



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.11 OF 2017

JOSEPH KIUNA.....1ST PLAINTIFF/APPLICANT

PETER WANG'ANG'A KIARIE

(Administrators of the Estate of

KIARIE KIUNA (deceased)..... 2ND PLAINTIFF/APPLICANT

-VERSUS-

DOMINIC MWAURA HINGA.....DEFENDANT/RESPONDENT

RULING

The Plaintiffs herein filed this suit on **4th January 2017**, and sought for various reliefs against the Defendant. Among the prayers sought, is an order for permanent injunction restraining the Defendant from interfering with the Plaintiffs suit property ***Ndeiya/Ndeiya/1419***. Contemporaneously, the Plaintiffs/Applicants filed a ***Notice of Motion*** application even dated and sought for these orders:-

1) Spent.

2) Spent.

3) Spent.

4) That an order of temporary injunction against the Defendant herein restraining him from wasting, and/or interfering with the Plaintiff's quiet possession, and/or any dealing in any way with that parcel of land known as *Ndeiya/Ndeiya/1419* pending the hearing and determination of this suit.

5) That the cost of this application be borne by the Defendant/Respondent.

The application is premised upon the grounds stated on the face of the application and on the ***Supporting Affidavit*** of the ***Applicants***. These grounds are:-

1) That the Defendant/Respondent is a step son of *Wang'ang'a Kiuna (deceased)* who was a brother to the Applicants' father herein and both were sons of *Kiuna Muthuri*.

2) *That the Applicants have never allowed the Respondent to come and built on their land.*

3) *That the Respondent has failed to seek consent when accessing the parcel of land and has gone further to damage the same through wasting and building a temporary house without the Applicants' consent yet the Applicants are the beneficiaries of the estate of the deceased who is the registered owner.*

4) *That unless the court restrains him, the Applicants stands to suffer irreparable damage since the respondent is wasting away the land without any care and further causing restlessness and strife within the compound where they both live.*

In their **Supporting Affidavit**, the Applicants averred that they are administrators of the **estate of Kiarie Kiuna (deceased)** who was their father and the registered owner of the suit property, **Ndeiya/Ndeiya/1419**. Further that the mother title was **Ndeiya/Ndeiya/446**, which was also in the name of their late father. However, in the year **1987**, their late father **Kiarie Kiuna** decided to give **3¼ acres** to his brother **Wang'ang'a Kiarie** and his son, **Francis Njoroge Wang'ang'a**. The mother title was therefore sub-divided into two equal portions wherein **Ndeiya/Ndeiya/1419**, comprising of **8½ acres** was registered in the name of the late **Kiarie Kiuna** and **Ndeiya/Ndeiya/1420**, was registered in the name of **Francis Njoroge Wang'ang'a**. It was their contention that the Defendant herein was born after **Wang'ang'a Kiuna** had divorced his wife and so he is not a biological son of **Wang'ang'a Kiuna**, nor a beneficiary to his estate. However the Defendant has invaded the suit land even though the same has already been subdivided vide **Succession Cause No.378 of 2010**, marked as **annexture JK 2**.

They further contended that **Wang'ang'a Kiuna died** in the year **2005**, and was buried on **Ndeiya/Ndeiya/1420**, and that during his life time, the said **Wang'ang'a Kiuna** never laid a claim on the suit property. They urged the Court to allow their claim.

The **application is contested**. The Defendant herein filed a **Notice of Preliminary Objection** dated **6th March 2017**, on the following grounds.

1. The Plaintiff's Notice of Motion application dated 30th December 2016, is bad in law, incompetent, incurably and fatally defective for the following reasons:-

a) The issue of ownership of all that property being Title No.Ndeiya/Ndeiya/1419, is res judicata.

b) The Land Tribunal sitting in SRMC, LDT Case No.10 of 2006 – Limuru made an award on the ownership of 1 acre out of Title No.Ndeiya/Ndeiya/1419.

c) The Plaintiffs' said application and the whole suit is a non-starter devoid of any merits.

The Defendant urged the court to strike out the entire suit with costs.

