REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 7 OF 2016

ABADULLAHI HAJI MOHAMED and **ZAINAB MOHAMED ABDI** (Suing as the Administrators of the Estate of the late

HAJI MOHAMED ABDI – DECEASED …....…….....PLAINTIFFS

VERSUS

ROBLE HAJI MOHAMED...……..……..1ST DEFENDANT

ABDULLAHI DAGANE BARE…….…….……..2ND DEFENDANT

MUHUMED GURE……..…….3RD DEFENDANT

RULING

What is pending for my determination is the plaintiffs' Notice of Motion dated 3rd February 2016 seeking some injunctive reliefs with respect to land parcel No. HARAGE/MARAMTU/FARM NO 3 situated at Garissa and the defendants' Preliminary Objection to the effect that this suit is infact Res-judicata in view of **EMBU HIGH COURT CIVIL CASE No. 49 of 2011** which was later transferred to **GARISSA HIGH COURT** and designated as **CIVIL CASE No. 9 of 2011** (herein the Garissa Case) and which involved the same parties and subject matter and which was heard and determined.

The plaintiffs filed this suit on 4th February 2016 seeking the following order against the defendants:

> ***'A permanent injunction do issue restraining the 1st, 2nd and 3rd defendants, whether by themselves, their servants and or agents or their privies, employees or through or other persons un-known to the plaintiffs from accessing, interfering with, or occupying or developing, disposing off, selling, charging, transferring and or leasing, entering, threatening to enter or erecting any development or putting up any construction of whatever nature or otherwise from committing trespass or continuing to commit trespass and from interfering with the plaintiffs' peaceful and quiet use and enjoyment of their property, Land Reference No. 128/96/19 known as HARAGE MARAMTU FARM NO 3 situated at Garissa within the Republic of Kenya".***

Pending the hearing of the suit, the plaintiffs sought a temporary injunction restraining the defendants by themselves, their agents or other persons from accessing, interfering with or occupying or developing, disposing off, selling, charging, transferring or leasing, entering, threatening to enter or erecting any development or putting up any construction of whatever nature or otherwise trespassing or continuing to commit trespass or interfering with the plaintiffs peaceful and quiet use and enjoyment of the property known as Land Reference No. 128/96/19 HARAGE/MARAMTU/FARM NO 3 situated at Garissa (herein the suit land).

The application is supported by the affidavit of **ABADULLAHI HAJI MOHAMED** the 1st plaintiff herein sworn also on behalf of the 2nd plaintiff **ZAINAB MOHAMED ABDI** both suing as the Administrators of the Estate of the late **HAJI MOHAMED ABDI BARE** (deceased). In the affidavit, it is deponed, inter alia, that the deceased who died on 12th April 1998 had since 1960's been the owner of the suit land and had a letter of allotment dated 28th March 1996. That the said suit land measures 500 acres although the Garissa G.K. Prison has occupied 300 acres. That the defendants have now commenced fencing the suit land yet the plaintiffs regularly pay the land rates and premiums without fail to the Garissa County Government.

In opposing the application, the 1st defendant **ROBLE HAJI MOHAMMED** on behalf of the other defendants, filed a replying affidavit in which he deponed, inter alia, that neither he nor the other defendants have trespassed onto the suit land or any land belonging to the plaintiffs. That the 1st and 2nd defendants are the proprietors of **BARAKA FARM** which was purchased from one **SULEIMAN ALI KUNYO** in 1992 as per the annexed sale agreement – annexture **RHM 2.** That the suit land belongs to the Estate of the late **HAJI MOHAMMED ABDI** who was his father and also the father of the 1st plaintiff while the 2nd plaintiff is their sister. That he was surprised to learn that the plaintiffs had filed a Succession Cause in respect to the Estate of the deceased in Nairobi High Court without calling for a family meeting. That he and the 2nd defendant are in occupation and use of **BARAKA FARM** and not the suit land which belongs to his late father's Estate. That the suit land was infact taken over by the Prison Department and for which compensation is being sought from the Government of Kenya. That therefore the defendants have never grabbed the suit land as alleged and instead have utilized **BARAKA FARM** for over twenty years. That the plaintiff had filed the Garissa Case seeking similar orders which was dismissed on 15th April 2013 and therefore this suit ought to be struck out for being res-judicata and in any case, no prima facie case is established.

When counsel for the parties appeared before me on 17th March 2016 it was agreed that both the plaintiffs' Notice of Motion and the defendants' Preliminary Objection be canvassed simultaneously by way of written submissions which have now been filed.

I have considered the Notice of Motion, the Preliminary Objection and submissions by counsel.

