



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 139 OF 2013**

**RAJ WALIA.....PLAINTIFF**

**VERSUS**

**GABRIEL M. WANDERI.....1<sup>ST</sup> DEFENDANT**

**MODERN SECURITIES LTD. ....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application to strike out suit for not disclosing a cause of action and for being res judicata; plaintiff having title to suit property which is also claimed to be owned by a separate entity; cannot be said that the plaintiff has no cause of action as she is entitled to protect her title; whether or not the plaintiff's title is genuine to be determined after hearing suit; res judicata; previous suits having centered around ownership of two companies one of which is said to be the owner of the suit property; previous suits not res judicata as they did not determine the dispute over ownership of the suit property but only shareholding of the companies; application dismissed)***

1. The application before me is that dated 17 January 2014 filed by the 1st defendant. It is an application seeking the following orders :-

1. .. (spent)

2. *That this honourable court be pleased to make a finding that this suit discloses no cause of action and is an abuse of the process of court, and wastage of judicial time and consequently the court be inclined to strike out and/or dismiss the suit.*

3. *That in the alternative the court do order that this suit is res judicata and should be struck out.*

4. *That the costs of this application as well as the costs of the suit be borne by the plaintiff/respondent.*

2. The application is opposed but before I go to the gist of the objections raised by the plaintiff, I think it is necessary that I give a little background to this suit.

3. This suit was commenced by way of plaint filed on 7 February 2013. The original defendants were two, that is Gabriel Wanderi and Modern Securities Limited. The case of the plaintiff against these two defendants was that the two defendants had trespassed into her land parcel number Nakuru Municipality Block 16/167 (the suit property). An application to amend the plaint was made and allowed, which amendment brought in a third defendant by name of Harrison Waitindi Kahigah. It was also alleged that Mr. Kahigah had interfered with the quiet possession of the plaintiff over the suit property. The prayers in the original and amended plaint are the same, and the plaintiff has sought the following :-

*(a) A declaration that the plaintiff is the sole registered proprietor of Nakuru Municipality Block 16/167 and that the defendants' invasion and trespass thereon is wrongful and illegal.*

*(b) A permanent order of injunction to restrain the defendants by themselves, their agents and servants from entering into, remaining in, dealing with or in any other way interfering with Nakuru Municipality Block 16/167 and St. Michael's High School standing on this land.*

*(c) Costs of this suit be borne by the defendants either jointly or severally.*

4. The core of the plaintiff's case is that she holds title to the suit property, which title is displayed in her documents, and which shows that she became registered as proprietor on 6<sup>th</sup> September 2010. It is her case that the suit property was previously owned by her deceased husband, Dharampal Walia, who willed this property to her. It is her case that the property always belonged to her husband and not to St. Michael's High School. It is her case that because she is the registered proprietor of the suit property, the defendants have no right to interfere with it.

5. The 1st and 3rd defendants entered appearance and filed defences. The case of the 1st defendant is that the suit property is owned by St. Michaels' High School Limited, a limited liability company. The 1st defendant has averred that he is a shareholder of the said company, having purchased shares in the said company.

6. He has displayed title that shows that the land is owned by the said company. It is also his view that the matters herein were settled in the case Nakuru High Court Civil Suit No. 455 of 1999.

7. The 3rd defendant is an advocate of the High Court of Kenya, and it is his view that the plaintiff had no business suing him as he has not trespassed into the land and has no interest in it.

8. The grounds upon which the present application are based are inter alia that the suit property is owned by St. Michael's High School Nakuru Limited (the company) ; that the plaintiff has elsewhere admitted in Nakuru HCCC No. 455 of 1999 that the property is owned by the Company; and that the suit herein is res judicata Nakuru HCCC No. 455 of 1999. In the supporting affidavit, the 1st defendant has annexed a copy of the title in favour of the company; documents showing that he is a shareholder and director of the company; various affidavits sworn in the suit Nakuru HCCC No. 455 of 1999 and has explained that the property is properly owned by the company. It is his view that the title of the plaintiff is not a genuine title.

