



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIROMENTAL COURT
ELC NO 853 OF 2012(O.S)

ANNE NJERI MBUGUA(Suing as the Legal Rep.

of PETER MBUGUA MUKORA.....PLAINTIFF/APPLICANT

VERSUS

DAVID GATHAIYA (being sued as the Legal Rep. of

RAPHAEL WAIRIMU MBUGUA.....DEFENDANT/REPODENT

RULING

The Application for determination is the Plaintiff's/Applicant's *Notice of Motion* dated *15th January 2016*, brought under *Order 51 Rule 1 and Order 42 Rule 6* and *Sections 3 and 3A of the Civil Procedure Act, Cap 21* seeking for orders, inter-alia, that;-

i. Spent.

ii. The pending the inter-partes hearing of this Application this Honourable Court be pleased to make an Order directed at the Land Registrar Nairobi to forbid all dealings or further registration of any entries in the register over L.R No. Dagorretti /Mutuini/913, 914, 915 , 916 and 917.

*iii. That the Honourable Court be pleased to direct the Land Registrar Ardhi House to cancel all the entries registered in the Register pertaining to the parcels of land known as L.R No. Dagorretti /Mutuini/913, 914, 915 ,916 and 917 that have been registered after the *7th day of June 2013* when the injunction orders were given pending the final determination of the suit herein, by Honourable Lady Justice Gacheru.*

*iv. The Honourable Court be pleased to give leave to the Plaintiff Applicant to cite or commence contempt proceedings against David Gathaiya for disobeying the Orders of this Court given on *7th June, 2013.**

This Application is premised on the supporting affidavit of *Anne Njeri Mbugua* “the Plainitff/Applicant herein”. She averred that an Injunction was issued by this Honourable Court on *7th June 2013*, pending the hearing and determination of the suit. However, the Defendant/ Respondent caused a transfer of the

Suit property to himself during the pendency of the suit. That this came to light when she conducted a search **on 3rd November 2015**, over **L.R No. Dagorretti /Mutuini/917**, where she resides and conducts business. The search revealed that the property was now registered to one **David Gathaiya** (the Respondent herein). The Plaintiff/Applicant therefore contended that since the transfers were undertaken during the pendency of this suit, the same ought to be cancelled and the Respondent be held in contempt of this Honourable Court orders. She further contended that the Defendant had sought in the Succession proceedings of his late sister the parcel of Land known as **L.R No. Dagorretti/Mutuini 488C and not L.R No. Dagorretti /Mutuini/ 917**.

In response thereto, the Defendant/Respondent filed his **Replying Affidavit** on **26th February 2016**, wherein he averred that he had never been served with the Court order dated **7th June 2013**, hence was not in contempt of any Court order. He stated that Land **L.R No. Dagorretti/Mutuini 488** was the subject of **Nairobi High Court Succession Cause No. 2141 of 1998** and **Nairobi Appeal No. 141 of 2006**, respectively wherein the Appellate Court determined that the parcel of land was to be registered in his name absolutely. Consequent thereto, he transferred the land in his name and caused sub-division and was issued with new Title Deeds namely Land **L.R No. Dagorretti/Mutuini No. 914, 916 and 917**, respectively a process that was concluded on **2nd April, 2013**.

It was his further averments that the Land **L.R No. Dagorretti/Mutuini 488**, did not exist on the date the Order was issued i.e on **7th June 2013**. He annexed copies of Title deeds in reference to parcels of Land **L.R No. Dagorretti/Mutuini Nos. 914, 915 916 and 917**. He further contended that the Plaintiff currently resided on the parcel of land known as **Kambu Lari /Bathi /237**, and not on any of the land parcels aforementioned. It was his averment that Plaintiff/Applicant had further obtained an Order of prohibition dated **15th January 2015**, through deception and misrepresentation. He deposed that the current proceedings in Court were *Res-judicata* having being determined in **Nairobi High Court Succession Cause No. 2141 of 1998** and **Nairobi Appeal No. 141 of 2006**

Further thereto, he averred that the husband of the Plaintiff had fraudulently purported to sell land title Number **L.R No. Dagorretti/ Mutuini /488** and **Title No. L.R No. Dagorretti/ Mutuini /915 and 916** to one **Geoffrey Mikinya Mbuku**, on **26th April 2001** and **23rd June 2000** respectively, who is in possession of the same currently and hence the Applicant had no legal or beneficial interest in the property and the parcels of land known as **L.R No. Dagorretti/Mutuini 915 and 916** respectively were sold by the Applicant's late husband **Peter Mbugua Mukora (Deceased)** albeit illegally and he was constrained from signing the transfer in the purchaser's name, because the Applicant's late husband had put the purchaser in possession. He averred that the Order having being issued on **7th June 2013**, the same lapsed a year later pursuant to the provisions of order 40 Rule 6 of the Civil Procedure Rules, 2010, and hence there was no Order capable of been enforced by way of Contempt of Court.

