



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 735 OF 2016

MICHAEL KARUKU GATURA.....PLAINTIFF

VERSUS

STEPHEN NGUGI ROBERT.....1ST DEFENDANT

NJOKI KAGECHE.....2ND DEFENDANT

RULING

What is before me for determination is an application brought by way of Notice of Motion dated 28 June, 2016 in which the plaintiff/applicant has sought a temporary injunction restraining the defendants/respondents from dealing and/or interfering in any manner with all that parcel of land known as L.R No. Dagoretti/Mutuini/T.115 (hereinafter referred to as “the suit property”) pending the hearing and determination of this suit.

The application is supported by an affidavit sworn by the applicant on 28th June, 2016. The applicant has contended that he is the registered owner of the suit property and that he has been paying land rates in respect thereof. The applicant has averred that the respondents have been occupying the suit property illegally despite his several demands that they vacate the same. The applicant has averred that he relies on the suit property for livelihood and that if the respondents are not evicted from the property they may forcefully dispossess the applicant of the same and cause it to be registered in their names. He has urged the court to grant the orders sought.

The 1st defendant/respondent is deceased and as such did not enter appearance. The application was opposed by the 2nd defendant/respondent through Notice of Preliminary objection dated 16th June, 2017. In her preliminary objection, the 2nd respondent has averred that this suit is *res judicata* since the ownership of the suit property was the subject of a previous suit between the parties namely, Nairobi HCCC No. 1664 of 1977(O.S) which was heard and judgement entered in favour of among others, the 2nd respondent by O’Kubasu J. on 9th March, 1983. The 2nd respondent (hereinafter referred to only as “the respondent”) has contended that the applicant is yet to pay the costs that were awarded to the respondent in that suit. The respondent has averred that pursuant to the said judgment, the applicant’s title in respect of the suit property was cancelled after a notice for that purpose was put in the Kenya Gazette and a new title issued in the names of the respondent and one, Wambuku Ngeche, deceased who later sold and transferred her interest in the property to the 1st defendant, Stephen Ngugi Robert, deceased. The respondent has averred that the applicant is no longer registered as the owner of the suit property and that the applicant’s suit is bad in law for violating various provisions of the Civil Procedure Rules.

The application was argued on 9th April, 2018 when Mr. Osundwa appeared for the applicant while Ms. Muhuhu appeared for the respondent. In his submission, Mr. Osundwa relied on the applicant’s affidavit that was filed in support of the application and the written statement filed on 16th June, 2017. He submitted that the preliminary objection by the respondent was not properly taken as it raised issues that require evidence to be provided. He submitted that the issues before the court were not in issue in Nairobi HCCC No. 1664 of 1977(O.S) (hereinafter referred to as “the previous suit”). He submitted further that the plaintiff was not aware of the previous suit and that the judgment in that suit was entered ex parte. Mr. Osundwa submitted further that there was no material before the court on the basis of which the court could make a determination as to the issues which were raised in the previous suit. He submitted that the court was not supplied with certified copies of the proceedings in the previous suit. Mr. Osundwa wondered why the respondent who claimed to have executed the decree in the previous suit against the applicant did not recover her costs. He urged the court to strike out the respondent’s preliminary objection and allow the applicant’s application.

In her submissions in reply, Ms. Muhuhu submitted that this suit is *res judicata* in view of the judgment that was delivered in the previous suit. She submitted that the applicant was aware of the previous suit as he had attached to his pleadings a copy of the decree that was issued in the said suit, a copy of the Gazette Notice pursuant to which his title was cancelled and a copy of the extract of the register for the suit property. Ms. Muhuhu submitted that it was evident from a copy of the decree that was issued in the previous suit that the suit was heard inter partes. Ms. Muhuhu submitted further that the suit property was no longer registered in the name of the applicant and urged the court to

strike out the applicant's suit.

In a rejoinder, Mr. Osundwa submitted that there was a letter on record to the effect that the suit property had two titles. He urged the court to dismiss the preliminary objection by the respondent and to allow the application by the applicant.

Determination:

I have considered the applicant's application and the respondent's preliminary objection to the application and the entire suit. I need to dispose of the preliminary objection first before considering the application on merit should it become necessary. In the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors (1969) EA 696.

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.’

In the case of Oraro v Mbaja [2005] 1 KLR 141, it was held that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised.”

The respondent's preliminary objection is grounded on section 7 of the Civil Procedure Act. Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya 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 determined by such court.”

I am of the view that the respondent's preliminary objection has been taken prematurely. As was stated in the case of Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors (supra), a preliminary objection must be based on the pleadings. The respondent's plea of *res judicata* is not based on any pleading. The respondent has only filed a Notice of Appointment of Advocate and Notice of Preliminary Objection. The respondent has neither entered appearance nor filed a statement of defence. It is my finding in the circumstances that the respondent's plea of *res judicata* has no basis and as such unsustainable.

The disposal of the preliminary objection takes me back to the applicant's application. The applicant has sought a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of Giella v Cassman Brown & Co. Ltd [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further in that case that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“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 prevent the irreparable damage that may result from the invasion. ...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 threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

I am not satisfied from the material before me that the applicant has established a prima facie case with a probability of success against the respondent. The evidence before me shows that the applicant is not the registered owner of the suit property. The bundle of documents filed in court on 30th May, 2017 by the applicant contains a copy of a decree that was issued in the previous case on 9th March, 1983. In that decree, the court ordered that the respondent and one, Wambuku w/o Ngeche were the proprietors of the suit property and that they be

registered as the owners thereof in equal shares. From a copy of the register for the suit property which also forms part of the applicant's documents, the respondent and Wambuku w/o Ngeche were registered as the proprietors of the suit property on 3rd May, 1988 pursuant to the said decree. On the same date, Wambuku w/o Ngeche transferred her interest in the suit property to the 1st defendant. A search carried out by the applicant on 16th July, 2015 which is also in his bundle of documents shows that as at that date, the suit property was registered in the names of the respondent and the 1st defendant.

According to the said decree, the respondent and Wambuku w/o Ngeche acquired the suit property by adverse possession. Since the applicant is not the proprietor of the suit property, it has not been demonstrated that he has a right or interest in the property which is threatened with violation by the respondent. From the material placed before the court by the applicant, the respondent acquired the suit property through a court decree that has not been reviewed or set aside. I am not persuaded that the respondent acquired the suit property irregularly or unlawfully as claimed by the applicant.

The applicant having failed to establish a prima facie case with a probability of success, I am not obliged to consider whether he will suffer any loss or injury that cannot be compensated in damages. The upshot of the foregoing is that both the application by the applicant and the preliminary objection by the respondent have no merit. The same are accordingly dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 13th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Ngira h/b for Mr. Osundwa for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Catherine-Court Assistant