REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 385 OF 2015

MAVUTI MUANGE NTHEI…….PLAINTIFF

VERSUS

THE CABINET SECRETARY MINISTRY OF LANDS

AND HOUSING…….1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL……....2ND DEFENDANT

JOSEPH MUTUNDU KIOKO…….……..…3RD DEFENDANT

ONESMUS NTHEI KOLI……..……4TH DEFENDANT

RULING

Usalala sub-location in the former Makueni District was declared an adjudication section on a date which is not clear from the court record. The plaintiff and the 3rd and 4th defendants who are relatives were residents of Usalala during the land adjudication in the area. In the course of recording of interests in land in the area, Plot No.922, Plot No. 630 and Plot No. 921 were recorded in the names of the plaintiff, the 3rd defendant and the 4th defendant respectively as the owners thereof. The plaintiff was not satisfied with the decision of the adjudication committee with respect to the said parcels of land and lodged an appeal to the Arbitration Board. The Arbitration Board allowed the plaintiff's appeal and ordered that portions of Plot No. 630 and 921 that had been recorded in the names of the 3rd and 4th defendant respectively be curved out and recorded in the name of the plaintiff. It is this decision that gave rise to Plot No.1094 which was curved out of Plot No. 921 that had earlier been recorded in the name of the 4th defendant and Plot No. 1095 which was curved out of Plot No.630 that had been recorded in the name of the 3rd defendant.

After the completion of the adjudication register, the 3rd and 4th defendants lodged objection against the recording of Plot No. 1054 and Plot No. 1055(hereinafter only referred to as "the suit properties" where the context so admits) in the name of the plaintiff. The 3rd and 4th defendants' objections were dismissed by the land adjudication officer. The 3rd and 4th defendants were still not satisfied with that decision. They appealed against the same to the Minister for lands, the 1st defendant herein pursuant to section 29 of the Land Adjudication Act, Chapter 284 Laws of Kenya. The 1st defendant rendered his decision on the appeals by the 3rd and 4th defendants on 31st July 2013. The 1st defendant allowed the appeals and set aside the decision of the Arbitration Board that gave rise to Plot No.1054 and Plot No. 1055. The 1st

defendant ordered that the 3rd and 4th defendant were entitled to the whole of Plot No. 630 and Plot No. 921 respectively.

The plaintiff was aggrieved with this decision of the 1st defendant and moved the High Court on 8th October 2013 seeking an order of certiorari to quash the same and an order of prohibition to prohibit the enforcement thereof. The plaintiff's application for judicial review was heard by Odunga J. who dismissed the same with costs on 28th April 2015 on the ground that it lacked merit.

The plaintiff did not give up. He has now moved this court by way of a civil suit to challenge the said decision of the 1stdefendant once again. In his plaint dated 11th May 2015, the plaintiff has averred that by his decision made on 31st July 2013, the 1st defendant gave to the 3rd and 4th defendants the suit properties which belong to him. The plaintiff has contended that the 1st defendant relied on extraneous evidence in arriving at the contested decision. The plaintiff has contended that in his decision, the 1st defendant relied heavily on the decision of the clan elders which was not before him instead of the judgment in Civil Case No. 105 of 1973 that had been made in hisfavour. The plaintiff has also faulted the 1st defendant for considering the decision of the Arbitration Board instead of that of the Adjudication Officer that was the subject of the appeal before him. The plaintiff has sought an order for the setting aside of the said decision of the 1stdefendantmade on 31st July 2013 and an order prohibiting the enforcement thereof.

Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 11th May 2015seeking orders that :-

1. Spent

2. The Honourable Court issues a temporary preservation order of prohibition against the Director of Land Adjudication to stop any further steps to enforce the decision, judgment or order issued by the District Commissioner, Mbooni East District delivered on 31st July 2013 in Appeal to the Minister in Case Number 337 of 1997 and 338 of 1997 pending the hearing and determination of this application interpartes.