The Plaintiff/Applicant filed a **Supplementary Affidavit** on **10th March 2016**. She reiterated that the Respondent was well aware of the Court Order issued by this Honourable Court on **7th June 2013**. Further thereto, it was her further contention that the parcel of land known as **L.R No. Dagoretti/ Mutuini/488**, was not mentioned in **Nairobi High Court Succession Cause No. 2141 of 1998** and **Nairobi Appeal No. 141 of 2006**, since the pleadings were based on **Plot No.488C**, a parcel of land different from **L.R No. Dagoretti/ Mutuini/488**. She averred that the two suits did not distribute any property as alluded to by the Defendant/Respondent and they both dealt with Revocation of Grant. It was her further averment that the Defendant had managed to acquire a Certificate of Confirmation solely whereas he had applied together with is two brothers. She contended that the late Rachel Wairimu Mbugua(deceased) commissioned a surveyor in **1994 upto 1996** to subdivide **L.R No. Dagoretti/ Mutuini/488**, into **L.R No. Dagorretti/Mutuini Nos.914, 915 916 917 and 918** respectively. The deceased was to occupy **No. 915** which was indicated in the Surveyor Plan as **488C**.

She also contended that the Defendant had misled the Court and that by **1998 L.R No. Dagoretti/ Mutuini/488**, had ceased to exist and not as alleged on **7th June 2013**. It was a surprise to her to find out that the Defendant had processed a title to parcel **No. L.R No. Dagoretti/ Mutuini/915** which she currently

occupies.

Parties agreed to canvass the application by way of Written Submissions. The Plaintiff/Applicant filed hers on **19th May 2016**. In totality the Plaintiff submitted that it was imperative that the Court does maintain the already injunction and issue preservatory orders pending the determination of the suit. The Defendant/Respondent filed his on **21st June 2016**. His submission was Four pronged. On ground 1, he submitted that the Plaintiff's assertion that she had lived on the suit property for more than **12 years** was erroneous and hence she could not be on the land by virtue of adverse possession. Secondly he submitted that the prayer for injunction wherein he contended that the orders sought by the Plaintiff were of a final nature and could not be granted at the interlocutory stage. On ground number 3, it was his submission that the Order from which the Plaintiff was basing the prayer for Contempt of Court proceedings had lapsed. He submitted that the order issued on **7th June 2013**, had already lapsed after a period of **12 months** as the same was crafted on condition that the Plaintiff set the **Originating Summons** dated **17th November 2012** ,for hearing. This he contended was not done and hence there was no Order capable of been enforced by way of Contempt proceedings.

Further he buttressed his submissions by stating that he had not been served with the Order itself and as far as he was concerned he could not be in contempt of an Order he was not aware of. On ground number 4 titled inhibitions, it was his submission that the Plaintiff cited the wrong provisions of the law and none of them would grant orders of inhibition and cancellation of the titles issued to the Defendant. He contended that the rights of the Defendant were aptly protected under Sections 23, 24 and 25 of the Land Act, 2012 respectively. He submitted that the only proviso in law that grants a party inhibition Orders was Section 68 of the Land Registration Act which had not been invoked by the Applicant. He cited the case of **HCCC Case No. 222 of 2012 Mark Mukut.. Vs... Kakai Ole Masanka**, wherein it was held that **where a party wanted to seek an order of inhibition and did not wish to do so thorough an injunction, the only other remedy available to him was through Order 68 of the Land Registration Act 2012**. In summation he submitted that the Orders sought were final in nature and could not be granted on interlocutory stage.

From the Submissions of the respective parties three issues arise for determination;

- a) **Is the matter herein res-judicata having been dealt with in Nairobi High Court Succession Cause No. 2141 of 1998 and Nairobi Appeal No. 141 of 2006 respectively?**
- b) **Can an order issue forbidding further dealings on the land?**
- c) **Is the Defendant/Respondent in contempt of this Honorable Court's orders issued on 7th July, 2013?**

Findings and Determination

Res-judicata

The doctrine of res judicata is set out in the **Civil Procedure Act** at **Section 7** 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 can 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 **Civil Procedure Act** also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

‘Explanation. (1)—The expression “former suit” means a suit which has been decided before the

suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction.

