



REPUBLIC OF KENYA

IN THE E.L.C. COURT OF KENYA AT EMBU

E.L.C. NO. 3 OF 2016

JOHN NJAGI MUTUMA.....PLAINTIFF

VERSUS

ESTHER WANJUE NYAGA.....1st DEFENDANT

JACOB NJIRU KITHAKA.....2nd DEFENDANT

RULING

1. By a Notice of Motion dated and filed on 14th November 2016, the Plaintiff sought a stay of execution of the decree in Embu CMCC No. 217 of 2014 and all consequential orders under Order 22 rule 25 Civil Procedure Rules. The Plaintiff also sought an interlocutory injunction under Order 40 Rule 1 of the Civil Procedure Rules to restrain the Defendant from interfering, occupying, alienating or dealing with *Title No. Evurore/Kathera/96*. The Plaintiff further sought an order of inhibition inhibiting any further dealings with the suit property pending the hearing and determination of the suit.

2. The said application was supported by the affidavit of the Plaintiff, John Njagi Mutuma, which had several exhibits including the decree issued by the Magistrate's Court in *Embu CMCC No. 217 of 2014* together with an eviction order.

3. It was stated in the said application that the Plaintiff had bought 3 acres out of the suit property from the administrator of the estate of the late Musa Kithaka Gitabu (deceased) and that the said portion had been included in the certificate of confirmation of grant as his share of the estate.

4. It was further stated in the said application that when the Plaintiff sought to transfer the 3 acres into his name, it was discovered that the 1st Defendant's deceased husband, Nyaga Mbarinjo, had fraudulently transferred the entire parcel of land into his name during his lifetime. The Plaintiff further stated that the 1st Defendant's husband was charged with forgery in respect of the said transfer but was acquitted in unsatisfactory circumstances.

5. It was also clear from the said application that the said Nyaga N. Mbarinjo had during his lifetime filed suit for the eviction of the current Plaintiff in *Embu CMCC No. 217 of 2014* in which he obtained a decree against the Plaintiff, John Njagi Mutuma. Copies of the relevant decree and eviction order were annexed to the supporting affidavit.

6. The 1st Defendant filed a replying affidavit on 10th March 2017 in opposition to the said application. The main grounds of opposition were that the Plaintiff was seeking a stay of execution of the decree in *Embu CMCC No. 217 of 2014* whereas no appeal had been preferred against the decree. The 1st Defendant further stated that the Plaintiff herein was a Defendant and participant in the said suit and

therefore ought to have raised the issues raised herein in the earlier suit or by way of appeal rather than filing a fresh suit which constitutes *res judicata*.

7. The 1st Defendant further stated that the instant suit was filed when the earlier suit was pending judgement and that in his defence before the Magistrate's Court, the Plaintiff herein had pleaded that he had bought part of the suit property.

8. The 1st Defendant's replying affidavit also stated that her late husband, Nyaga N. Mbarinjo, had actually bought the suit property from the late Musa Kithaka Gitabu during his lifetime hence there was no fraudulent transfer of the property to her deceased husband.

9. The 1st Defendant conceded that her late husband was indeed charged with forgery but was acquitted upon full trial. The appeal by the state against the acquittal was reportedly withdrawn upon the death of her husband and as such there was no pending criminal appeal in respect of the alleged forgery.

10. The 2nd Defendant did not file any papers in response to the Plaintiff's said application despite having attended court on 5th April 2017 when the said application was scheduled for hearing. On the said date, Ms Rose Njeru for the Plaintiff and Mr Mogusu for the 1st Defendant opted to rely entirely on the affidavits and annexures on record and requested the court to give a ruling date.

11. The main issues for determination, in my view, are;

- a) Whether the instant suit is *res judicata* in view of the decree in *Embu CMCC No. 217 of 2014*.
- b) Whether the Plaintiff has made out a case for the grant of an order of stay of execution.
- c) Whether the Plaintiff has made out a case for the grant of an order of injunction or order of inhibition.

12. On the 1st issue, I have seen a copy of the Plaint and Defence in *Embu CMCC No. 217 of 2014* annexed to the 1st Defendant's replying affidavit. The parties therein are the 1st Defendant and her late husband as Plaintiffs and John Njagi as the Defendant. The subject matter of the suit is *Title No. Evurore/Kathera/96*. In the Plaint, the Plaintiffs pleaded that they were the registered owners of the suit property and that the Defendant had trespassed and constructed a residential house thereon. The Plaintiffs, therefore, sought an eviction order against the Defendant together with costs.

13. It is also clear that the Plaintiff herein filed a statement of defence in the said suit in which he pleaded, *inter alia*, that he had purchased a portion of the suit property from the estate of the late Musa Kithaka and that the 2nd Plaintiff had been charged with forgery with respect to the transfer of the suit property in *Siakago Criminal Case No. 471 of 2001* which culminated in an appeal against his acquittal in *Criminal Appeal No. 58 of 2013*. The Defendant otherwise denied the Plaintiffs' claim in the Magistrate's court in its entirety.

