



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.750'A' OF 2017

JAMES NJAU WABURURU (Suing on behalf

of the Estate of FRANCIS MBURURU NJAU (Deceased).....PLAINTIFF/APPLICANT

-VERSUS-

FLORENCE WAMBUI KAGIA.....1ST DEFENDANT/RESPONDENT

MUIGAI PHARIS THUMBI.....2ND DEFENDANT/RESPONDENT

THE LAND REGISTRAR, KIAMBU.....3RD DEFENDANT/RESPONDENT

RULING

The Plaintiff/Applicant herein filed this suit dated 26th September 2017 and sought for Judgement against the Defendants/Respondents herein. Among the orders sought are:-

i. A declaration that Francis Wabururu Njau (deceased) is the true owner of all that parcel of land being Title No.Karai/Karai/1373.

ii. An order of permanent injunction restraining the Defendants by themselves, their servants, agents and or whomsoever in any means howsoever from selling, charging, encroaching, invading, cutting trees, constructing and/or in any other way interfering with the parcel of land being Title No.Karai/Karai/1373.

iii. Cost and interest of this suit.

The Plaintiff/Applicant is the administrator of the *Estate of Francis Wabururu Njau (deceased)* whom he alleged was the rightful owner of the suit property herein *Karai/Karai/1373*. He also alleged that the 1st Defendant's father *Bernard Kagia Njuguna*, fraudulently and illegally caused the suit property to be registered in his name and the said registration caused the father of the Plaintiff/Applicant herein *Francis Wabururu Njau* to lodge a caution against the suit property. However the father of the 1st Defendant (*Bernard Kagia Njuguna*) filed *Civil Suit No.751 of 2003*, seeking to have the said caution removed. Further on 10th February 2011, the court granted orders against the said *Bernard Kagia Njuguna* and restrained him from selling, charging and/or disposing off the suit property.

He further contended that in contempt of the said *Court Order*, the said *Bernard Kagia Njuguna* fraudulently and illegally transferred the suit property to the 1st Defendant on 19th January 2012. Further that once more *Francis Wabururu Njau* lodged a restriction against the suit property in the year 2012 awaiting conclusion of *HCCC No.751 of 2003*.

It was his contention that the said *Francis Wabururu Njau* (deceased) was in actual possession of the suit property, but he later died on 19th February 2015. He also contended that vide a *Misc.Appl. No.46 of 2017*, filed at *Kiambu Chief Magistrate's Court*, the 1st Defendant prayed for the removal of the said caution lodged by *Francis Wabururu Njau (deceased)* against the suit property which *Order* was given on 2nd August 2017. Therefore the 1st Defendant sold the suit property to the 2nd Defendant who cannot claim that he is an innocent purchaser for value.

The Plaintiff/Applicant has also contended that the 2nd Defendant has proceeded to cut down trees on the suit property, has fenced off a portion of the suit property and intend to continue with the said invasion and has refused to yield vacant possession to the Plaintiff/Applicant.

Simultaneous to the suit, the Plaintiff/Applicant filed a *Notice of Motion* application even dated and sought for these orders:-

- 1) *That pending the hearing and determination of this suit, an Order of Inhibition be registered against all that parcel of land being Title No.Karai/Karai/1373.*
- 2) *That pending the hearing and determination of the main suit, this Honourable Court be please to restrain the 1st Defendant/Respondent by herself, her servants, agents and/or whomsoever in any means howsoever from selling, charging, encroaching, invading, cutting trees, constructing and/or in any other way interfering with the parcel of land being Title No.Karai/Karai/1373.*
- 3) *That the OCS, Kikuyu Police Station do oversee the enforcement of Court Orders issued.*
- 4) *That cost of this application be provided for.*

The said application is supported by the grounds stated on the face of the application and *Supporting Affidavit* of the Plaintiff/Applicant herein which is basically a reiteration of the averments in the *Plaint*.

The application is vehemently contested by the 1st and 2nd Defendants/Respondents herein.

The 1st Defendant/Respondent *Florence Wambui Kagia* filed a *Notice of Preliminary Objection* dated 24th October 2017 and averred that:-

- 1) *That the application and the entire suit lacks merit, bad in law, incompetent, frivolous and vexatious and should be dismissed.*
- 2) *That the Plaintiff's/Applicant's suit is Res judicata as the suit premises Karai/Karai/1373 was the subject matter in dispute in HCCC Suit No.751 of 2003, Bernard Kagia Njuguna..Vs...Francis Wabururu Njau and in the HCCC No.338 of 2008 whereby Francis Wabururu Njau alias Francis Wabururu Njau was ordered to remove a caution and also to be evicted from the said premises and no appeals were lodged in the respect of the said two cases.*
- 3) *That the Plaintiff's/Applicant's pleadings have been overtaken by events and ought to be dismissed with costs as they are a waste of court's time.*