The Court in the English case of ***Henderson...Vs.... Henderson (1843-60) ALL E.R.378***, observed thus:

“...where a given matter becomes the subject of litigation in, and of 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 case, not only to points upon which the court was actually required by the 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.”

The Defendant/Respondent states that the issues in this matter are *res-judicata* as they were canvassed in ***HC Succession Cause No. 2141 of 1998***, and in the consequent Appeal being ***Nairobi Appeal No. 141 of 2006***. I have perused the contents of both the Rulings delivered in respect to the above-mentioned cases. In ***HC Succession Cause No. 2141 of 1998 In the matter of the Estate of Rachel Wairimu Mbugua(deceased)*** her ***Ladyship Honourable Rawal J. (as she then was)*** adjudicated on an application for revocation of grant brought by the Co-wives of the deceased. The Co-wives sought to be beneficiaries of the deceased by virtue of the fact that they had been granted letters of administration jointly in their late husband’s estate as co-wives. The Court ruled that they had no right to inherit the property of the deceased by virtue of Section 39 of the Law of Succession Act which provides the hierarchy of beneficiaries. Being dissatisfied they preferred an Appeal on the same grounds and which Appeal was dismissed against them. Hence this matter in my view is not *res-judicata*. The crux of this suit is who owns which parcel of land and which issue is yet to be determined. What the Court dealt with at that point was the issue of revocation of grant. In the end, I find that the issues raised are not *res-judicata*.

Contempt Proceedings.

On ***7th June 2013***, this Honourable Court did issue orders to the effect that an injunction order does issue prohibiting any dealings on the suit property on condition that the Plaintiff/Applicant set the Originating Summons dated ***17th November 2012***, for hearing within the next ***12 months*** failure to which the Interim injunction would be discharged automatically.

From the Court record the Plaintiff/Applicant’s husband ***Peter Mbugua Mukora(deceased)*** was the Plaintiff prior to his demise on ***25th May 2013***, one month prior to the said Orders being issued. The Plaintiff/Applicant was substituted vide an Application dated ***19th November 2013***, and determined on ***8th October 2014***. It is trite law that the suit could not proceed unless the Plaintiff was substituted and hence it was not possible to set the matter for hearing during the pendency of the Abatement Application. However that notwithstanding the orders issued on ***7th June 2013***, were not extended and as such remain discharged. On that basis I agree with the Submissions by the Defendant/Respondent that the Order cannot be enforced by way of contempt proceedings. The Defendant/Respondent cited the case of ***Sam Nyamweya and Others..Vs ...Kenya Premier League Limited (2015) eKLR*** . The Court finds that the

same is not applicable as in that case there was a valid Court Order to that effect. This Court will not delve on the issue as to whether the Respondent was served or not as rightfully observed the Order automatically discharged.

Orders of Cancellation of Titles and Inhibition

The Plaintiff seeks that pending the proceedings, the Honourable Court be pleased to make an Order directed at the Land Registrar, Nairobi to forbid all dealings or further over the suit properties. The dispute herein is who indeed is the rightful owner of the suit properties.

To allow for both parties to present evidence, and for this Court to determine the right owners of the respective suit properties, it is imperative that the *status quo* be maintained. The *status quo*, if not maintained then the Applicant's suit will be conducted merely as an academic exercise. Therefore to achieve this *status quo*, the Court will **allow prayer 2** of the application. This prayer is allowed to the extent that the Respondent is restrained from dealing or further registration of any entries registered in the Register pertaining to the parcels of land known as **L.R No. Dagorretti /Mutuini/913, 914, 915 , 916 and 917, pending hearing and determination of the suit.**

With regard to **Prayer No. 3** this Court cannot grant the same at interlocutory stage since the same call for adducing of oral evidence. It is premature at this stage, as it will require calling of evidence before it can be allowed. Prayer No.3 is a mandatory order which can only be determined after evidence has been advanced and circumstances that led to the said registrations have been established.

For the above reasons, the Court finds that the Plaintiff/Applicant's **Notice of Motion** dated **15th January 2015**, is **merited in terms of prayer No.2**. The Court **allows the said prayer No.2 entirely**.

However, the Court finds that prayer no.3 cannot be allowed at this

Interlocutor stage. Consequently, the Court **declines to allow prayer No.3. Costs of this application shall be in the cause.**

It is so ordered.

Dated, Signed and Delivered at Nairobi this 31st day of August, 2017.

L GACHERU

JUDGE

31/8/2017

In the Presence of:-

M/s Michira holding brief for Mr. Njoroge for the Plaintiff/Applicant

Mr. Mageto for the Defendant/Respondent

Catherine - Court Clerk

L GACHERU

JUDGE

31/8/2017