



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 135 OF 2016**

JOSEPH BABAI MUHU.....PLAINTIFF/APPLICANT

VERSUS

PATRICK MUIRURI KAGIA (Being the Legal Personal Representative

of the Estate of MARY NYAMBURA

NJOROGE.....DEFENDANT/RESPONDENT

**RULING**

On 2nd September 2016, the plaintiff filed this suit seeking judgment against the defendant in the following terms:-

- (a) A declaration that the ruling made by the Land Registrar Muranga on 25th July 1994 is still valid.***
- (b) That a ruling made by C.N. NGARI Resident Magistrate (as he then was) in THIKA LAW COURT CIVIL SUIT No. 243 of 1994 is still valid.***
- (c) A declaration that the plaintiff's occupation of L.R LOC 4/KIRANGA/29 is legal and lawful the same being his ancestral land.***
- (d) A permanent injunction restraining the defendant by himself or his agents from entering, alienating, disposing or in any way interfering with the plaintiff's exclusive possession, use and occupation of L.R LOC 4/KIRANGA/29.***
- (e) The title deed issued to the mother of the defendant MARY NYAMBURA NJOROGE (deceased) be cancelled.***
- (f) Defendant to pay costs.***
- (g) Any other relief that this Honourable Court may deem fit to grant.***

The basis of the plaintiff's case is that whereas the defendant's deceased mother **MARY NYAMBURA NJOROGE** is the current registered proprietor of the land parcel No. **LOC 4/KIRANGA/29** (the suit land) and which was originally registered in the names of her late husband **NJOROGE KAGIA** who was the defendant's father, that registration was obtained illegally, un-procedurally and through corrupt schemes. That the suit land is ancestral land belonging to the larger **WAMUHU** family of which the plaintiff is a member. That the plaintiff was born and raised on the suit land before the land adjudication and demarcation process. A dispute over the suit land was heard by the then Land Registrar Muranga

(**S.K. GATHERU**) in 1994 who ruled that the defendant's father **NJOROGE KAGIA** and other family members acquired the suit land illegally. That the defendant's father filed Civil Suit No. 243 of 1994 at Thika Court seeking to evict the plaintiff's family but that suit was dismissed yet the defendant is now using the Provincial Administration to evict the plaintiff hence this suit.

Simultaneously with that plaint, the plaintiff filed a Notice of Motion citing **Order 40 Rules 1, 2 and 4, Order 51 of the Civil Procedure Rules** and **Sections 63 (c) and (e) of the Civil Procedure Act** seeking the following orders:

**1. Spent.**

**2. Spent.**

**3. "That pending the hearing and determination of this suit, an order of temporal (sic) injunction do issue restraining the respondent either by himself, his servants, agents or otherwise from entering, alienating, disposing, offering for sale, and/or in any other manner interfering with the applicant's occupation and quiet possession of L.R No. LOC 4/KIRANGA/29"**

**4. "That the costs of the application be borne by the respondent"**

That application, which is the subject of this ruling, is premised on the grounds set out therein and supported by the affidavit of **JOSEPH BABAI MUHU** the plaintiff herein. His case is that whereas the defendant is the Legal Administrator or the Estate of **MARY NYAMBURA NJOROGE** the registered proprietor of the suit land and which land was originally registered in the name of the defendant's deceased father **NJOROGE KAGIA**, the said land belongs to the plaintiff's family and is ancestral land passed down from his great grandfathers to his parents and is where the plaintiff and his family reside as part of the larger **WAMUHU** family. That in 1994, the Land Registrar Muranga delivered a ruling over the dispute involving the suit land and concluded that the defendant's father had acquired it fraudulently. The defendant's father then filed Civil Suit No. 243 of 1994 at Thika seeking to evict the plaintiff's family but that suit was dismissed. That since July 2016, the defendant has been illegally using the Provincial Administration to evict him and unless restrained, the defendant will evict him illegally causing him and his family irreparable damages.

In opposing the application, the defendant **PATRICK MUIRURI KAGIA** filed a replying affidavit in which he deponed, inter alia, that the suit land belonged to his late father **NJOROGE KAGIA** who had purchased it for value from **NYAWIRA WAMUHU** but denied that such registration was obtained by fraudulent means. That the plaintiff and his family have no interest legal or equitable in the suit land and have their own land adjacent to the suit land. That the plaintiff and his family are not in possession of the suit land and have only encroached on a part of it to grow food crops and so the District Surveyor Muranga visited the suit land on 4th August 2016 to repair the up-rooted beacons. That the Land Registrar Muranga only made recommendations that the C.I.D investigate claims of fraud and the plaintiff has never made any attempts to lodge a formal complaint to the Police. That Thika Civil Suit No. 243 of 1994 was dismissed on a technicality issue but was never heard on its merit. That the dispute was reported to the Local Chief because the plaintiff and his family have up-rooted the boundary features on the common boundary between their land and the suit land in a bid to extend their land into the suit land. That the plaintiff's suit and this Notice of Motion have no reasonable cause of action and should be struck out. That the plaintiff has also filed summons for the revocation of the grant issued in respect to the Estate of the defendant's deceased father but has not attended Court to prosecute the same and further, the plaintiff had lodged a caution on the suit land which was removed after notices were sent to the plaintiff but he failed to attend when summoned by the Land Registrar Muranga.

