



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 185 OF 2017

ELIJAH NGUNJIRI MWENENIA.....PLAINTIFF/APPLICANT

VERSUS

MOSES MWANGI KIRICHU.....1ST DEFENDANT/RESPONDENT

SAMUEL WNAJOHI KIRICHU.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 27th November 2014 and filed on the 10th November 2014 under Section 1A, 1B, and 3A of the Civil Procedure Act and Order 40 Rule 1, Order 51 rule 1 of the Civil Procedure Rules, and all other enabling provisions of the Law where the Plaintiff/Applicant seeks orders that:-

i. Spent

ii. Spent

iii. That pending the hearing and determination of the suit, the Defendants by themselves, servants, agents or workmen be restrained by way of temporal injunction from entering, cultivating, developing and/ or in any way interfering with the plaintiff's quiet possession and enjoyment of that land parcel referred to as Laikipia/Salama Muruku Block 1/828

iv. That the orders herein be enforced by the OCS Ndaragua Police Station.

v. That the Respondents be condemned to bear the cost of this Application.

2. The said application was supported by the grounds on its face and an Affidavit, sworn by Elijah Ngunjiri Mwenenia the Plaintiff/Applicant herein.

3. Through the directives of the court, the matter was to be disposed of by way of written submissions.

4. The Respondents filed their respective submissions on the 16th October 2017 whereas the Applicant filed his submission on the 14th November 2017.

5. I have looked at both submissions and find that the Applicant's issues are that he is a holder of the Power of Attorney as is evidenced by annexure ENM1, which power was donated to him by the registered proprietors of the suit land known as Laikipia/Salama Muruku Block 1/828.

6. That sometime the respondent's father one Kirichi Ndegwa (now deceased) trespassed on the suit land and started felling trees thereon and burning charcoal.

7. That proceedings for injunction were brought against the said deceased, as is seen in annexure ENM 3 (a) and (b), wherein injunctive orders were subsequently issued on the 1st November 2012 as is annexed as annexure ENM 4.

8. That upon the demise of their father, the Respondents herein continued with the activities of their father which necessitated the Applicant to move to court vide his application dated the 3rd December 2013 marked as annexure ENM 5, seeking for the committal to jail of the Respondents herein.

9. A ruling was subsequently delivered dismissing the said application citing the fact that the Respondents herein were not parties in the suit No. 216 of 2013 filed the Nakuru Environment and Land Court and further that the suit had abated at the death of their father.
10. That based on the said ruling, the Applicant/Plaintiff filed the present suit seeking for interlocutory orders against the Respondents.
11. The applicant relied on the celebrated case of **Giella vs. Cassman Brown & Company Ltd (1973) EA 358**, to submit that he had established a prima facie case as was held in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**
12. To this, the Applicant submitted that he had established a prima facie case by placing copy of the title deed as well as a certificate of search herein annexed as ENM 2(a) and (b) in reference to the suit land, on the record of the court to prove that the donors of his power of Attorney namely Tabitha Wangechi Murigu, Mary Wangui Murigu, John Gitahi Murigu, Jane Wamuyu Murigu and Charles Gichuki Murigu were the proprietors of the suit land.
13. The Applicant submitted that since he had satisfied the first condition required of a party seeking interlocutory injunction, should an order of injunction be denied, he would suffer irreparable loss since the Respondents had already entered on the suit land and were in the process of erecting a house thereon as evidenced by annexure ENM 7. That the said loss and /or injury would not be adequately compensated monetarily. That by issuing the injunctive orders, the applicant submitted the suit land would be preserved. He relied on the decided case of **George Orango Orago ve George Liewa Jagalo [1986]3All ER 772** to buttress his submissions.
14. The Applicant further submitted that on a balance of convenience, since he had established that he had proprietary rights and/or interest over the suit land affording protection of this honorable court, the balance of convenience tilted in his favor.
15. That the application dated the 27th November 2014 should be upheld since they had established all the principles for granting of the interlocutory injunction.
16. The Application was opposed by the Respondents who through their submissions stated that they are the sons of Kirichu Ndegwa the registered owner of Laikipia/Salama Muruku Block 1/193 (Muruku) measuring 15.179 hectares as was evidenced by a title deed annexed as MMK1 (b) and that they resided upon the said piece of land as of right.
17. That Applicant lives in Mugunda Town which is about 100 Kilometres from the suit land and the issues of trespass were hearsay since none of the registered owners had deponed the same through a sworn affidavit.
18. The Respondents submitted that vide HCCC No. 216 of 2013 filed in Nakuru which suit touched on the same subject matter, and herein annexed as MMK2, the same confirmed that the Respondents had not trespassed on the said suit land. That further the issue of ownership of the disputed portion of land was settled in Laikipia West Rumuruti Division Land Disputes Tribunal in Case No. 71 of 2006 which decision was adopted as a judgment of the court and an attempt to overturn the judgment was dismissed in Nakuru Judicial review Case No.77 of 2010 which settled the whole issue.
19. That granting the orders prayed would amount to an eviction.
20. The respondents submitted that the Applicants had not established a prima facie case against the Respondents to the effect that the Applicant offended the provision of Order 4 rule 4 of the Civil Procedure Rules which provisions are couched in mandatory terms to the effect that;
- Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises.
21. In the present case, the Applicant had filed his suit as a plaintiff and not as the duly appointed Attorney of the registered owners of the suit land. This same scenario also repeated itself at paragraph 1 of the verifying affidavit.
22. The Respondents also pleaded Res judicator at paragraph 8 of their defence to the effect that the dispute between the parties had been adjudicated upon vide the decisions marked as MMK 3, MMK4 and MMK 5 and as such the present case/suit fell within the ambit of the provisions of Order 7 of the Civil Procedure Rules.
23. That the Applicant had not sought cancellation of the title deed herein annexed as MMK1 (b) issued to the Respondents father.
24. Further, it was the Respondent's submission that the orders sought cannot lie against them as they were not the legal representatives of the Estate of their deceased father and as such could not be sued on behalf of the estate.
25. On the issue of irreparable loss, the Respondents submitted that the acts of cultivation and trespass complained of by the Applicant took place in the year 2013 whereas the application was filed in the year 2014, close to 3 years ago and that if there was any loss to be prevented, it must have been occasioned by now, that the Respondents were therefore guilty of laches and cannot be accorded the comfort of an equitable remedy of injunction.
26. That the Applicant herein has not demonstrated that the Respondents have put the suit land to waste.
27. That lastly on a balance of convenience, the same tilted in favor of the Respondents as all facts put together show that the horse had