The starting point must be the issue as to whether or not this suit and the Notice of Motion ought to be struck out for being res-judicata. If res-judicata is up-held, then there will be no need to consider the plaintiffs' Notice of Motion.

Res-judicata is provided for under ***Section 7 of the Civil Procedure Act*** in the following terms:-

> ***"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

Before res-judicata can be invoked, the following must be shown to exist:

1. ***The matter must be directly and substantially in issue in the two suits.***

2. ***The parties must be the same or litigating under the same title as in the previous suit.***

3. ***The previous suit must have been heard and finally determined by a competent Court.***

The doctrine of res-judicata is ably discussed in various cases including ***KATABAZI VS ATTORNEY GENERAL OF UGANDA*** as adopted by the Kenya Court of Appeal in ***NJERU VS ATTORNEY GENERAL C.A CIVIL APPEAL No. 110 of 2011 NYERI*** cited by the defendants advocate. It is also the law that res-judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment but also 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 – ***HENDERSON VS HENDERSON 1843 67 E.R 313.***

It is clear from the pleadings in the Garissa Case that the dispute involved land parcel known as **HARAGE MARAMTU** farm within Garissa Municipality measuring 500 acres. That is clear from the judgment delivered by **Justice S.N. MUTUKU** on 15th April 2013 and the subsequent decree issued on 15th July 2013. It is also clear from that judgment that the plaintiffs in that case were the two plaintiffs in this case now before me in addition to a third plaintiff by the name **HABIBA ALI NOR** who is not a party herein. It is also clear from the judgment in the Garissa Case that the 2nd defendant herein was the only defendant in that case which, like this case now before me, sought an order of permanent injunction to restrain the 2nd defendant by himself, his employees, agents or servants from trespassing or encroaching onto the suit land. The Garissa Case was dismissed with an order that each party meet their own costs. It has not been suggested that the High Court sitting in **GARISSA HIGH COURT CIVIL CASE No. 9 of 2011** and presided over by **Justice S.N. MUTUKU** was not a competent Court. It is obvious to me that the plea of res-judicata is well founded in the circumstances of this case.

In an attempt to persuade the Court that res-judicata is not applicable in this case, the plaintiffs' advocate has submitted that the judgment of **Justice S.N. MUTUKU** did not settle the dispute to finality and has specifically referred to the following paragraph in that judgment where the Judge said:

> ***"I wish also to state here that the defendant did not file a counter-claim together with his defence and therefore the issue of ownership of Baraka Farm has not been resolved. I find this necessary to mention to avoid a situation where the defendant may claim to have won the case"***

In their submission, counsel for the plaintiffs has stated that:

> ***"The facts in this case are unsettled and highly contested. The issue of relationship between the said two farms, that is Harage Maramtu and alleged Baraka Farm is still contentious. This is clearly demonstrated by the mere fact the defendants admitting that the former farm exists but the legal proprietors of the former insists that the defendants herein who contend to be running Baraka Farm have trespassed and continue to interfere with suit premises (Harage Maramtu)".***

That submission is not supported by the pleadings in this case which show that the order of permanent injunction being sought is with respect to the property known as "***Land Reference No. 128/96/19 known as HARAGE MARAMTU FARM NO. 3 situated at Garissa within the Republic of Kenya***". There is no mention of Baraka Farm in paragraph 15 of the plaintiffs' pleadings which is the one describing the remedy sought. Indeed I have perused all the 15 paragraphs of the plaint and there is no reference in any of them to Baraka Farm. I do not therefore see how, as submitted by the plaintiffs' counsel, "***the issue of relationship between the said two farms, that is Harage Maramtu and alleged Baraka Farm is still contentious"*** when that is not part of the plaintiff's own pleadings. It is well settled that parties are bound by their own pleadings. If the issue concerning Baraka Farm was not determined in the Garissa case, it is because it was not pleaded and that is precisely the situation now obtaining in the case before me.

Counsel for the plaintiff has also submitted that the Garissa case was not determined to finality. That cannot be true because **Justice S.N. MUTUKU** delivered a judgment on 15th April 2013 and an application to extend time for filing and serving of the Notice of Appeal and record of Appeal against that judgment was dismissed by the Court of Appeal in **CIVIL APPLICATION No. 210 of 2013** on 21st February 2014. There can be no better finality to judicial proceedings than an order from a Superior Court dismissing an appeal from the decision of the trial Court.