3. This Honourable Court issues a temporary preservation order of prohibition against the Director of Land Adjudication to stop any further steps to enforce the decision,judgment or order issued by the District Commissioner Mbooni East District delivered on 31.7.2013 in Appeal to the Minister in case number 337 of 1997 and 338 of 1997 pending the hearing and determination of the suit herein.

4. This Honourable Court grants any other order it deems fit in the circumstance to ensure the ends of justice are met.

The application was brought on the grounds set out on the face thereofand on the supporting affidavit sworn by the plaintiff on 11th May 2015. In his affidavit, the plaintiff stated as follows. The 3rd and 4thdefendants are his brothers. Theyare grandchildren of the late Nthei from whom they were all entitled to inherit land. A part from the ancestral land, the plaintiff had a parcel of land which belonged to him exclusively and which was not to be shared with other family members. During land adjudication at Usalala Adjudication Section, the land that exclusively belonged to him had been mistaken as ancestral land and awarded or shared between him and other family membersin the mistaken belief that the same had been inherited from their grandfather.The subject parcel of land was given parcel numbers 1094 and 1095("the suit properties")during the land adjudication. At the time of land adjudication, he had occupied and used the suit properties for a period of over 60 years.In a civil case that he had filed in 1973 against Musau Mukoti and Ndetei Nthuku at Uaani District Magistrates Court, namely, Civil Case No. 105 of 1973, the court made a finding that the suit properties belonged to him. The plaintiff gave a detailed account of what transpired during the land adjudication in relation to the suit properties and their ancestral land that belonged to the whole family from the time the adjudication commenced up to the time of the appeal that was lodged by the 3rd and 4th defendants to the 1stdefendant. I have set out that account at the

beginning of this ruling and I do not wish to repeat the same here.The plaintiff stated that the 3rd and 4th defendants' appeal to the 1st defendant was filed out of time and that the District Commissioner Mbooni East who presided over the appeal on behalf of the 1st defendant considered the evidence of the clan elders which was not part of the record while determining the appeal. Hestated further that the decision of the 1st defendant did not take into consideration the findings of the court in Civil Case No. 105 of 1973 referred to above. The plaintiff contended that the said decision of the 1st defendant denied him the right to enjoy the suit properties which he had cultivated and developed for many years.He stated that he is apprehensive that the director of land adjudication might proceed to alter the registersof the suit properties in conformity with the decision aforesaid of the 1st defendant.He stated that the decision of the 1st defendant contained glaring irregularities and omissions which are an affrontto justice and it would be wrong to allow such a decision to stand or go unchallenged.He stated that his application for Judicial Reviewof the said decision was dismissed by the High Court as there were conflicting facts and it was the opinion of the court that the issues could not be determined through judicial review.

The application was opposed by the 3rd and 4th defendants through a replying affidavit which was sworn by the 4th defendant on 19th June 2015. The 3rd and 4th defendants contended that the plaintiff's application is an abuse of the court process for the reasons that the proceedings herein are in their very nature and purport a replica of the proceedings in **JR No. 341 of 2013** which wasbetween the same partiesand which concerned the same subject matter. The 3rd and 4th defendants (hereafter jointly referred to only as "the defendants" where the context so permits) contended that this suit is *res judicata*. In his affidavit, the 4th defendant stated that the parties herein had subjected themselves to the procedure set outunder the Land Adjudication Act Chapter 284 Laws of Kenya for resolving disputes. He stated that the dispute between the suit properties started at the Land Adjudication Committee and went up tothe appeal to the 1st defendant. He stated that the 1st defendant'sdecision made on 31st July 2013 was made after hearing the parties on the same issues raised herein.The defendants contended that this court should not hear thepresent application since it amounts to an appeal against the said decision of the 1st defendant which was made by the District Commissioner Mbooni East District on his behalf. The defendants contended that under the Land Adjudication Act, Chapter 284 Laws of Kenya,the decision of the 1st defendant is final and the only option that was available to the plaintiff was to apply for judicial review of the same which he did and failed as aforementioned. The defendants denied the plaintiff's claim that the judgment in Civil Case No. 105 of 1973 aforesaid conferred upon him title to the suit properties. The defendants contended that the plaintiff has not met the threshold for grant of the reliefs sought.