The application was canvassed by way of written submissions which have been filed by the firm of **NYAMBURA NJUGUNA ADVOCATES** for the defendant and **WANJOHI GACHE ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits together with annexures thereto and the submissions by counsel.

From the submissions filed by counsel, they have confined themselves to the law relating to the grant of temporary injunctions. However, upon a perusal of the affidavits and annexures herein, it is clear to me that this matter is infact res-judicata. And although neither of the advocates addressed that issue, res-judicata is a matter of law and goes to the jurisdiction of this Court to handle this suit. And an issue of jurisdiction can be take up suo-motto by the Court because, as was held in **OWNERS OF THE MOTOR VESSEL 'LILLIAN S' VS CALTEX OIL (KENYA) LTD 1989 K.L.R 1**, jurisdiction is everything and a Court must down its tools the moment it finds that it has no jurisdiction. An issue of jurisdiction must therefore be raised and disposed off at the earliest opportunity. I shall therefore interrogate whether infact this suit is res-judicata.

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”.***

The rationale behind res-judicata is that it is in the public interest that there should be an end to litigation or that parties and those that represent them are protected from un-ending litigation over the same subject matter and so that there is some end and finality in solving disputes. The doctrine of res-judicata was well captured in the case of **HENDERSON VS HENDERSON (1843) 67 E.R 313** as follows:

***“..... where a given matter becomes the subject of litigation in and 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 forward, 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 ....”.***

It is clear from **Section 7 of the Civil Procedure Act** that res-judicata applies not only to the parties themselves but also to ***“parties under whom they or any of them claim litigating under the same title”***. It is clear from the pleadings herein that the defendant is the son to **MARY NYAMBURA NJOROGE** the registered proprietor of the suit land and who was the wife of **NJOROGE KAGIA** the original proprietor of the said land. It is also clear from the plaintiff’s supporting affidavit that he is a member of the larger **WAMUHU** family who have litigated over the suit land with the defendant’s deceased father one such suit being **THIKA CIVIL CASE No. 234 of 1994** (the Thika Case) in which the defendant’s deceased father was the plaintiff while the three defendants were named as **NJOROGE WAMUHU, NJUGUNA WAMUHU** and **JEREMIAH WAMUHU** who are no doubt part of the larger **WAMUHU** family as deponed by the plaintiff. Although the pleadings in the Thika Case were not availed, the trial magistrate delivered an un-dated ruling dismissing the suit for being time barred. The trial magistrate commences the ruling as follows:

***“The plaintiff one NJOROGE KAGIA has sued the defendants NJOROGE WAMUHU, NJUGUNA WAMUHU and JEREMIAH WAMUHU seeking orders that the trio and their family or agents be evicted from land parcel LOC 4/KIRANGA/29”.***

After re-visiting the history of the dispute including the decision made by the Land Registrar Muranga, the trial magistrate then makes the following order:

***“Plaintiff having admitted when he was registered it would be a waste of time to wait for the issue to be raised during trial, I am convinced the right time is now pre-trial and dismiss the suit as it is time barred.***

***Accordingly it is so ordered. Costs to the defendants”.***

The annexed copy of that ruling is not dated but in paragraph 14 (a) of the plaint, it is pleaded that the said ruling was delivered on 25th July 1994. There is no evidence that there was any appeal against that ruling and therefore the trial magistrate’s order dismissing the Thika Case stands and there would be no need, as is sought herein, to declare it as valid. Only an appellate Court can declare it invalid or otherwise. This Court is not determining any appeal. It is clear from the decision in **HENDERSON** (supra) that the parties in the Thika Case, under whom the parties in this case are now litigating over the same subject matter, were required ***“to bring forward their whole case”*** and not open fresh litigation even if they omitted to do so ***“from negligence in-advertence or even accident”***. In **SALWEM AHMED ZAIDI VS FAUD HUMEIDAN 1960 E.A 92**, the plaintiff’s case was dismissed for non-attendance and a new suit was filed. The then East African Court of Appeal held that the latter suit was res-judicata because an order dismissing a suit has the same effect as a dismissal upon evidence and accordingly the first suit must be deemed to have been heard and determined and therefore, the dismissal of the earlier suit operated as res-judicata. In **JUSTINA ANGORU VS NELSON BICHANGA & ANOTHER 2008 K.L.R**, MWERA J. (as he then was) found a subsequent application to a dismissed one to be res-judicata even though it had not been heard on its merit. It is clear to me that once a previous suit has been dismissed, an aggrieved party can only file an appeal against that dismissal but cannot proceed to file another suit on the same subject matter as such suit would be barred by the rule of res-judicata. The doctrine of res-judicata does not only apply where the previous suit was heard and determined on the evidence. It can also apply where the previous suit was dismissed or struck out or even if it was determined by consent of the parties so long as the requirement of **Section 7 of the Civil Procedure Act** are satisfied. If the trial magistrate did not have the jurisdiction to dismiss the Thika Case, as he did, then the remedy lies elsewhere but not through filing another suit over the same subject matter. The trial magistrate having made a specific finding that the case before him was ***“time barred”*** and proceeded to dismiss it, then this suit, and the application accompanying it, are clearly res-judicata and must suffer the same fate.