It is of course correct that the Garissa case did not involve the 1st and 3rd defendants. However, that alone does not frustrate the plea of res-judicata because, as was held in ***REPUBLIC VS CITY COUNCIL OF NAIROBI & TWO OTHERS (2014) e K.L.R,*** the addition of parties is not by itself a bar to res-judicata. See also ***POP-IN (KENYA) LTD VS HABIB BANK A-G ZURICH 1990 K.L.R 609***. It is therefore my finding that this suit is indeed res-judicata.

Notwithstanding my findings above, I will still consider the plaintiffs' Notice of Motion on its merits should I be wrong on the issue of res-judicata. That application seeks a temporary injunction restraining the defendants from interfering with the plaintiff's peaceful and quiet use and enjoyment of the suit land. It must therefore be considered as set out in the case of ***GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358*** where the Court laid down the following principles:-

> ***1. The applicant must establish a prima facie case with a probability of success.***
>
> ***2. The applicant must show that unless the injunction is granted, he would suffer irreparable loss that cannot be compensated by an award of damages, and***
>
> ***3. If the Court is in doubt, it will determine the application on a balance of convenience.***

A prima facie case on the other hand was defined by the Court of Appeal in ***MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003) e K.L.R*** as follows:-

> ***"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case" It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter".***

Being an equitable remedy, a Court will not grant it where it is shown that the applicant has not approached the Court with clean hands. And as was held in the case of ***FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1986 3 ALL E.R 772***, a Court considering such an application should always take the course that appears to carry the lower risk of injustice should it turn out to have been wrong.

From the affidavit of the 2nd defendant in support of the application for injunction, it is clear from paragraph 5 that this application is premised on the facts that on 28th March 1996, the plaintiffs were allocated the suit land. A copy of letter of allotment dated the same day is part of the plaintiff's annextures – annexture **AHM 3**.There is nothing in the pleadings to demonstrate that the plaintiffs have at any one time been in occupation of the suit land. If anything, the plaintiff's case is that whereas they have the letter of allotment to the suit land, it is the defendants who have taken possession by fencing it. The plaintiffs do not have the title deed to the suit land and neither do the defendants who, by the replying affidavit of the 1st defendant, have denied having trespassed or put up any structures thereon and adding that infact they occupy Baraka Farm and that the suit land which belonged to his late father has infact been taken over by the Prisons Department as a result of which compensation is being sought from the Government of Kenya. Annexed to that affidavit are several letters from various Government Departments including the Provincial Administration and the Lands Department showing that Baraka Farm does indeed exist and has land in Garissa. This case, as I have already stated above, relates to **HARAGE MARAMTU FARM NO 3** and not **BARAKA FARM.** The plaintiffs relies on the letter of allotment dated 28th March 1996 to lay a claim on the suit land but as was held in ***WRECK MOTOR ENTERPRISES VS COMMISSIONER OF LANDS & ANOTHER C.A CIVIL APPEAL No. 71 of 1997*** which cited with approval ***DR. JOSEPH NGOK VS JUSTICE MOIJO OLE KEIUWA C.A CIVIL APPLICATION No. 160 of 1997***, title to land normally comes to existence after the issuance of a letter of allotment, meeting the conditions stated therein and the actual issuance of the title document. It is therefore trite that a letter of allotment does not confer any interest to land. At most, it is only an offer to accept and pay for property after which a title will issue subject to all the conditions set out therein being met. The plaintiffs cannot therefore base their claim to the suit land on the letter of allotment dated 28th March 1996 and as there is no evidence placed before me indicating that they took possession thereof, I do not see what legal or equitable interest they have to warrant the orders sought in their Notice of Motion with respect to the suit land. In short, I do not see what prima facie case the plaintiffs have to justify the grant of an injunctive relief.

As the plaintiffs have not satisfied the existence of a prima facie case, then there is no need to consider

the two other principles set out in the ***GIELLA*** case (supra). As was stated by the Court of Appeal in ***NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012,***

> "***If prima facie case is not established, then irreparable injury and balance of convenience need no consideration".***

Therefore, in view of the above, the plaintiffs' Notice of Motion dated 3rd February 2016 is clearly lacking in merits and would be for dismissal.

However, having found that this suit is res-judicata, this Court makes the following orders:-

> ***1. The plaintiffs' suit and the Notice of Motion dated 3rd February 2016 are hereby struck out for being res-judicata.***
>
> ***2. The parties to meet their own costs since the plaintiffs and 1st defendant are siblings.***

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017

Ruling dated, delivered and signed in open Court this 1st day of February 2017

Ms Chepkonga for the Plaintiffs/Applicants present

Mr. Muyodi for the Defendants/Respondents absent.

B.N. OLAO

JUDGE

1ST FEBRUARY, 2017