already bolted and as such the present application ought to be dismissed.

28. I have considered the said application, the Affidavit in reply as well as the annexures thereto. I have also studied in detail the submissions and authorities placed before me by the learned Counsel for the parties herein. Having considered and reviewed the pleadings and submissions by the parties, it is clear and not in dispute that Tabitha Wangechi Murigu, Mary Wangui Murigu, John Gitahi Murigu, Jane Wamuyu Murigu and Charles Gichuki Murigu are the proprietors of the suit land namely Laikipia/Salama Muruku Block 1/828 measuring 11.34 hectares.

29. It is also not in dispute that the proprietor of suit land Laikipia/Salama Muruku Block 1/193 (Muruku) measuring 15.179 hectares one Kirichu Ndegwa is now deceased and that the Respondents herein are his sons.

30. It is further not in dispute that the power of Attorney was donated to the Applicant herein by the proprietors of suit land No. Laikipia/Salama Muruku Block 1/828.

31. Looking at the two parcels of land, it is clear that they are different and distinct, the bone of contention herein being that between December 2012 and August 2013, the Respondents herein trespassed and cultivated on the Applicant's parcel of land No. Laikipia/Salama Muruku Block 1/828 and had even started constructing a house thereon. The Applicant therefore seeks for injunctive orders against the Respondents.

32. On the other hand the Respondents aver that they have not trespassed on the Applicant's suit land. That further the issue of ownership of the disputed portion of land was settled by the Laikipia West Rumuruti Division Land Disputes Tribunal in case No. 71 of 2006 which decision was adopted as a judgment of the court and an attempt to overturn the judgment was dismissed in the Nakuru Judicial Review Case No.77 of 2010 which settled the whole issue.

33. While objecting to the issuance of the orders prayed for in the application stating that the applicant has not established a prima facie case, the Respondents herein have raised a number of issues.

34. The first issue raised was to the effect that the Applicant had contravened the mandatory provisions of Order 4 rule 4 of the Civil Procedure Rules to the effect that he had filed the suit and application as the Plaintiff herein where he was acting in the capacity of an Attorney for the registered proprietors.

35. The second issue raised is to the effect that they had no locus standi to sue and to be sued as they were not the administrators of the deceased's estate.

36. Third that the present suit was Res judicata, the dispute having been between the same parties and having been adjudicated upon vide decisions of the Laikipia West Rumuruti Division Land Dispute Tribunal case No 71 of 2006 herein annexed as MMK 3, Nyahururu Principle Magistrate's Court Land Dispute case No 35 of 2008 herein marked as MMK4 and Nakuru High Court Judicial Review No. 77 of 2010 herein marked as MMK 5. The suit herein offends the provisions of Order 7 of the Civil Procedure Rules.