I will nonetheless consider the plaintiff’s Notice of Motion on its merits should I be wrong on the issue of res-judicata.

Being an application for temporary injunction, it must be determined on the basis of the principles laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are that:

- 1. The applicant must show a prima facie case with a probability of success at the trial.***
- 2. Secondly, a temporary injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury that cannot be adequately compensated by an award of damages, and,***
- 3. If the Court is in doubt, it will determine such an application on the balance of convenience.***

A prima facie case was defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** as 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. An interlocutory injunction being an equitable remedy will not be granted to a party who has approached the Court with unclean hands and as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILM SALE LTD 1986 3 ALL E.R.**, the Court considering such an application should take the course that appears to carry the lower risk of injustice.

In opposing this application, the defendant has deponed in paragraph 10 and 24 of the replying affidavit

that the plaintiff and his family have no legal or equitable interest in the suit land nor has he demonstrated a prima facie case to warrant the grant of the injunctive relief sought. The plaintiff on the other hand has deposed in his supporting affidavit that the suit land is ancestral land on which he and his family reside. The mere fact that a party lives on land registered in the names of another party is not in itself sufficient reason to warrant the grant of an interlocutory injunction unless the applicant can demonstrate what interest, legal or equitable, he has in the said land. Otherwise, parties would move into others land and immediately lay a claim to the same even without any justification for doing so. I have therefore looked at the plaintiff's pleadings to see what interest he seeks to protect in the suit land and which would entitle him to the interlocutory injunction sought. However, I see none. The plaintiff's pleading does not, for instance raise a claim of trust or even adverse possession over the suit land which, according to the Green Card, has been registered in the names of the defendant's deceased father since 1967 before it was transferred to the defendant's mother in 2009. While I am alive to the fact that at this stage of the trial, I should not make any definitive findings of fact, I am nonetheless required as per *GIELLA's* case (supra) to be satisfied that the plaintiff has established a prima facie case with a probability of success at the trial. There can be no prima facie case established where from the pleadings, the plaintiff has not made out a claim recognized in law which the defendant is obliged to rebut. In *NGURUMAN LIMITED VS JAN BONDE NIELSEN & TWO OTHERS C.A CIVIL APPEAL No. 77 of 2012* the Court said the following:

***“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. 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 or is 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”.***

As indicated above, all that the plaintiff has pleaded in his pleadings is that his ancestors lived on the suit land before the adjudication process and that he too was born there (paragraph 7). That in itself cannot be a basis on which to claim land registered in the names of another party unless an interest known in law or equity is alleged which the Court is therefore called upon to investigate. No such interest has been pleaded by the plaintiff. The plaintiff similarly pleads that the suit land was registered in the names of the defendant's deceased father illegally, unprocedurally and through a corrupt scheme. The plaintiff is therefore imputing fraud in the manner in which the defendant's deceased father acquired the registration of the suit land in his names (paragraph 5). It is well settled that any allegations of fraud must be specifically pleaded and particulars thereof stated on the face of the pleadings – *MORJARIA VS DARBAR & ANOTHER 2000 e K.L.R (CIVIL APPEAL No. 106 OF 2000)*. That has not been done in this case. Surely this Court cannot find that a prima facie case has been established when from the pleadings themselves, and that is the primary document that the Court relies upon, there is no mention of what legal or equitable right the plaintiff is pursuing or which the defendant can be called upon to rebut. In my view, the plaintiff has not established a prima facie case with a probability of success at the trial which is the first hurdle that he had to surmount as per the *GIELLA* case (supra). It follows therefore, as was held in the case of *NGURUMAN* (supra), that:

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

I am of the view therefore that even considered on its own merit, the plaintiff's Notice of Motion was bound to fail.

From what I have stated earlier in this ruling however, this suit and the Notice of Motion accompanying it are clearly res-judicata. The trial magistrate having dismissed the Thika Case for

being “*time barred*”, the only option left to the plaintiff was to file an appeal against that dismissal and perhaps raise the issue that the Thika Case was infact not time barred. It was not, in my view, open to the plaintiff to file a fresh suit over the same subject as he has now done.

Ultimately therefore and upon considering all the matters herein, this Court makes the following orders:

***1. The plaintiff's suit and the Notice of Motion accompanying it are both struck out for being res-judicata.***

***2. Costs to the defendant.***

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2017**

Ruling delivered, dated and signed in open Court this 31<sup>st</sup> day of March 2017

Mr. Abubakar holding brief both for Wanjohi Gachie Advocate and Nyambura Njuguna Advocate at my request as none has turned up though notices were dispatched to them dated 15<sup>th</sup> March 2017 informing them that the ruling would be delivered today.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MARCH, 2017**