Further the Defendant filed his **Replying Affidavit** sworn on **1st March 2017**, and averred that the Plaintiffs have approached the court with unclean hands and have failed to reveal the true facts regarding the suit property. He alleged that he is the son of **Wang'ang'a Kiuna**, who was a brother to the father of the Applicants herein **Kiarie Kiuna**. He also alleged that the suit property belonged to their father **Kiuna Muthuri** vide title **Ndeiya/Ndeiya/466**, and was approximately **11 acres**. That it was the wish of their grandfather **Kiuna Muthuri**, to have the suit property sub-divided equally between **Kiarie Kiuna** and **Wang'ang'a Kiuna**. However, the late **Kiarie Kiuna** mischievously caused the original title **Ndeiya/Ndeiya/466**, subdivided into two unequal portions being **Ndeiya/ Ndeiya/1419** approximately **8½ acres** which was registered in the name of **Kiarie Kiuna** (now deceased) and **Ndeiya/Ndeiya/1420**, approximately **3½ acres** registered in the name of their brother, **Francis Njoroge Wang'ang'a**, to hold it in trust for the rest of his siblings and their father. However that was unfair subdivision as the original **Ndeiya/Ndeiya/466**, was supposed to be subdivided into two equal portions of **5½ acres** and **each** allocated to **Kiarie Kiuna** and **Wang'ang'a Kiuna**.

He further alleged that he filed a complaint at Land Disputes Tribunal at Limuru and *vide SRM LDT Case no.10 of 2006*, at *Limuru*, and the late *Kiarie Kiuna* was ordered to surrender *1 acre* to the Defendant and his other siblings as evident from *DM2(a)* and *DM2(b)*. Therefore in execution of the said decree, he moved to the suit property *Ndeiya/Ndeiya/1419*, and constructed his house on the one acre as per the said decree. However, the Plaintiffs/Applicants unfairly, illegally and without notice demolished the said house as is evident from *DM3*.

It was his contention that he is the rightful owner of one acre together with his siblings out of *Ndeiya/Ndeiya/1419*, which the Applicants herein ought to give him. Further that the Plaintiffs/Applicants are aware of the said decision of the Land Disputes Tribunal, in *Limuru*, and the Court's Decree wherein the Defendant was to get one acre out of the suit property. He also averred that he is a biological son of *Samuel Nganga alias Wang'ang'a Kiuna*, and there has never been any question of paternity. He is therefore a beneficiary of the rightful property of the said late *Wang'ang'a Kiuna*. He urge the Court to dismiss the Plaintiffs application.

On *6th March 2017*, the Court directed that the Preliminary Objection be canvassed first but on *22nd March 2017*, the Court directed that both the *Preliminary Objection* and *Notice of Motion* dated *30th December 2016* be canvassed together by way of written submissions. The directions of *6th March 2017* were vacated.

Subsequent thereto, the parties through their respective advocates filed their written submissions which this Court has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law and makes the following findings:

The Court will first determine the issue of preliminary objection. *What is a Preliminary Objection?*

Black Law Dictionary 9th Edition at Page 1299 describes Preliminary Objection as:- *“an objection that if upheld would render further proceedings before the tribunal impossible or unnecessary.”*

It is therefore evident that if a preliminary objection is upheld, it will dispose off the suit. The Court will first determine whether what the Defendant has raised is a Preliminary Objection which is capable of rendering further proceedings impossible.

The Defendant has averred that the suit herein is *incompetent, incurably* and *fatally defective* being *resjudicata* and non-starter. Courts have variously had occasions to decide on what amounts to preliminary objection. In the case of *Nitin Properties Ltd...Vs...Jagjit Singh Kalsi & Another, Civil Appeal No. 132 of 1989*, the Court held that:-

“A preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”. See also *Mukisa Biscuit Company..Vs...West End Distributors Ltd (1969)EA 696*.

Further in the case of *Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999*, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

The Defendant has alleged that the Plaintiffs suit is incompetent and fatally defective for being *resjudicata*. If the court is to arrive at a finding that the suit herein is incompetent and fatally defective, then the Court will have no option but to strike it out. That would indeed be capable of disposing the suit preliminarily.

The Court finds that the Notice of Preliminary Objection as raised by the Defendant fits the description of what is a preliminary objection. See the case of **Omondi...Vs..National Bank of Kenya Ltd & Others (2001) KLR 579**, where the Court held that:-

“The plea of resjudicata is a pure point of law which if determined in favour of the Respondent, would conclude the litigation....”

The next issue for determination is whether the preliminary objection is merited?

