



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 151 OF 2017**

**PARLIAMENTARY SERVICE**

**COMMISSION.....1ST PLAINTIFF**

**JUSTIN BUNDI.....2ND PLAINTIFF**

**=VERSUS=**

**CAPTAIN JAMES NYONGESA WAFUBWA .....DEFENDANT**

**RULING**

1. Before court for determination are two applications. The first application is the Notice of Motion dated 20/2/2017 through which the plaintiff seeks an interlocutory injunction restraining the defendant against interfering with, trespassing on, and or threatening the plaintiffs and their assigns/tenants with unlawful eviction from Land Reference Number 209/1048/85 situated in South C, Nairobi (the **suit property**). The second application is the defendant's Notice of Motion dated 3/5/2017 through which the defendant seeks an order dismissing this suit for being *res judicata* and an abuse of the process of the court. Both applications are opposed by the respective respondents.

2. The second plaintiff is the registered proprietor of the suit property, having purchased it through financing from the Parliamentary Service Commission. The first plaintiff holds a charge against the suit property, securing a sum of Kshs 6,300,000 advanced to the 2nd defendant to buy the property. The 2nd plaintiff purchased the suit property from one John Wambua Kiilu. Prior to that, John Wambua Kiilu had purchased the suit property from Housing Finance Company of Kenya Limited (**HFCK**) who sold it to him in exercise of its statutory power of sale after the defendant allegedly defaulted in his loan obligations to HFCK.

3. The plaintiff's case is that on two different dates in January and February 2017, the defendant interfered with the 2nd plaintiff's possession of the suit property by threatening to throw the 2nd plaintiff out of the suit property. The plaintiffs contend that the threats were made against a background where both the High Court and the Court of Appeal had adjudicated upon the issue of sale of the suit property by HFCK to John Wambua Kiilu. It is the said threats that prompted the plaintiffs to bring this suit together with their Notice of Motion.

4. The defendant's case is that the plaintiff's suit is *res judicata* and an abuse of the court process because the plaintiffs herein appeared and participated in Nairobi HCCC No 385 of 2011 before the Hon Justice E K O Ogola where directions were given on how the plaintiffs were to proceed with the issues they had at the time but the plaintiffs failed to proceed as directed. He thus contends that the plaintiffs are estopped from bringing a fresh suit against him.

5. I have considered the two applications together with the respective supporting affidavits. I have also considered the parties' rival submissions. I have similarly considered the relevant legal framework and applicable jurisprudential principles. Two issues fall for determination. The first issue is whether the plaintiffs' suit herein is *res judicata* and an abuse of the process of the court. The second issue is whether the plaintiffs have satisfied the criteria for grant of an interlocutory injunction. I will make pronouncements on the two issues in the order in which they are itemized.

6. The doctrine of *res judicata* is underpinned by 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**

7. The Court of Appeal in **John Florence Maritime Services Limited & Ano. v Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR** cited with approval the following holding in **Henderson v Henderson (1843) 67 ER 313** in relation to the tenor and import of the doctrine of adverse possession:

“.....where a given matter becomes the subject of litigation in any 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 a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.....”

8. The Court of Appeal summarized the rationale behind this doctrine thus:

**The rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.**

9. I have carefully examined the materials annexed to the affidavit in support of the defendant’s notice of motion dated 3/5/2017. Parties in Nairobi HCCC. No. 385/2011 were **Captain J N Wafubwa (plaintiff) v Housing Finance Company of Kenya (defendant)**. There is no evidence that the plaintiffs herein were admitted as parties in the said suit and were parties to the determinations made in the said suit. Secondly, the cause of action in the present suit relates to threats issued by the defendant on **29/1/2017** and **6/12/2017** respectively. The cause of action in Nairobi HCCC No 385/2011 and the cause of action in the present suit are not the same. Judgment in Nairobi HCCC 385/2011 was rendered in favour of the plaintiff for Kshs 4,520,662.80 on 26/4/2012 long before the cause of action giving rise to the present suit accrued in 2017. An appeal against the decision of the High Court culminated in the Court of Appeal’s Judgment delivered on 28/3/2014. The Court of Appeal set aside part of the award and decreed that HFCK pays the defendant herein Kshs 20,662.80 and set aside the award of Kshs 4,500,000. The Judgment of the Court of Appeal was similarly rendered before the accrual of the present cause of action. The plaintiffs herein were not parties to the appeal.

10. The totality of the above analysis is that the essential elements of *res judicata* as set out in Section 7 of the Civil Procedure Act are missing in the present suit. Consequently, my finding on the first issue is that the present suit is neither *res judicata* nor an abuse of the process of the court. The net result therefore is that the defendant’s notice of motion dated 3/5/2017 fails for lack of merit.

11. The second issue is whether the plaintiffs have satisfied the criteria for grant of an interlocutory injunction. The criteria was spelt out in **Giella v Cassman Brown (1973) EA 358**. Firstly, the plaintiffs were required to demonstrate a prima facie case with a probability of success. Secondly, they were required to demonstrate that they stand to suffer irreparable damage if the injunctive order is not granted. Thirdly, if the court were to be in doubt, the application for an interlocutory injunction would be determined on a balance of convenience.

12. It is not contested that the 2nd plaintiff is the registered proprietor of the suit property. It is also not contested that he is in possession of the suit property. It is similarly not contested that the 1st plaintiff holds a charge against the suit property. In his replying affidavit sworn on 7/6/2017, the defendant stated that since his eviction was illegal due to a 2nd illegal sale of the suit property to the 2nd plaintiff, he is entitled to demand rent and to evict the 2nd plaintiff as he is occupying the suit property illegally. This deposition confirms that indeed the defendant is keen to actualize the alleged threat and the 2nd plaintiff’s right to quiet possession of the suit property is under threat.

13. The allegations of illegal sale which the defendant raised in the replying affidavit were raised in preceding suits. In their respective judgment and ruling, the courts did not deem it necessary to annul the contested sale to Mr. John Wambua Kiilu. John Wambua Kiilu sold the suit property to the 2nd plaintiff. Against that background, the defendant threatens to evict the 2nd plaintiff from the suit property on the allegation that the sale to John Wambua Kiilu was irregular and the subsequently sale to the 2nd plaintiff was similarly irregular. The validity of the sale to John Wambua Kiilu was considered in previous suits and the court declined to nullify the sale. Yet the defendant is intent on actualizing his threats against the 2nd plaintiff who holds a title that has not been revoked. In my view, the above facts and circumstances satisfy the 1st and 2nd limbs of **Giella v Cassman Brown (1973) EA 358**. The court is therefore satisfied that the plaintiffs have satisfied the criteria for grant of an interlocutory injunctive order. Consequently, the plaintiff’s notice of motion dated 20/2/2017 is allowed in terms of prayers 4 and 5.

14. In the light of the above findings, the court hereby issues the following disposal orders.

- a) **The defendant’s Notice of Motion dated 3/5/2017 is dismissed. The plaintiffs shall have costs of the application**
- b) **The plaintiffs’ Notice of Motion dated 20/2/2017 is allowed in terms of prayers 4 and 5 of the application.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

.....Advocate for the plaintiff

.....Advocate for the defendant

Ms Halima Abdi - Court Clerk