The plaintiff filed a further affidavit on 14th July 2015 in which he stated that he has a title deed for Plot No. 1095 which was issued to him on 1st August 2013 and that the issues raised in this suit are different from those which were raised in the judicial review proceedings (**JR Case No 341 of 2013).** He contended thatin the judicial review proceedings, he had sought prerogative orders while in these proceedings, he has called upon the court to consider the merits of the decision of the 1st defendant. The plaintiff has contended further that this court has original jurisdiction to hear and determine the matters raised by him by virtue of the provisions of section 13 (2) of the Environment and Land Court Act and Article 162 (2) (b) of the Constitution of Kenya as it is the court now seized of all land disputes. He stated that the 3rd and 4th defendant had destroyed crops that he had planted on the disputed parcels of land. He contended that even if the defendants had a legitimate claim to the said parcels of land, they ought to have followed the due process of law in repossessing the same.

The application was argued by way of written submissions. The plaintiff submitted that he has brought this suit to overturn an injustice that was carried out by the 1st defendant in dispossessing him of the suit properties and awarding the same the same to the 3rd and 4th defendants.On whether this suit is *res judicata,* the plaintiff submitted that for a matter to be *res judicata*, the same ought to have been substantially heard and finally determined by a court of competent jurisdiction. In support of this submission, the court was referred to the case of **Kagai Mwangi –vs. –Ephantus Ngari Mwangi, Kerugoya ELC No. 174 of 2013** where the court stated that, "**From the above definition of the doctrine of res-judicata, I can discern five essential elements that must exist before the doctrine can**

be successfully raised as a bar to a litigation and these are;-

1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.

2. The former suit must have been between the same parties or parties under whom they claim.

3. The parties must have litigated under the same title.

4. The court which decided the former suit must have been competent and lastly,

5. The former suit must have been heard and finally decided by the court"

The plaintiff submitted that even though the parties and the subject matter in this suit and the former suit which was brought by way of judicial review are the same, the reliefs which were sought in the judicial review are not the same as the reliefs sought herein and as such this suit is not *res judicata.*The plaintiff submitted further that the court has jurisdiction to grant interim orders of injunction against officers of the Governmentwhere the rights of a party conferred by the Constitution have been fundamentally breached or are likely to be breached. For this submission, the plaintiff relied on the cases of **Royal Media Services Ltd. vs.Commissioner of Customs & Excise, HC. Misc. Case No. 383 of 1995 and Far East Car Bank Ltd-vs.- Commissioner of Customs & Excise HCCC No. 321 of 2001.** He submitted that in this case, the plaintiff is seeking interim orders against the implementation of the decision of the 1st defendant made on 31st July 2013or at least an interim order of preservation against the actions of the defendants. He submitted that pending the hearing and determination of this suit there is a need for the *status quo*as it is on the ground to be maintained. The plaintiff submitted that he has met the conditions for granting interlocutory injunction which were enunciated in the case of **Giella –vs. - Cassman Brown & Company Ltd. [1973] EA 358.**He submitted that he has provided evidence to show that he hasbeen using and occupying the suit properties for a period of over 60 years which evidence has not been challenged by the defendants. The plaintiff submitted further that the defendants have not indicated what prejudice they would suffer should the court grant the orders sought. He submitted in conclusion that even if the court was to be in doubt as to whether he has established a prima facie case, in the circumstances of this case, the balance of convenience would still tilt in favour of granting the reliefs sought.