She also filed a *Replying Affidavit* and averred that the Plaintiff is not entitled to bring this suit against the 1st Defendant/Respondent as the suit property was initially registered in the name of the 1st Defendant's father *Bernard Kagia Njuguna*. However, her father transferred the said land to her on 1st August 2011 and she has now *legally sold* and *transferred* the suit land *Karai/Karai/1373*, to the 2nd Defendant/Respondent. Therefore the Applicant has no beneficial interest over the suit property. Further, that the Plaintiff's parents were buried on *LR.No.Karai/Karai/1372*, where he has beneficial interest but not on the suit property. She also averred that *HCCC No.715 of 2003, Bernard Kagia Njuguna...Vs...Francis Wabururu Njau* was terminated in favour of her father on 19th June 2008 and the suit herein is *Res judicata*. Further, that *HCCC No.338 of 2005, Francis Wabururu...Vs..Bernard Kagia Njuguna* filed by the Plaintiff's father was dismissed in favour of her father and no appeals were lodged against the said Judgement and Ruling. That she applied to have the caution removed because the said *Francis Wabururu Njau* was already deceased. It was her contention that the suit herein is *frivolous, vexatious, incompetent, bad in law* and *lacks merit* and should be dismissed with costs for being *Res judicata*.

The 2nd Defendant/Respondent too filed *Grounds of Objection* on 16th November 2007 and opposed the application on the grounds that:-

- 1) *That the 2nd Defendant/Respondent is the lawful registered proprietor of parcel of land Karai/Karai/1373.*
- 2) *That the 2nd Defendant is a bonafide purchaser of land for value without notice.*
- 3) *That the application is misconceived, scandalous and an abuse of the process of the court.*
- 4) *That the suit herein is res judicata as similar suits being HCCC No.751 of 2003 and HCCC No.338 of 2008 were previously heard by the court.*

In his *Replying Affidavit*, the 2nd Defendant *Muigai Pharis Thumbi* averred that he is the registered proprietor of the parcel of land *No.Karai/Karai/1373*, as per the *title deed* attached *MPT-1*, which he purchased from the 1st Defendant under the *Sale Agreement MPT-2*. Further that before he purchased the suit property, he

performed due diligence and confirmed that indeed the land belonged to the 1st Defendant/Respondent. He also contended that the land does not belong to the Plaintiff as the area Chief had even confirmed ownership of the sit property by the 1st Defendant. He also contended that the 1st Defendant had advised him that the suit property was subject of various court cases which were determined in favour of her father, **Bernard Kagia Njuguna**.

Further that his advocate has advised him that the instant suit by the Plaintiff/Applicant is *Res judicata* and should be dismissed. He contended that he is in possession of the suit land which he has fenced and is awaiting to develop the same. He also contended that the Plaintiff's parents are buried in *LR.No.Karai/Karai/1372* and not *Karai/Karai/1373*, the suit property herein. He therefore urged the Court to dismiss the instant **Notice of Motion** and uphold the objection.

The application and the **Preliminary Objection** were canvassed together by way of written submissions which this Court has carefully read and considered. The Court has also considered the annexures thereto and the whole pleadings in general.

There is no doubt that the suit property herein was initially registered in the name of **Kamau Karanja Wangui** on **2nd July 1993**.

Further, the same was later registered in the name of **Bernard Kagia Njuguna**, the father to the 1st Defendant on **21st May 2001**, and caution was lodged by **Francis Wabururu Njau**, the father to the Plaintiff/Applicant on **29th January 2002**. Again the suit property changed hands on **19th January 2012** and was registered in the name of 1st Defendant, **Florence Wambui Kagia** who eventually sold and transferred it to **Muigai Pharis Thumbi**, the 2nd Defendant on **7th September 2017**. Therefore at the moment, the 2nd Defendant is the registered owner of the suit property.

There is also no doubt that the sit property herein *LR.No.Karai/ Karai/1373*, has been a subject of various court cases among them **HCCC No.751 of 2003** and **HCCC No.338 of 2008**, which cases were between the father of the 1st Defendant and the Plaintiff's father. It is evident that **HCCC No.751 of 2003** had initially been decided in favour of the Plaintiff theren **Bernard Kagia Njuguna** who is the father to the 1st Defendant. However, the Plaintiff/Applicant has alleged that the exparte Judgement entered on **19th June 2008** was set aside by Consent and the Defendant thereon, **Francis Wabururu Njau**, the father to the Plaintiff/Applicant was allowed to file his Defence and Counter-claim. He also averred that the suit is still ongoing at **Milimani Environment and Land Court(ELC)**, though the correct case number was not given and/or the current status of that matter at **Milimani Environment and Land Court (ELC)**. However, the court has seen the **Court Order** by **Muchelule J.** issued on **2nd April 2012**, restraining the Plaintiff in that suit **Bernard Kagia Njuguna** from **selling, charging, disposing off or dealing** with the suit property *Karai/Karai/1373*, pending the determination of the suit.