The Defendant has raised the plea of *Resjudicata* and has submitted that this suit was determined by Limuru Land Disputes Tribunal, which ruled in favour of the Defendant and vide **SRM LDT Case No.10 of 2006** and the said order of the Tribunal was adopted as the Decree of the Court. That the said Decree has not been appealed against and/or reviewed and thus the matter is concluded.

Black’s Law Dictionary describes *Res-judicata* as:-

“Resjudicata also known as ‘claim preclusion’, is the Latin term for a matter (already) judged” and refers to either two concept in both civil law and common law legal systems, a case in which there has been a final judgement and is no longer subject to appeal. And the legal doctrine is meant to bar or preclude continued litigation of a case on same issues between the same parties”.

The issue of *resjudicata* is also dealt with by Section 7 of the Civil Procedure Act which provides 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 claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issues has been subsequently raised, and has been heard and finally directed by such a court.”

The Defendant submitted that since this matter was deliberated by the Land Disputes Tribunal, then it is *Res judicata*. He quoted the case of **Kiprono Arap Biegon...Vs...John Arap Bii & Another HCCC No.38 of 2003** at **Kericho**, where the Court held that; ***“the matter was Resjudicata as the issues therein had been deliberated by the Land Disputes Tribunal.***

However, the Plaintiffs submitted that the suit is not *Resjudicata* as the matter was not heard and determined by a court of competent jurisdiction. The Plaintiffs relied on the case of **R...Vs...Kajiado North District, Ngong Land Disputes Tribunal, Senior Resident Magistrate Kajiado**, where the Court held that:-

“If the said Tribunal had no jurisdiction to entertain the matter, whatever proceedings flowed from its decision would be null and void since decision made by a tribunal which has no jurisdiction to entertain the dispute before it must of necessity be null and void.”

Indeed the Court has considered Section 7 of the Civil Procedure Act and it is clear that the matter should have been determined by a **‘court of competent jurisdiction’**.

It is indeed not in doubt that the Land Disputes Tribunal sitting in Limuru decided the matter involving the Defendant herein being **Dominic Mwaura Hinga..Vs...Francis Njoroge Kiuna** and **Kiarie Kiuna** and directed that **Kiarie Kiuna**(now Deceased) should surrender one (1) acre of his portion of land to the Defendant herein. The said order of the Tribunal was adopted as the order of the Court by the SRM Court, Limuru. Though the Defendants therein did not appeal the said decree, it is evident that the suit land **Ndeiya/Ndeiya/1419**, was registered in the year **1987**. It was a registered land and the Land Disputes Tribunal did not have jurisdiction to interfere with title to a registered land. The jurisdiction of the Land Disputes Tribunal was stipulated in Section 3(i) of the Land Disputes Tribunal Act (now repealed) which

provides as follows:-

“Land Disputes Tribunal will deal with disputes involving:-

- a) The division, determination of boundaries including land held in common.***
- b) A claim to occupy or work in land.***
- c) Trespass to land.***

The Land Disputes Tribunal therefore did not have jurisdiction to deal with title to land and the decision that followed thereof was null and void. See the case of ***Gibson Senele Mato...Vs..Eastern Province Land Disputes Committee & Another, Nairobi Misc. CA 331 of 2003***, where the Court held that:-

“Makueni District Land Tribunal Appeals Committee had no jurisdiction to determine question of ownership and title to land registered under the Registered Land Act and that in doing so, the Tribunal acted ultra vires and the entire proceedings became a nullity”

It is evident that the Land Disputes Tribunal in Limuru had no jurisdiction to determine an issue of ownership of title to land registered under Registered Land Act (now repealed) as held by ***Kiarie Kiuna***. That decision was *ultra vires* and therefore null and void. The Defendant cannot rely on that decision to allege that the suit herein is *Resjudicata*.

After careful consideration of the ***Notice of Preliminary Objection*** raised by the Defendant and the submissions thereto, ***the court finds it not merited and consequently dismisses the same entirely with costs to the Plaintiffs/Applicants.***

The next issue is whether the Plaintiffs/Applicants are deserving of the orders sought in their ***Notice of Motion*** dated ***30th December 2016***. The orders sought therein are injunctive orders which are granted at the discretion of the court. However, the said discretion must be exercised judicially. See the case of ***Giella..Vs..Cassman Brown & Company Ltd 1973 E.A 358*** where the court held that:

“The granting of an Interim Injunction is an exercise of Judicial discretion and an appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially”.