The defendants filed their written submissions in reply on 1st December 2015. The defendants submitted that this court lacks jurisdiction to deal with this matter because the suit boarders on an appeal. They submitted that under the Land Adjudication Act, Chapter 284 Laws of Kenya, the decision of the Minister("the 1st defendant") is final and the only option that was open to the plaintiffto challenge the same was to apply for judicial review which he did and failed. The defendants submitted that the issues raised herein were heard and determined by a tribunal of competent jurisdiction and as such this court has no jurisdiction to open up the same for re-hearing. In support of their submission, the defendants cited the Court of Appeal case of **Nicholas Njeru-vs.- The Attorney General& 8 Others[2013] e KLR.** The defendants submitted that in these proceedings the plaintiff has sought to reopen the issues that were determined by the 1st defendant and the judicial review court. The defendants reiterated that the suit herein is *res judicata* and an abuse of the court process. The defendants submitted that the plaintiff had chosen to challenge the decision of the 1st defendant by way of judicial review and should stick to that procedure. The defendants submitted that that the plaintiff has filed a notice of appeal against the decision of Odunga J. in the judicial review application and as such should not be allowed to litigate the same issues in these proceedings.

I have considered the plaintiff's application together with the affidavits and submissionsthat were filed in support thereof. I have also considered the replying affidavit and submissions by the defendants in opposition to the application.What is before me is an interlocutory application. At this stage the court is not supposed to express firm or conclusive opinion on the issues of fact and law on which the parties' respective cases are anchored. The plaintiff has sought temporary orders of preservation in the nature of a

prohibition against the defendants pending the hearing and determination of this suit. In my view, there is no difference between the "conservation" orders sought by the plaintiff and a temporary injunction. I believe that the plaintiff was shy of seeking injunction because of the joinder in the suit of the 1st and 2nd defendants against whom injunctive reliefs do not normally issue. A party seeking an interlocutory order which has the effect of restraining adefendant in a suit from carrying out some act in relation to the subject matter of the suit whether the order is termed preservation, conservatory or injunctionmust demonstrate that he has an arguable case against the said defendant and that he stands to suffer prejudice if the orders sought are not granted pending the hearing of the suit. The onus was upon the plaintiff to demonstrate that he has an arguable case against the defendants herein and the prejudice he is likely to suffer if the orders that he has sought are not granted. The facts giving rise to this suit are to a large extent not disputed. The plaintiff and the 3rd and 4th defendants are brothers. During land adjudication at Usalala sub-location Adjudication Section where they live, a dispute arose on how they were to share land more particularly the suit properties. Theyemployed the dispute resolution mechanism established under the Land Adjudication Act, Cap.284 Laws of Kenya to try to resolve the dispute. They went through the land adjudication committee, the arbitration board, objection proceedings and appeal to the Minister. The 3rd and 4th defendants were successful before the adjudication committee. The plaintiff appealed to the arbitration board which overturned the decision of the adjudication committee and awarded the plaintiff the suit properties. The 3rd and 4th defendants who were not satisfied with the decision of the arbitration board lodged objections against the recording of the plaintiff as the owner of the disputed parcels of land. The 3 and 4th defendants' objections failed and they appealed to the Minister for lands, the 1st defendant herein who upheld their objection and reinstated the decision of the adjudication committee. The plaintiff moved to the High Court for the review of the said decision of the 1st defendant that was made on 31st July 2013. The plaintiff's judicial review application was found to be without merit and was dismissed with costs on 28th April 2015. It is following the dismissal of that application that the plaintiff filed the present suit.

