



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1124 OF 2014

MICHAEL MAINA NDUGO.....PLAINTIFF/RESPONDENT

=VERSUS=

NTIKYA ENTERPRISES LIMITED.....DEFENDANT/APPLICANT

RULING

1. The Defendant/ Applicant filed a Notice of Motion dated 11th November, 2016 in which it sought the following reliefs:

(i) Spent

(ii) Spent

(iii) That Pending the hearing and determination of this suit, the Plaintiff by themselves and/or their agents, employees, assigns and/or successors and/or any person howsoever acting on their behalf be and are hereby restrained from constructing, selling, offering for sale, charging and/or in any other manner whatsoever interfering and/or dealing with the suit parcels of Land known as **Santon Estate Plot No. 1352 on Land Registration number 8480/2**.

(iv) That the injunctive order made on 18th November, 2015 be and is hereby discharged.

(v) The costs of this application be awarded to the Defendant/ applicant.

2. The Applicant contends that it is the registered owner of **LR No. 8480/2** in which plot number **1352** falls. The subject matter of this suit is Plot number **1352** (suit land). The Respondent moved to Court and obtained injunctive orders on 18th November, 2015. The Respondent has since not bothered to fix the suit for hearing as ordered in the ruling delivered on 18th November, 2015. The Respondent has instead embarked on construction on the suit land as if he is the owner of the suit land. That this is to the detriment of the Applicant who is the registered owner.

3. The Applicant further contends that the injunction orders granted on 18th November, 2015 have since lapsed and the same should be discharged and the Applicant granted injunctive orders preserving the suit land until the dispute on ownership is solved.

4. The Respondent has opposed the Applicant's application based on grounds of opposition dated and filed in Court on 23rd November, 2016. The Respondent contends that the application is res judicata, is

misconceived, frivolous and is otherwise an abuse of the process of the Court. That the Respondent moved expeditiously to have the case fixed for Pre-trial and that the Applicant's application is an application for review disguised as one for preservatory orders.

5. I have considered the applicant's application, the opposition thereof by the Respondent as well as the submissions by the Parties. The issues which emerge for determination are as follows:

- (i) Whether the orders of injunction issued on 18th November 2016 should be discharged.
- (ii) Whether the Applicant is entitled to injunctive orders sought.
- (iii) Whether this application is res judicata.

Whether the orders of injunction issued on 18th November 2015 should be discharged.

6. In seeking orders discharging the injunction orders issued on 18th November 2015, the Applicant is relying on Order 40 Rule 6 of the Civil Procedure Rules which provides as follows;

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.”

7. In the instant case, the Court granted injunction orders in favour of the Respondent on 18th November 2015 and further ordered that the main suit be fixed for hearing expeditiously so that the issue of ownership could be determined. The record shows that the Respondent's Advocates applied to Court through their letter dated 31st August 2016 seeking a date for pre-trial. On 5th September 2016 the Court set down the matter for pre-trial on 1st December 2016. Before the case could come up for pre-trial, the Applicant filed the present application on 11th November 2016.

8. Whereas it is not possible to tell whether the applicant's counsel had been served with Notice for pre-trial, it is clear that the letter requesting for pre-trial date was copied to them. They were therefore aware that the Respondent was in the process of carrying on with the case but they decided to scuttle that process by filing this application. The Respondent cannot therefore be blamed as he had already set out the process of having this case heard. It is also in Public knowledge that Milimani ELC Court was overwhelmed with cases such that even getting a date for mention was not easy. There is therefore no way the case would have been determined within twelve months. I therefore find that there are no grounds for discharge of the injunction orders granted on 18th November 2015.

Whether the applicant is entitled to injunctive orders sought.

9. The Applicant's main aim seems to be discharge of the injunctive orders. The Prayer for injunctive orders in its favour seems to have come by the way. The prayers for injunction in favour of the applicant have no basis. The Applicant has not made any counter-claim in this suit. When injunctive orders were granted in favour of the applicant, he had already constructed as shown in the photographs attached to the supporting affidavit which resulted in the orders being complained of.

10. The Applicant cannot therefore claim that Respondent invaded the suit land and commenced construction of an unapproved building. It therefore follows that the Applicant's prayer for injunctive orders are misconceived and cannot be granted.

Whether this application is res judicata

11. To an extent, the applicant's application is res –judicata. This is more so regarding the prayer for injunction. The doctrine of res judicata is not confined to suits. It also applies to applications. Where an issue has been dealt with by a competent court and a decision made thereon cannot again be brought up

where the subject of that litigation and the parties are the same.

In the present case, the issue of injunction was considered by the Judge who found that the injunction as prayed for by the Respondent should be granted. The Applicant should not have again come back seeking to litigate on an issue which had been settled. I therefore find that the Applicant's application in as far as injunctive relief is concerned is res judicata.

12. As I have already found that there are no grounds for discharging the orders given on 18th September 2015, I find that the Applicant's notice of motion dated 11th November, 2016 lacks merit. The same is hereby dismissed with costs to the Plaintiff/ Respondent.

It is so ordered.

Dated, signed and delivered at Nairobi on this 22nd day of June, 2017.

E. O. OBAGA

JUDGE

In the absence of Advocates who were aware of the date of delivery of ruling.

Court Assistant: Hilda