was the basis of these Judicial Proceedings, requires direct evidence to be adduced viva voce with cross-examination for veracity of witnesses and therefore calls for a procedure amenable to full hearing on the merits such as a suit by plaint or originating summons or by (a) constitutional petition before the Environment and Land Court or the Constitutional Division of the Court. The judicial review Court is wholly unsuited for this type of inquiry/hearing."

9. Evidently, the Learned Judge did not consider and determine the dispute between the parties on the merits as he, rightfully in my view, found the unique judicial review jurisdiction unsuitable for the kind of inquiry that was required to determine the dispute herein. The contestation that this matter is res judicata therefore cannot hold as indeed the Plaintiff herein followed the advise of the Learned Judge when she subsequently brought this dispute for determination by this Court.

10. As to whether or not the Plaintiff is entitled to an interlocutory injunction at this stage, the principles for the grant thereof are now well known. In ***Nguruman Limted –vs- Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012***, the Court of Appeal restated those principles as follows:-

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) Establish his case only at a prima facie level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted, and

(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

11. Explaining what would constitute a prima facie case in a matter such as this, the Court of Appeal in **Nguruman (supra)** proclaimed that:-

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and

there must be an urgent necessity to preventt the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violations…....”

12. In the matter before me, the Plaintiff contends that she is the absolute registered owner of the parcel of land known as Kilifi/Mtondia 945 which parcel of land the Defendants have trespassed onto with a view to carrying out sub-divisions thereon. It is the Plaintiff's case that the claim by the Defendants that they own Plot No. Kilifi/Mtondia/941 is misconceived as the said Plot was sub-divided on 21st March 2001 after which Plot Nos 944, 945 and 946 were created. She has annexed a Survey Record marked "CGW-2" as proof of the sub-division.

13. On their part, the 2nd Defendant contends that they bought Kilifi/Mtondia/941 from the 1st Defendant in the year 2002 and that they have a fully functional institution and school on the land.

14. I note that the Plaintiffs do not deny the existence of the 2nd Defendant's institution and school. On the contrary, at Page No.2 of their submissions in support of the application, the Plaintiff's state as follows:-

"There is no legal entity registered as Good Samaritan Vision and if at all it is there is an imagination (sic)

The individual who purports to trade in the name and style (of) Good Samaritan Vision is known by the name of Mwasaha Mwangambo claiming to be the founder and director of the named orphan/poor child care support institution is actually not a founder and neither a director(sic) though he was employed as a manager to run the Children Care Centre by the sponsor Mr. Arngrim Yutterhus a Norwegian national who purchased the said Plot from the 1st Defendant/Respondent and paid Kshs 1,300,000/= consideration.

15. Arising from the foregoing, it is evident that the 2nd Defendant has a school or institution on the disputed parcel of land. This fact is not disputed by the Plaintiff. If the orders sought herein were to be granted, the same would certainly interfere with the running of the institution. While the Plaintiff submits that the 2nd Defendant does not exist as a legal entity, I note that it is the same Plaintiff that sued the 2nd Defendant in the JR application No. 64 of 2011 and in the matter herein.

16. From the material presented before me, it is apparent that both the Plaintiff and the 2nd Defendant are registered proprietors of two different parcels of land registered as Nos Kilifi/Mtondia 945 and Kilifi/Mtondia 941 respectively. Both titles appear to refer to the same parcel of land on the ground. Before this Court can make any orders that may affect either party and/or amount to an eviction of one party herein, it is imperative that this dispute is first heard and determined in full.

17. Accordingly, I decline to issue the orders sought by the Plaintiff. However, in view of the special circumstances of this case and more so the fact that there appears to be two certificates issued in reference to the same parcel of land, the Defendants are hereby restrained from disposing the disputed parcel of land to 3rd Parties pending the hearing and determination of this suit.

18. Each party shall bear their own costs.

Dated, signed and delivered at Malindi this 15th day of March, 2018.

J.O. OLOLA

JUDGE