



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 487 OF 2010 (O.S)

TWIGA ESTATE SQUARTERS Suing through

WILLIAM CHEGE (CHAIRMAN)..... 1ST PLAINTIFF

JOSEPH WORU NGANA (SECRETARY).....2ND PLAINTIFF

GEORGE MWANGI IRUNGU(TREASURER)3RD PLAINTIFF

VERSUS

**MBOI-KAMITI FARMERS COMPANY LIMITED.....
DEFENDANT**

RULING

The plaintiffs by an application dated 23rd September 2011 brought under Order 9 Rule 9 and Order 45 of the Civil Procedure Rules, Sections 1A,B, C and 3A of the Civil Procedure Act seeks the following orders:-

1. That **M/S J.W. Wanjohi & Co. Advocates** do come on record for the plaintiffs instead of **M/S Wambui Ngugi & Company Advocates**.
2. That this Honourable Court do deem it necessary to review the ruling of **Hon. Justice A.O. Muchelule** issued on 5th July 2011 dismissing the suit.
3. That pending the hearing and determination of this application the Defendant/Respondent be restrained by way of a temporary injunction from taking over, evicting and/or in any manner demolishing the plaintiff's houses on their three pieces of land being I.R.15113, I.R.15114 and I.R.19438.
4. That the costs of the application be provided for.

The application is predicated on the grounds that appear on the face of the application and on the supporting affidavit of **William Chege** sworn on 23rd September 2011. The Applicant aver that the suit was dismissed on a technicality on 5th July 2011 on the ground that the suit and application are **res judicata**. The applicant state that it was a failure of their then Advocate to file a further affidavit to demonstrate that the earlier referred to suits had no relevance to the present suit. The plaintiffs further state they would like to appoint another advocate to take over conduct of the matter and to seek reinstatement of the dismissed suit. The plaintiffs allege they stand the risk of being evicted by the

Defendants from their land where they have lived for more than 30 years. The plaintiffs further claim they have new and important evidence in this matter which was not available or availed to court at the time the suit was dismissed for being **res judicata**.

William Chege in his sworn statement avers that he is the Chairman of **M/S Twiga Estate Squatters** and that he had the authority of all the squatters in the scheme to swear the affidavit on their behalf and attaches a list of 295 squatters and a certificate of Registration of the Self Help Group dated 24th February 2010.

The plaintiffs depone that they had instructed the firm of **M/S Wambui Ngugi & Company Advocates** to file the present suit which unfortunately was dismissed on 5th July 2011 as their advocate allegedly failed to file a further affidavit in answer to the objection taken by the Defendant that the suit was **res judicata** owing to previous suits namely Nairobi **HCCC NO. 781 of 2004**, Nairobi **HC ELC NO. 20 of 2010 (OS)** and Nairobi **HC ELC NO. 170 of 2010**. The plaintiffs claim that had their erstwhile advocate then on record responded and filed a further affidavit annexing copies of these suits the court would have been able to verify that those suits had nothing to do with the present plaintiffs and therefore had no bearing to the suit and thus the plea of **res judicata** was unsustainable. The plaintiffs state copies of these suits have now been annexed as **"WC6"** and urges the court to consider them as they were not availed at the time of the dismissal of the suit. The Plaintiffs allege the copies of the suits now availed constitute new and important evidence that was not available at the time the earlier application was heard and the court should in the premises review the ruling by **Hon. Justice Muchelule** dismissing the suit. The plaintiffs contend that they ought not to be punished by reason of the fault of their counsel.

The Defendant/Respondent filed a replying affidavit sworn by one **Stephen Kimani Mihiu** a director of the Defendant on 5th June 2013. The Defendant contends that:-

- i. This suit is **res judicata** contrary to section 7 of the Civil Procedure Act in that the Applicants similar suit raising the same issue has been consequently dismissed by a court of competent jurisdiction in Nairobi **HCCC NO. 781 of 2004** (Decree attached and marked **"SKM1"**).
- ii. That a similar suit and application was held to be **res judicata** and dismissed with costs in this Honourable court ELC NO. 487 of 2010 (ruling attached and marked **"SKM2"**).
- iii. That the instant suit is an abuse of the due process of court as the Applicants are notorious in filing frivolous suits one of a similar nature between the same parties have been struck out in Nairobi **ELC NO. 20 of 2010 (O.S)** (ruling attached and marked **"SKM3"**)

The defendants aver that the plaintiffs claim of having been in occupation and possession of the suit lands has no factual basis as the plaintiffs association was only registered on 24th February 2010 and further that the plaintiff's suits claiming occupation and possession of the land have variously been dismissed and/or are pending in court. In particular in **HC ELC NO. 170 of 2010** the same parties recorded a consent which was adopted by the court that the Defendants therein (who constituted the present plaintiffs) do vacate the suit land within 21 days of the date of the order. The Defendants aver that the plaintiffs are abusing the due process of the court as they persist in bringing fresh suits on similar grounds after the suits are dismissed. The Defendant further avers that the suit land has already been subdivided and allocated and occupied by individual members as per the annexed plan marked **"SKM5"** and besides and pursuant to the orders issued in **HCCC NO. 57 of 2012** annexed and marked **"SKM6"** the applicants have already vacated the suit property and the structures thereon have been demolished. The Defendant asserts that there is no basis upon which the court can review its order dismissing the suit and the present application ought to be dismissed.