I have had some difficulty in understanding the legal basis on which the suit herein has been brought. As rightly submitted by the defendants, the plaintiff has not come out clearly whether this suit is an appeal against the decision of the 1st defendant made on 31st July 2013 or a new cause of action against the defendants in respectof the parcels of land in dispute herein. As I have stated earlier in this ruling, the plaintiff's application is opposed on several grounds. The defendants have contended that the court has no jurisdiction to entertain this suit together with the present application in view of the fact that the decision of the 1st defendant complained of by the plaintiff is final and no appeal lies to this court therefrom. The defendants have contended that the only avenue that was open to the plaintiff was to seek the review of the said decision which the plaintiff did unsuccessfully. The defendants have also contended that the issues raised herein had been raised in the judicial review application by the plaintiff and were considered and conclusively determined by Odunga J. in his ruling of 28th April 2015 aforesaid. The defendants have contended that the suit herein is *res judicata*. As I havestated above, at this stage, I am not supposed to make any conclusive findings on the contentious issues before me. Having considered the material before me, I am not persuaded that the plaintiff has established an arguable case against the defendants. The Land Adjudication Act, Chapter 284 Laws of Kenya has an inbuilt dispute resolution mechanism which starts at the lowest level which is the Adjudication Committee up to the highest level which is an appeal to the Minister for Lands, the 1st defendant herein. The plaintiff exhausted this machinery. Section 29(1) of the said Act provides that the decision of the Minister is final. The Act has not provided for a further appeal to this court from the decision of the Minister. I am in agreement with the submission by the defendants that this court has no jurisdiction to sit on appeal against the decision of the Minister made under the Land Adjudication Act. I am of the view that this court cannot entertain disputes arising from decisions made during the land adjudication process save in exercise of its supervisory jurisdiction. Parliament gave that power to the bodies established under the Land Adjudication Act which I have mentioned above. In the case of **Speaker of the National Assembly vs. Karume [1992] eKLR,** the Court of Appeal stated that, "**In our view,there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."**

I am in agreement with the submission by the defendants that the procedure of judicial review that the plaintiff had adopted in challenging the said decision of the Minister was the correct way of doing so. The plaintiff has not satisfied this court that he can legally have another bite at the cherry after losing the judicial review application by instituting a civil suit. In the case of,**Nicholas Njeru vs. Attorney General & 8 others [2013] eKLR**which was cited by the defendants, the Court of Appeal observed that decisions made in the land adjudication proceedings can be challenged by way of judicial review or through a declaratory suit. The plaintiff having lost the judicial review application, I am doubtful if he could still maintain a declaratory suit. Even if it is assumed that the plaintiff couldmaintain such a suit, what is before me is not a declaratory suit. The reliefs sought by the plaintiff in the suit herein are not declaratory in nature. The reliefs are the same as those which the plaintiff had sought in the judicial review application save that instead of certiorari, the plaintiff has now sought "the setting aside" of the decision of the 1st defendant. The prayer for prohibition remains the same. The facts upon which the present claim has been anchored are the same as those which were put forward in support of the judicial review application. The defendants' contention that this suit is *res judicata*is in my view is not far-fetched. In the case of **Mwangi Njangu vs. Meshack Mbogo Wambugu and Esther Mumbu, HCCC No. 2340 of 1991 (unreported),** Kuloba J. stated that, "**If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before courts of competent jurisdiction, merely because he gives his case some cosmetic face lift on every occasion he comes to a court, then I cannot see what use the doctrine of res judicata plays.**" I cannot agree more with this observation.

Due to the foregoing, I am not satisfied that the plaintiff has established a prima facie case against the defendants. On whether the plaintiff would suffer prejudice if the orders sought are not granted, the answer is in the affirmative. However, the prejudice which the plaintiff would suffer would be occasioned not by illegal acts but in execution of lawful orders issued by the 1st defendant. The plaintiff having failed to demonstrate on a prima facie basis that the said orders arewrong,a case has not been made out to justify the protection of the plaintiff against the said prejudice that he will suffer arising from the execution of the said orders.

I believe that I have said enough to show that the plaintiff's application dated 11th May 2015 has no merit. The same is accordingly dismissed with costs to the 3rd and 4th defendants. In the interest of justice and for the sake of law and order, I order that the 3rd and 4th defendants shall not use or develop land parcel No.1094 and land parcel No. 1095 until the orders made on 31st July 2013 by the 1st defendant have been implemented by the fixing of new boundaries of Plot No. 630, 921 and 922.

Delivered and Dated at Nairobi this 2nd Day of August, 2016.

S. OKONG'O

JUDGE

In the presence of

Mr. Webale for the Plaintiff

N/A for the 1st and 2nd Defendants

Ms. Kamende for the 3rd and 4th Defendants

John Court Assistant