



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C CASE NO. 246 OF 2015

JAMES GACHUNGU KARIUKI PLAINTIFF

-VERSUS-

PAUL MACHARIA WAGUNYA DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion application dated **25th September, 2015** seeking orders of injunction restraining the defendant, his servants/agents/employees from picking tea, cultivating, digging or working on **Title Number Loc 8/Matharite/1580** (hereinafter referred to as the suit property), until the suit is heard and determined. The plaintiff also prays that costs of the application be provided for.
2. The application is premised on the grounds on its face as well as the supporting affidavit sworn by the plaintiff on 25th September 2015. He depones that he bought the suit property and the tea bushes thereon. Despite this, the defendant has continued to unlawfully pick tea and has even uprooted the boundaries set on the land. He seeks the court's intervention to prevent these acts of waste.
3. The application was opposed by the defendant vide his replying affidavit sworn on 3rd November, 2015. He denied the assertions made by the plaintiff and stated that he was, in fact, the one who planted the said tea bushes.
4. Not only did the defendant deny the plaintiff's allegations but he also raised a Preliminary Objection that the present suit is *res judicata*; the matter having been decisively concluded by this same court in ELC 229 of 2013, where the plaintiff in this case was the 2nd defendant in the aforesaid suit.
5. In his replying affidavit, the defendant depones that the judgment rendered by this court ordered the plaintiff to compensate him to the tune of Kshs 1,620,000 being the market value of the land and developments, as well as the costs of that suit; that the plaintiff's suit for eviction is therefore premature, considering that he (the plaintiff) has not complied with the decree of the court. Were the plaintiff to comply and pay the defendant the decretal sum, the defendant would vacate the land. The defendant has annexed the pleadings of ELC 229 of 2013 as well as the judgment of this court delivered on 23rd April, 2015.
6. The plaintiff swore a further affidavit on 10th November, 2015. He depones that he had been absolved from paying the said sum of Kshs. 1,620,000 through a consent recorded and filed in court between him and the 1st defendant in ELC 229 of 2013; that he is not liable for the sum ordered by the court and the defendant should pursue the 1st defendant for the decretal sum and vacate the suit property immediately.

7. On **17th November, 2015** this court gave directions that the Preliminary Objection be heard first and that the same be disposed of by way of written submissions.

8. Both parties filed their written submissions.

In his submissions, the defendant reiterated the contents of his replying affidavit and further cited **Order 4 Rule 1(1) (ff) and (2)** of the Civil Procedure Rules, that the plaintiff did not disclose that there had been previous proceedings between the parties in ELC 229 of 2013. He further submitted that the consent filed after judgment was illegal and not binding as the defendants could not compromise the suit to the detriment of the plaintiff.

9. The plaintiff, who was unrepresented, filed written submissions and a further supporting affidavit sworn on **10th February, 2016** in which he reiterates the contents of his earlier pleadings. He submitted that the court in ELC 229 of 2013 was enforcing an illegal contract of sale over land belonging to a dead person without proper administration procedures. This was the reason he had recorded the consent; to absolve himself from the illegality of the 1st defendant. He has also attached a copy of the said consent and marked it as JGK1.

10. I have considered the parties' pleadings and written submissions and have been able to establish the following; that this Court in ELC 229 of 2013 considered the issue of ownership of the suit property and rendered its Judgment on 23rd April, 2015.

11. In that judgment, the Court observed that the plaintiff in this suit (the 2nd defendant in ELC 229 of 2013) had purchased the suit property from the 1st defendant in that suit. The defendant in this suit was in occupation of the suit property as he had earlier purchased the same from the 1st defendant.

12. The court ordered the plaintiff (then the 2nd defendant in ELC 229 of 2013) to compensate the defendant (in this suit) to the tune of Kshs 1,620,000 based on the valuation report produced by the defendant. This was a condition which once met, would enable the plaintiff to occupy the suit property, as the defendant would peaceably vacate.

13. It appears that the plaintiff and the 1st defendant in ELC 229 of 2013, unable to fulfill the terms of the court's decree, entered into a consent which, according to the plaintiff, absolved him from all liability relating to ELC 229 of 2013, and enabled him to file the instant suit for eviction of the defendant from the suit property.

14. It is thus clear that the plaintiff and the defendant are parties to the two suits (the instant suit and ELC 229 of 2013) and that there were orders in ELC 229 of 2013 which required the plaintiff and his co-defendant to compensate the defendant herein before evicting him. The consent so recorded between the plaintiff and his co-defendant is nothing more than an attempt to evade the orders of the court made in ELC 229 of 2013 and I find the same to be void and of no effect to the orders issued in the ELC 229 of 2013.

15. The law provides that any issue arising out of a judgment or ruling of a court can only be questioned through appeal or review and that no proceedings can be taken after judgment has been entered. This was stated by the court of appeal in the case of **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 Others (2016)eKLR**, Para 72, that **“Save as authorized by law, upon delivery of judgment, a court becomes *functus officio*.... The error in law committed by the trial court is aptly demonstrated by posing the question what would happen if contestations and dispute arise from the affidavits and reports filed in court? Would the trial court after judgment re-litigate the issues arising from the affidavit and reports? Which pleadings would form the basis of the re-litigation? In the instant case, by allowing parties to file affidavits and reports after judgment, the trial court erred in law as the procedure has the potential to introduce secondary litigation and raise new issues that were not in the original pleadings before the court. Such a procedure is not provided for in the Civil Procedure Act and Rules and it perpetuates and introduces secondary and side litigation. It is**

impermissible to allow parties to file pleadings after judgment.”

16. See also the case of **Peter Ngugi Kabiru vs Esther Wangari Githinji & Anor (2013) eKLR.**

17. Having taken liberty to go through the proceedings in ELC 229 of 2013, I can confirm that the questions raised in this suit were substantially in issue in Nyeri ELC 229 of 2013 as regards the suit property, ownership, occupation, and parties. By bringing the same matters by way of a fresh suit as opposed to an appeal or review whichever was suitable, the plaintiff clearly engaged in abuse of the court process.

18. The upshot of the foregoing is that the objection is found to have merit and the same is allowed with costs.

Dated, signed and delivered at Nyeri this 17th day of August, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Ms. Wambui h/b for Mr. Kirubi for defendant/respondent

James Gachungu Kariuki – plaintiff/applicant

Court assistant - Lydia