The parties filed written submissions each dated 16th July 2013 and filed on the same date to ventilate their respective positions. The plaintiff/Applicants in their submission submit that the earlier suits relied upon by **Hon. Justice Muchelule** to hold the present suit to be **res judicata** were not filed by the present plaintiffs and the issues and parcels of lands litigated upon were not the same as the plaintiffs issues herein. The plaintiffs submit it was their then advocates fault to fail to file a further affidavit to explain the nature of the earlier suits which led the court to make the decision that it did. The plaintiffs urge the court to consider the annexures relating to the previous suits which were not availed to **Hon. Justice**

Muchelule and exercise its discretion to review the ruling by **Hon. Justice Muchelule**. The plaintiff content it would be unjust for the plaintiffs to be condemned unheard as they have never been afforded an opportunity to give evidence in support of their case. They urge the court to take refuge under Article 159 of the Constitution to render substantive justice to the parties without being shackled by technicalities.

The Defendant in its submissions maintained that the plaintiffs suit is **res judicata** and is brought in abuse of the court process. The Defendant further submitted the plaintiff had not met and/or satisfied the conditions for review of the court order issued by **Hon. Justice Muchellule**. The Defendant submitted that the plaintiff did not satisfy the conditions for review set out under order 45 Rule 1 of the Civil Procedure Rules and urged for the dismissal of the plaintiffs application. The Defendant submitted that under Order 45 Rule 1 an applicant for orders for review has to demonstrate either of the following in order to succeed:-

- a. That there is discovery of new and important matter or evidence that was not within the knowledge of the applicant,
- b. That the order was made on account of some mistake or error apparent on the face of the record,
- c. The existence of any other sufficient reason.

In support of their submission that the suit is frivolous and an abuse of the process of the court the Defendant gave an outline and synopsis of the previous suits which they claimed were by the same parties and on the same subject matter being **HCCC NO. 781 of 2004, HCCC NO. 57 of 2012**. The Defendant contends that in all the referred to suits the plaintiffs herein were parties represented variously.

I have considered the pleading and the submissions by the parties and the principal issue to be determined is whether the plaintiffs have satisfied the conditions for review to entitle the court to review the ruling by **Hon. Justice Muchelule** dated 11th July 2011.

Order 45 rule 1 (1) provides:-

1. **(1) Any person considering himself aggrieved-**
 - a. **By a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or**
 - b. **By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

The Applicants contention is that **Hon. Justice Muchelule** ruled this suit *res judicata* without the benefit of a response from the applicants to the Defendant's replying affidavit where the Defendants had made reference to 3 previous suits. In the ruling by **Muchelule J** at page 3 he observes thus:-

“In the replying affidavit sworn on behalf of the Defendants by their Vice Chairman James Kamau Njire reference was made to three previous suits between the same parties which the High Court has finally heard and determined. One of them is Nairobi HCCCC NO. 781 of 2004(JKNI) which was dismissed with costs. The other is Nairobi HC ELC NO. 20 of 2010 (OS) which was struck out with costs for being an abuse of the process of the court because the plaintiff had filed it against the Defendants while knowing that their similar suit had been dismissed with costs. The last one is Nairobi HC ELC NO. 170 of 2010 in which the present Defendants were suing the plaintiffs over the same suit lands from which eviction was being sought. The suit was resolved by a consent issued on 29th July 2010 by which the present plaintiffs agreed to vacate within 21 days failing which they were to be

removed by force.

In the present application the plaintiffs were granted leave to file an affidavit to respond to the averment contained in the replying affidavit. They failed to do so. The averments were therefore not contravened. It means that the existence of the suits above and their results has not been denied. The result is that both the suit and the application are introducing and urging matters that have finally been determined as between the parties. The suit and application are consequently res judicata and are therefore dismissed with costs”.

The foregoing is the ruling that the plaintiffs seeks to be reviewed on the basis that their advocate failed to file the further affidavit in response to the Defendant’s replying affidavit. The plaintiffs had no reason not to file the further or supplementary affidavit after expressly having been granted leave. The Defendants had annexed copies of the decree orders and rulings referred to in the previous three suits. The existence of the suits and their determinations cannot be in issue. Any affidavit by the plaintiffs in my view could not have altered this position.

As I understand the plaintiff’s present application even if a further affidavit had been filed in the earlier applications they would not be disputing the existence of the earlier suits and/or the rulings rendered therein as they indeed have annexed the same orders and rulings annexed by the Defendant. Their position appears to be that they were not parties to those previous suits and therefore the decisions rulings in those suits cannot be applied to affect them. It is thus necessary to illustrate who the parties were and what the issues were in these suits.