However, by the time the said **Orders** were issued, the suit property had already been registered in the name of Florence Wambui Kagia, the 1st Defendant on **19th January 2012**. The said Order of the court was entered after the suit property had been registered in the name of the 1st Defendant. The above position is evident from the copy of the **Green Card FWK-8**.

The Plaintiff has alleged that **HCCC No.751 of 2003** is an on-going case after the **Judgement** of **19th June 2008** was set aside. That allegation has not been disputed by the Defendants/Respondents herein though they have alleged that the suit herein is *res judicata*.

The issues now for determination are:-

- i. **Whether the suit is *Res judicata***
- ii. **Whether the Applicant is deserving of the injunctive orders sought.**

Black Law Dictionary, 9th Edition defines **Res judicata** as "**a thing adjudicated with the essence of being that once a law suit is decided, the same issue or an issue arising from the first issue cannot be contested against.**"

It is evident that there was a **Civil Suit No.751 of 2003**, in which a Judgement was entered on **19th June 2008**. However, it has been alleged that the said exparte order was set aside and this **HCCC No.751 of 2003** is still going on at **Milimani Environment and Land Court (ELC)**. The position of that suit was not given. However, the Court will not dispute the setting aside of the Judgement of **19th June 2008**, since it is evident that on **10th February 2011**, **Consent Orders** were recorded allowing the Defendant thereon, **Francis Wabururu Njau**, the father to the Plaintiff/applicant to file his Defence and Counter-claim. It is therefore evident that as at **10th February 2011**, **HCCC No.751 of 2003** was active and was not a decided matter. Since there is no evidence of finalization of that **HCCC No.751 of 2003**, this Court will not find and hold that the suit herein is *Res judicata*. As was held in the case of **Alex Tonny Gitonga Njeru & 18 Others...Vs...Luka Munyi Njagi (Embu ELC Case No.332 of 2015(OS))**, plea of *Res judicata* can be raised:-

“... Before a plea of *res-judicata* can be properly raised and up-held, the issues in dispute in the former suit must be directly and substantially in dispute between the same parties or parties under whom they or any of them litigate, the former suit must have been heard and finally determined by a competent court.”

Section 7 of the **Civil Procedure Act** provides for instances when the plea of *Res judicata* can be raised. It provides:

“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.”

However, in the instant suit, the suit referred to **HCCC No.751 of 2003** which is directly and substantially in issue in this suit has not been fully determined. The Court therefore declines to uphold the **Notice of Preliminary Objection** that the suit herein is ***Res judicata***.

However, it is evident that the suit in issue herein is **Karai/Karai/1373**, which is the same suit property in issue in **HCCC NO.751 of 2003**. The parties therein are the Plaintiff's father who is now deceased and the Plaintiff is the legal representative of his Estate and the father to the 1st Defendant/Respondent, **Bernard Kagia Njuguna**. Though the Plaintiff alleges that the Defendants are not parties in **HCCC No.751 of 2003**, the issues raised in this suit are substantially the same issues raised in **HCCC No.751 of 2003**.

That 1st Defendant became the registered owner of the suit property after it was transferred to her by **Bernard Kagia Njuguna**, the Plaintiff in **HCCC No.751 of 2003**. The Plaintiff has alleged that the said transfer was done **fraudulently** and in **contempt** of the **Court Order** issued on **2nd April 2012**. However, the Court finds that these are issues that could have been raised in **HCCC No.751 of 2003** which according to the Plaintiff/Applicant is a suit on-going at **Milimani Environment and Land Court**. By filing this suit, the Court finds that the Plaintiff has gone against the **Subjudice Rule**, as provided by **Section 6** of the **Civil Procedure Act** which provides:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

If the Plaintiff was of the view that the Defendants herein obtained registration of the suit property in their favour fraudulently, then he ought to have enjoined them as parties in **HCCC No.751 of 2003** instead of filing a new suit in which the matter issue **LR.No.Karai/Karai/1373** is also directly and substantially in issue in a previous instituted suit or proceedings being **HCCC NO.751 of 2003**. There is a danger of different courts issuing different orders over the same suit property and thus bringing embarrassment to the Judiciary Institution.

The Court therefore finds that as provided by **Section 6** herein, the Court has no option but to stay the suit herein until **HCCC No.751 of 2003**, which is allegedly pending in **Milimani Environment and Land Court** is heard and determined. The Plaintiff/Applicant could also choose to enjoin the Defendants herein as parties in the above referred **HCCC No.751 of 2003** and seek the reliefs sought herein in the said suit.

Having stayed the suit herein, the Court finds no reason to decide the merit of the **Notice of Motion** dated **27th September 2017**.

It is so ordered.

Dated, Signed and Delivered at Thika this 2nd day of November 2018.

L. GACHERU

JUDGE

2/11/2018

In the presence of

No appearance for Plaintiff/Applicant

Mr. Karuga holding brief for Mr. Maingi Kamau for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Ruling read in open court.

L. GACHERU

JUDGE

2/11/2018