9. The plaintiff filed a replying affidavit to oppose the motion. She has deposed inter alia that she acquired the property after the demise of her husband who had willed the property to her. It is her view that the company is not the owner of the property and she has also contested the shareholding of the 1st defendant in the company.

10. Mr. Lawrence Karanja for the applicant argued that the motion should be allowed and he was supported by Mr. Kagucia for the 3rd defendant. Mr. Waiganjo for the plaintiff, naturally argued that the motion should not be allowed. I have considered these arguments of counsel in arriving at my decision. I take the following view of the matter.

11. The application herein seeks to dismiss the plaintiff's case on two substantive grounds. The first is that the plaint discloses no cause of action and the second is that the suit is res judicata.

12. On the first ground, it has been argued that the suit property belongs to the company and that the plaintiff cannot have a good title to it. The plaintiff's case of course is that she is the proprietor of the suit property and she has displayed her Certificate of Lease.
13. I hesitate going into whether or not it is the plaintiff who is entitled to proprietorship of the suit property or whether the property belongs to the company. If I go into this, that will essentially mean that I will be determining the dispute without first hearing the parties.
14. That said, I am unable to hold that the suit discloses no cause of action. The plaintiff has a Certificate of Lease to the property and she is of the view that the property belongs to her. I think she has every right to attempt to assert her title and thus has a cause of action.
15. Whether or not she will succeed is what will be determined at trial, but I do not see how I can shut out the plaintiff from attempting to protect a property which she believes belongs to her. I am therefore unable to dismiss the plaintiff's suit on the argument that her case discloses no cause of action.
16. The other ground for the application is that this suit is res judicata. From the documents presented before me, it appears as if there have been two previous cases that may have a bearing in this matter. These cases are Nakuru HCCC No. 455 of 1999 and Nakuru HCCC No. 187 of 2000. The plaintiff in both cases is one Anil Walia (not a party to this suit). The cases to me appear to have been concerned with the shareholding of St. Michael's High School Nakuru Ltd and St. Ann Girls Secondary School Limited.
17. I do not think that the parties in the said cases were disputing over the ownership of the suit property herein. The basis of the dispute was not the ownership of the suit property but the ownership of the shares in the two companies, which the two cases resolved.
18. I do not see how this case can be said to be res judicata as the question of ownership of the property was not among the questions that were determined. What was decided was the ownership of the two companies and not the ownership of the suit property. This case cannot be res judicata for the reason of those two previous suits.
19. It was of course argued by the applicant that in the course of the two suits, the plaintiff or the person she has succeeded, Mr. Dharampal Walia, made some statements which seem to suggest that the suit property belongs to the company, but to me, that alone, if true, cannot make this suit res judicata or make the suit lack substratum so that it ought to be dismissed summarily. The defendants are however free to make use of any such statements to support their position in this suit.
20. I am not too sure of the presence of the 2nd and 3rd defendants in the suit, for they do not seem to me to have an interest in the suit, but if the plaintiff feels that she has a cause of action against them, so be it. She deserves to be heard. I would in fact hesitate to go into the presence of the 2nd defendant for my predecessor allowed him to be enjoined to these proceedings, and if I reverse that, I may be sitting on appeal against her decision.
21. I think the best thing is to have the matter proceed for trial and for the plaintiff to prove her case as pleaded. The defendants will of course also have a chance to ventilate their defence. Any prejudice can be compensated by an award of costs.
22. The long and short of the above is that I find no merit in the application and it is hereby dismissed with costs.
23. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> January, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:-**

Mrs. Mukira holding brief for Mr Lawrence Karanja for 1<sup>st</sup> defendant/applicant

Mr Waiganjo for plaintiff/respondent

Mr Kagucia for 3<sup>rd</sup> defendant

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**