Further the Court will also take into account that at this stage, the Court is not dealing with the matter conclusively especially based on affidavits evidence. The Court will only determine whether the Applicants are deserving of the order sought based on the usual criteria. See the case of ***Edwin Kamau Muniu..Vs..Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002***, where the court held that:

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria....”

The criteria to be applied herein is the one set in the case of ***Giella...Vs...Cassman Brown & Co. Ltd 1973, EA 358***. These criterias are:

- a) The Applicant must establish that he has a prima facie case with probability of success.***
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) When the Court is in doubt, to decide the case on a balance of convenience.***

Have the Applicants herein established that they have a *prima-facie* case with probability of success?

The *Black's Law Dictionary 2nd Edition* defines *prima-facie* case as “**one that can be judged from the first disclosure, presumably. A litigant is said to have a prima-facie case when the evidence in his favour is sufficiently strong for his opponent to be called to answer it**”.

It is evident that the suit property herein was registered in the name of **Kiarie Kiuna (deceased)** in the year 1987. The said late **Kiarie Kiuna** was a brother to **Wang'ang'a Kiuna** (deceased) who was registered as proprietor of **Ndeiya/Ndeiya/1420**. The said **Wang'ang'a Kiuna**, was the father to the Defendant herein. There is no evidence that after **Kiarie Kiuna** and **Wang'ang'a Kiuna** got registered as proprietors of their respective parcels of land **Ndeiya/Ndeiya/1419** and **1420**, there was a dispute or contention from **Wang'ang'a Kiuna** the alleged father of the Defendant on the size of his portion of land. It is also not in doubt that the suit property **Ndeiya/Ndeiya/1419**, was subdivided to the respective beneficiaries of the late **Kiarie Kiuna** vide **Succession Cause No.378 of 2010**. There is no evidence that the Defendant herein raised any objection to the confirmation of grant issued on **8th May 2013**. He cannot therefore invade the said parcel of land which has already been distributed vide the said Succession Cause.

The Court finds that the order of the Land Disputes Tribunal, Limuru that the Defendant herein relied on was *ultra vires* and therefore null and void. No evidence was given as to why he is not seeking his rightful share in **Ndeiya/Ndeiya/1420**, which was allegedly a share of his father **Wang'ang'a Kiuna**. The Court finds that the **Plaintiffs/Applicants have established** that they have a *prima-facie* case with probability of success at the trial.

On whether the Plaintiffs will suffer irreparable loss which cannot be compensated by an award of damages, it is evident that the suit land has been distributed to the respective beneficiaries of the late **Kiarie Kiuna** as per the Certificate of Confirmation of Grant issued on **8th May 2013**. By allowing the Defendant to continue building the house in the suit property, then the said action would most probably cause breach of peace and the loss that would be incurred due to the said breach of peace may not be compensated by an award of damages.

On the balance of probability, it is evident that the Defendant has not been utilizing the suit land. As the Court awaits to take evidence and determine the main suit, the Court finds that the balance of convenience would tilt in favour of maintaining the *status quo*. The *status quo* herein would mean the Plaintiffs/Applicants to continue utilizing the suit property as per their respective shares granted to them vide Confirmation of Grant issued on **8th May 2013**. However, they should not **sell** and/or **alienate** any of their shares until the suit herein is heard and determined. The *status quo* herein is considered by taking into account the definition of balance of convenience as stated in the **Black's Law Dictionary** to mean;

“The question is to balance the relief given to the Plaintiff against injury that will be done to the Defendant”.

Having now considered the Plaintiffs/Applicants **Notice of Motion** application dated **30th December 2016**, the **Court finds it merited** and consequent thereto, **it is allowed in terms of prayer no.4 with costs to the Plaintiffs/Applicants**.

However, the beneficiaries of the estate of **Kiarie Kiuna** as described in the Confirmation of Grant issued on **8th May 2013**, should not **sell** and/or **alienate** any of their respective shares until the suit is heard and determined.

It is so ordered.

Dated, Signed and Delivered at Thika this **19TH** day of **October 2017**.

L. GACHERU

JUDGE

In the presence of

M/S Kinuthia for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court clerk.

Court – Ruling read in open court in the presence of M/S Kinuthia for the Plaintiffs/Applicants and absence of the Defendant/Respondent.

L. GACHERU

JUDGE