37. That following the award of the Land Dispute Tribunal, the Respondent's father's acreage was rectified and the title was amended to read 15.179 Ha from the previous 12.55 Ha.

38. And last but not least, the Respondents had accused the Applicant of being guilty of laches in that the cause of action if any had occurred in the year 2013, the suit filed in the year 2014 and the orders sought in 2017 almost three years thereafter.

39. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (**E.A. Industries v. Trufoods, [1972] E.A. 420**)."

40. I have carefully considered the said submissions by both parties. The issue for determination by this court is whether the plaintiff established a prima facie case to enable this court grant him the interlocutory injunction so sought.

41. On the first issue raised by the Respondents on the contravention of the provisions of Order 4 rule 4 of the Civil Procedure Rules, I find that the same was not fatal and that the Applicant can redeem himself by amending his pleadings I am also guided by the provisions of Article 159(2) (d) of the Constitution in arriving at my decision.

42. On the second issue, I find that this suit was brought against the Respondents in their personal capacity as they were the perpetrators of the trespass, after the demise of their father. The same was not brought against the estate of the deceased and such this line of opposition is lacks merit.

43. I also note that the Applicants in seeking for interlocutory injunction, have sought that the Respondents be enjoined from entering, cultivating, developing and/ or in any way interfering with the plaintiff's quiet possession and enjoyment of that land parcel referred to as Laikipia/Salama Muruku Block 1/828 land upon which the respondents have submitted that they live thereon.

44. Granting the said orders would amount to an eviction of the Respondents from the suit land which in my humble opinion is premature at this stage.

45. On the third aspect of Res judicator, 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).

46. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

47. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

48. Looking at the circumstance of the present suit as well as the previous suit, this court finds that the decision of the decisions of the Laikipia West Rumuruti Division Land Dispute Tribunal case No 71 of 2006 was on the same parcels of land which the tribunal found were bordering each other and that whereas the 'Applicant's' land parcel No. Laikipia/Salama Muruku Block 1/828 of 2 shares measured approximately 18 acres, on the ground it measured 11.34 acres.

49. The Respondent's father's land parcel No. Laikipia/Salama Muruku Block 1/193 (Muruku) of 4 shares was approximately 36 acres while on the ground it measured 12.55 Ha.

50. The Tribunal found that part of the Respondent's father's land was in the Applicant's land and recommended that the Laikipia District Land surveyor resurvey the two plots and make the necessary amendments and alter the title deeds.

51. That the award was adopted in the Nyahururu Principle Magistrate's Court Land Dispute case No 35 of 2008 and confirmed in the Nakuru High Court Judicial Review No. 77 of 2010 through a technicality. No Appeal was filed therein making the award of the tribunal to still stand.

52. That pursuant to the dismissal of the Application dated the 12th July 2011, the applicant filed another notice of motion dated the 10th November 2011 wherein the court's decision vide a ruling dated the and delivered on the 9th July 2012, was to the effect that parties maintain the status quo until the hearing and determination of the suit.

53. That pending the hearing and determination of the suit, the Defendant who was the Respondents father passed away and on the 3rd December 2013, the Applicant herein filed proceeding for contempt of court orders against the Respondents vide Nakuru ELC No. 2166 of 2013 which was dismissed as the respondents were not party to the suit and the suit had abated.

54. Now the Applicant has filed te present suit against the Respondents in their personal capacity as they were the perpetrators of the trespass

55. It is worth noting that in all the above cases the parties were the same and/or were litigating under the same title for the same claim. The previous cases were determined by a court of competent jurisdiction.

56. 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 November 2014 is sought are substantially the same as those on which injunction dated 10th November 2011 was sought previously.

57. I find that the issues in the previous suit which were substantially the same in the subsequent suit were determined and covered by the decision in the previous case.

58. Succinctly put, the High Court has no jurisdiction to overturn its own decision except on reviewing its own decision, a procedure that the plaintiff has not pursued. Reliance is put on the case of **E.T vs Attorney General & Another (2012) eKLR** where it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

59. The upshot of the foregoing is that matters in this case were conclusively decided vide Nakuru High Court Judicial Review No. 77 of 2010 and therefore the present case is res judicata and an abuse of the court process. The same is therefore dismissed with costs to the Defendants.

Dated and delivered at Nyahururu this 31st day of July 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE