



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 178 OF 2016

JOYCE NANCY KABIRU PLAINTIFF/APPLICANT

VERSUS

FAULU MICRO-FINANCE BANK LIMITED 1ST DEFENDANT/RESPONDENT

PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT/RESPONDENT

CREATIVE LINKS ENTERPRISES LTD 3RD DEFENDANT/RESPONDENT

RULING

On 16th June 2017, this Court delivered a ruling dismissing with costs to the 1st and 3rd defendants, the plaintiff's Notice of Motion dated 2nd November 2016 which sought the main order that a temporary injunction do issue restraining the defendants, their agents and/or servants from transferring, alienating and/or otherwise interfering with the plaintiff's right in any way on land parcel No. MWERUA/MUKURE/1673 or any part thereof until the hearing and determination of this suit. That application was brought under the provisions of **Order 40 Rules 1 and 2 of the Civil Procedure Rules**.

I now have before me a similar application dated 28th September 2017 also premised under the provisions of **Order 40 Rules 1 and 2 of the Civil Procedure Rules** and citing also **Section 68 of the Land Registration Act and Section 1A, 1B and 3A of the Civil Procedure Act** seeking the following orders:

1. Spent.

2. Spent.

3. That the Honourable Court be pleased to issue a temporary injunction against the 3rd defendant restraining by itself, its agents and/or servants from evicting and/or removing the plaintiff, her family, her agents and/or servants from title number MWERUA/MUKURE/1673 until the hearing and determination of the main suit.

4. Spent.

5. That the Honourable Court do order that the status quo in respect to the title number MWERUA/MUKURE/1673 be maintained, the plaintiff is in possession of the suit land, until the hearing and determination of the main suit.

6. That the Honourable Court do issue inhibition in respect to title number MWERUA/MUKURE/1673 until the hearing and determination of the main suit.

7. That the Land Registrar Kirinyaga and the Officer-In-charge Baricho Police Station do ensure compliance with the Court order.

8. That costs of this application be provided for.

The application is predicated on the grounds set out therein and supported by the affidavit of the plaintiff **JOYCE NANCY KABIRU**.

The gravamen of the application is that the plaintiff and her family are in possession of the parcel No. MWERUA/MUKURE/1673 (the suit property) which they have fully developed and is the source of their livelihood. However, the suit property was transferred to the 3rd defendant by the 1st defendant following a public auction conducted by the 2nd defendant. That public auction is the subject of this suit in

which the plaintiff is seeking orders that the same was void and also the cancellation of the title issued to the 3rd defendant as well as a permanent injunction to restrain the defendants from trespassing, evicting, removing, alienating and/or otherwise interfering with the plaintiff's rights over the suit property. The plaintiff further avers that the 3rd defendant has threatened to evict the plaintiff and her family and also transfer the suit property to a third party and her husband **STANLEY GAKUYA GICHIRA** has been charged with the offence of forcible detainer contrary to Section 91 of the Penal Code in Criminal Case No. 1057 of 2017 at Baricho Court.

The application is opposed and in a replying affidavit sworn by **JOSEPH K. GACHAKI** on behalf of the 3rd defendant, it is deponed, inter alia, as follows:

- 1. That a similar application dated 2nd November 2016 seeking to restrain the 3rd defendant from interfering with the suit land was dismissed with costs on 16th June 2017 and therefore this application should be struck out for being res-judicata.**
- 2. That this Court had made a finding that even if the plaintiff were to succeed in the main suit, her remedy would be damages and so this application lacks legal foundation.**
- 3. That the suit property was lawfully transferred to the 3rd defendant and a title issued to it and the plaintiff was never in possession thereof and instead, it is her husband STANLEY GAKUYA GICHIRA who had leased out the tea on the same and was issued with a notice to vacate.**
- 4. That the 3rd defendant has since taken possession of the tea bushes on the property and even delivered a total of 494 Kg of the tea leaves to MURUNGA TEA FACTORY.**
- 5. That STANLEY GAKUYA GICHIRA lives alone in the house on the suit property but has declined to vacate thus giving rise to the Criminal Case No. 1057 of 2017.**

The other defendants did not file any responses.

The application was canvassed by way of written submissions which have been filed both by **Mr. IKAHU NGANGA** advocate for the plaintiff and **Mr. MAGEE WA MAGEE** advocate for the 3rd defendant.

I have considered the application, the reply by the 3rd defendant and the submissions by counsel.

The 3rd defendant has raised the issue that this application is res-judicata and should therefore be struck out. I think that must be the starting point in this ruling.

Res-judicata is provided for under **Section 7 of the Civil Procedure Act** 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”.

Explanation 4 of that provision provides as follows:

“Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit”.

At the commencement of this ruling, I pointed out that on 16th June 2017, I dismissed a similar application by the plaintiff also seeking orders of temporary injunction restraining the defendants from trespassing, alienating, and/or otherwise interfering with the plaintiff's right to the suit property. It is on that basis that counsel for the 3rd defendant **Mr. MAGEE WA MAGEE** has submitted that this application is res-judicata and should be struck out. There is merit in that submission. The issue that arises is whether an interlocutory proceeding and subsequent ruling is also covered under the general principle of res-judicata as provided for under **Section 7 of the Civil Procedure Act**. This was considered in the case of **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 considered whether a matter of interlocutory nature decided in one suit can be the subject of another similar application in the same suit. The Court of Appeal held that the principle was applicable and said:

“.....there must be an end to applications 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”.

That decision of a superior Court is binding on this Court and I must abide by it. See also the majority decision in **MBURU KINYUA VS GACHINI TUTI 1978 K.L.R 69.**

It is of course correct that in the application now before me, the plaintiff has introduced a new prayer seeking an order of inhibition and also an order for status quo which were not the subject of the earlier application dismissed on 16th June 2017. However, the introduction of those

new prayers does not defeat the plea of res-judicata because explanation No. 4 of Section 7 of the Civil Procedure Act which I have already referred to above makes it clear that such matters ought to have been made a ground of attack or defence in the previous application. The prayer for inhibition and status quo were matters that could have been brought to the fore in the previous application. In HENDERSON VS HENDERSON (1843) 67 E.R 313 it was held that:

‘..... Where a given matter becomes the subject of litigation in and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject contest but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case’.

It is clear therefore that the plaintiff’s Notice of Motion dated 28th September 2017 is res-judicata and caught up with the provisions of Section 7 of the Civil Procedure Act as a similar application was dismissed on 16th June 2017. This Court cannot therefore go into the merits or otherwise of the application which I must order to be struck out.

The up-shot of the above is that the plaintiff’s Notice of Motion dated 28th September 2017 is struck out with costs to the 3rd defendant.

B.N. OLAO

JUDGE

7TH MAY, 2018

Ruling signed and dated at Bungoma this 7th day of May, 2018.

To be delivered at Kerugoya on notice.

Ruling read and Signed on 26th June 2018

S.N.MUKUNYA

JUDGE

26TH JUNE, 2018