14. In those circumstances, I am of the considered view that the Plaintiff in the instant suit is precluded under **section 7 of the CPA (Cap 21)** from raising the same or substantially the same issues which were directly and substantially in issue in *Embu CMCC No. 217 of 2014*. The material provisions of section 7 provide, *inter alia*, that;

“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.”

15. Explanation No. 4 to the said section makes it clear that any matter which ought to have been made a

ground of attack or defence in the previous proceedings shall also be deemed to have been in issue in such previous suit.

16. In the case of ***Kamunye & Others v. The Pioneer Assurance Society Ltd [1971] E.A 263*** the test for *res judicata* was stated thus;

“The test whether or not a suit is barred by res judicata seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time.”

17. Similarly, in ***Ramdev Malik v. Lionel Albert Callow [1958] E.A 99***, the Respondent had obtained judgement against the Appellant in respect of salary arrears before the Magistrate’s Court. The Appellant did not appeal that judgement but instead filed a new suit seeking to set aside the earlier judgement on the basis that it was obtained fraudulently. It was held that the alleged fraud was included in something which had already been adjudged and to entertain a new suit would be to reopen the issue already decided and to test the evidence of the witnesses again which the Appellant could have done in the earlier suit.

18. In view of the foregoing, I find and hold that the Plaintiff herein had an opportunity to raise and canvass all issues relating to his acquisition of the portion of 3 acres out of the suit property or the alleged fraudulent transfer of the property by the late Nyaga Mbarinjo in the previous suit. If he was aggrieved by the proceedings or decision of the earlier court, his option was not to file a fresh suit raising substantially the same issues. I, therefore, hold that the current suit is *res judicata* and otherwise an abuse of the court process.

19. The 2nd issue is whether the Plaintiff has made out a case for stay of execution of the decree. An order for stay of execution of a decree may be made where there is a pending appeal from the decree and where the applicant might otherwise suffer substantial loss under Order 42 of the Civil Procedure Rules. The Plaintiff has, however, chosen to apply for a stay of the decree under Order 22 Rule 25 of the Civil Procedure Rules which provides that;

“Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”

20. In my view, it is doubtful if the said provisions are applicable to the instant situation because the decree in favour of the 1st Defendant was not issued by this court but by the Magistrate’s court. The section seems to refer to a situation where the decree was issued by the same court in which the second suit is pending hence the reference to a “decree of such court” in rule 25.

21. The Plaintiff did not refer the court to any authority in which a stay of a decree has been granted under Order 22 where the decree is not subject to challenge. Be that as it may, the court is not satisfied that there are any good grounds for granting a stay of execution of a decree of a court of competent jurisdiction which has not been appealed against. There is no indication on record if there is any pending application to have the decree set aside, varied or reviewed. It has not been contended that the Magistrate’s court acted without or in excess of jurisdiction.

22. A perusal of the Plaint reveals that the Plaintiff is seeking an order for cancellation of the title issued to the late Nyaga Mbarinjo, costs of the suit and any other relief the court may deem fit to grant. There is no prayer for setting aside the decree issued in *Embu CMCC No. 217 of 2014*. That decree cannot simply be ignored or wished away. Any challenge against the decree can only be mounted in the manner prescribed by law such as by way of appeal, review, judicial review, etc but not by way of filing a separate suit.

23. In the circumstances, the court is not satisfied that the Plaintiff has made out a case for the grant of an order of stay of the decree issued in *Embu CMCC No. 217 of 2014*.

24. The 3rd issue relates to the requirements for the grant of an order of injunction under Order 40 of the Civil Procedure Rules. The principles for the grant of such order are well settled. See ***Giella v. Cassman Brown & Co Ltd [1973] EA 358***. First, the Applicant must demonstrate a *prima facie* case with a probability of success at the trial. Second, the Applicant must demonstrate that unless the order is granted, he would suffer irreparable damage which cannot be compensated by an award of damages. Third, where the court is in doubt on the 2nd principle, it shall decide the case on the balance of convenience.

25. The court is far from satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success at the trial for the reasons given in respect of the 1st and 2nd issues. In the court's view, the Plaintiff is simply trying to re-litigate the matters which were conclusively determined in *Embu CMCC No. 217 of 2014*. The court is not satisfied that there is a probability of the Plaintiff overturning or overcoming the said decree at the trial of the action. I need not say more on this issue at this interlocutory stage.

26. Given that the Plaintiff has not satisfied the court on the 1st principle for the grant of an injunction, it is not necessary to consider the 2nd and 3rd principles since fulfilment of the 1st principle is a prerequisite for consideration of the other principles.

27. The court is also of the view that the prayer for an order of inhibition is not merited since the Plaintiff has not made out a *prima facie* case with a probability of success at the trial.

28. The upshot of the foregoing is that the court finds no merit in the Plaintiff's Notice of Motion dated 14th November 2016 and the same is hereby dismissed with costs to the 1st Defendant. The 2nd Defendant did not file any response to the said application.

29. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **31st** day of **MAY, 2017**

In the presence of Ms Rose Njeru for the Plaintiff/Applicant, Mr Mogusu for the 1st Defendant/Respondent and in the absence of the 2nd Defendant.

Court clerk Mr Njue.

Y.M. ANGIMA

JUDGE

31.05.17