- i. In **HCCCC NO. 781 of 2004 – Twiga Men and Women Group** were the plaintiffs while **Karume Investment Ltd and Mboi Kamiti Farmers co. Ltd** were the Defendants. In the suit the plaintiffs sought a declaration on behalf of their families to be solely registered as the owners of **L.R.NOS. 9312, 9313, 3760 and 252**. The plaintiffs suit was struck out with costs to the Defendants.
- ii. **HCCC NO. 20 of 2010 (OS)** the plaintiffs described themselves as **Twiga Estate Squatters** and sued **Mboi Kamiti Farmers Co. Ltd**. In the suit the plaintiffs sought to be declared as owners of **L.R.NO.9312, 9313, 3760 and 252** Nairobi by virtue of adverse possession. The suit was struck out with on the basis that the same was an abuse of the process of the court.
- iii. **HCCCC NO. 170 of 2010- Mboi Kamiti Farmers Co. Ltd** as plaintiff sued the Defendants collectively described as **Twiga Men and Women Group** and sought orders of eviction against the Defendants from Land parcels **L.R.NO.9312, 9313 and 3760**. A consent order was made on 29th July 2010 that the Defendants, their agents and their servants do vacate the suit lands within 21 days of the date of the order.
- iv. In **HC ELC NO. 57 of 2012- Municipal Council of Ruiru** was the plaintiff and the plaintiff’s in the instant suit were the 2nd-8th Defendants while the Defendant herein was the 1st Defendant. The parties in the suit on 13/2/2012 entered a consent whereby the Defendants agreed to vacate the suit lands within 21 days of the order. This order was executed and the Defendants vacated the suit lands or were forcibly evicted.

In the instant suit the plaintiffs seek declarations that the Defendant’s title in respect of **Grant NO. 15114 (L.R. NO. 9312) Grant NO. 15115 (L.R.NO.9313)** and **Grant NO.19438(L.R.NO. 252)** all which are situated **North East of Ruiru Township in Thika district** is extinguished under the limitation of Actions Act Cap 22 section 17 and that the plaintiffs ought to be registered as owners by virtue of being in adverse possession. There is no doubt the plaintiffs are claiming the same suit lands that have been the subject of litigation in the previous highlighted suits. In the three suits referred to **Muchelule J**, the plaintiffs were described variously as **Twiga Men and women Group and Twiga Estate Squatters** with the common denominator being that they were squatters who were in occupation of the suit lands before the suit lands were acquired and registered in the name of the Defendant. In the present suit the present plaintiffs, **Twiga Estate Squatters** are claiming the same land **Twiga Men and Women Group** claimed as plaintiffs in **HCCCC NO. 781 of 2004**. In **HCCCC NO. 20 of 2010 (OS)** the court dismissed the claim by **Twiga Estate Squatters** over the same parcels of land holding that the suit was an abuse of the process of the court as the issue had been litigated previously. The decisions in **HCCCC NO. 781 of**

2004 and **HCCCCNO. 20 of 2010 (OS)** were never appealed and the decisions remain valid to date.

I have reviewed all the material presented by the parties before the court and I find no basis upon which I can review the ruling of 5th July 2011 by **Muchelule J**, There is no discovery of any new matter or evidence that was not available to the applicant at the time the earlier application was heard and determined. Indeed **Muchelule J**, had before him all the rulings/orders of the previous suits referred to him. As to whether the parties and the issues in the previous suits were similar as in the instant suit my view is the parties were virtually the same and the issue were the same as the question was whether the plaintiffs who described themselves as squatters were entitled to be registered as owners of the suit land on account of having been in adverse possession.

My view is that the plaintiffs in **HCCC NO. 781 of 2004** who were squatters claimed to be entitled to the suit land by virtue of being in adverse possession were the same persons in 2010 now claiming the same lands under the name “**Twiga Estate Squatters**” except they had now obtained registration under the new name. There would otherwise be no explanation for two separate parties claiming the same parcels of land on the basis of adverse possession. There cannot be adverse possession by two parties at the same time of the same parcel of land. The picture that the plaintiffs want the court to accept is that “**Twiga Men and Women Group**” and “**Twiga Estate Squatters**” are two separate and different groups but what is not explained is how they were in occupation and possession of the same parcels of land which they claim separately. The court is satisfied that the two were one and the same group of squatters who are referring to themselves by different names ostensibly with the objective of misleading the court that they are different when they actually are not.

For all the above reasons I see no basis to interfere with **Hon. Justice Muchelule’s** ruling of 5th July 2011. The application for review is declined.

The consideration for the injunction was dependent on the order dismissing the suit being reviewed and the same being reinstated. As the review has not been granted it follows that the injunction cannot be granted. At any rate the plaintiffs have already been evicted from the suit lands and consequently an injunction would not lie to injunct that which has already taken place. The order of injunction is thus denied.

The upshot is that the plaintiffs application dated 23rd September 2011 is dismissed with costs to the Defendant.

Ruling dated, signed and delivered at Nairobi this...**6th** day of **February** 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Begsen..... For the Plaintiffs

Kariuki for Mutiso..... For the Defendant