



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 141 OF 2010

JOHN PETER KAMAU RUHANGI.....PLAINTIFF

VERSUS

KENYA FOREST SERVICE..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 6th March 2014 (hereinafter referred to as the “Second Injunction Application”) in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from trespassing, entering, fencing or interfering in any manner whatsoever with the property known as L.R. No. 17942 IR. No. 57926 (hereinafter referred to as the “suit property”) pending the hearing and determination of this Application and suit and that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, John Peter Kamau Ruhangi, sworn on 6th March 2014 in which he averred that after filing an application on 24th March 2010, the ruling delivered acknowledged that he is the registered proprietor of the suit property and ordered that the “status quo” be maintained until the full determination of the suit. He further averred that on 1st March 2014, the Defendant accompanied by armed security personnel delivered fencing material to the suit property and commenced fencing thereon. He further averred that his employees at the suit property were being subjected to harassment by the Defendant. He further confirmed having instructed his Advocates to write to the Defendant’s Advocates requesting that the Defendant be advised to cease threatening and harassing his employees and that the Defendant’s Advocates wrote back stating that his claims were baseless. He further stated that he was genuinely apprehensive that unless stopped by a restraining order of this court, the Defendant would continue with the fencing and construction on the suit property the loss of which would be difficult to quantify and repay.

The Application is contested. The Defendant filed the Replying Affidavit of Stephen Wambugu Kahunyo, the County Forest Coordinator, sworn on 19th March 2014 in which he averred that this matter was instituted by the Plaintiff on 24th March 2010 and was accompanied by a Notice of Motion application under Certificate of Urgency (hereinafter referred to as the “First Injunction Application”) seeking for a temporary injunction to restrain the Defendant from trespassing, entering or interfering with the suit property. He further averred that after hearing both parties

on the application for injunction, the court delivered its ruling on 18th October 2010 *inter alia* stating that “*On the material available at this interlocutory stage I am unable to find that the Plaintiff has an indefeasible title. The Parties will have to testify and their respective documents examined for the court to decide one way or the other. The result is that the Plaintiff has not established a prima facie case with probability of success to be entitled to an interlocutory injunction.*” He further averred that the court in conclusion stated that the status quo be maintained and that the status quo as at 18th October 2010, the date of delivery of the ruling and all along was that the suit property was gazette forest land in the possession, occupation and control of the Defendant. He further averred that the second prayer of the Plaintiff’s Second Injunction Application is the same as the substantive prayer that had been sought in the First Injunction Application which Application the court dismissed on 18th October 2010. He further stated that in the event that the Plaintiff was dissatisfied with the orders of the court on 18th October 2010, the only recourse he had was to appeal against the ruling or apply for review which he did not do and not to bring a fresh application for a temporary injunction. He further disclosed that the Defendant fenced the suit property between 20th to 25th February 2014 to secure the area from encroachment and does not in any way affect any alienable rights that would accrue to either of the parties that may be found to be entitled to the suit property at the conclusion of the suit. He further pointed out that since the ruling of 18th October 2010, the Plaintiff has not taken any steps to set down the main suit for hearing on its merits.

Both the Plaintiff and Defendant filed their written submissions.

I will focus on the most pertinent issue which is for determination in this matter and this is the question whether the Second Injunction Application is *res judicata* owing to the First Injunction Application for which a ruling was delivered on 18th October 2010. The Defendant dwelt on this issue extensively in its written submissions which position I agree with. Essentially, there is no question that the prayers sought by the Plaintiff/Applicant in the First Injunction Application are substantially similar to the prayers sought in the Second Injunction Application. It is true that the following was the finding of the court in its ruling in respect of the First Injunction Application:

“On the material available at this interlocutory stage I am unable to find that the Plaintiff has an indefeasible title. The Parties will have to testify and their respective documents examined for the court to decide one way or the other. The result is that the Plaintiff has not established a prima facie case with probability of success to be entitled to an interlocutory injunction.”

This decision was not appealed against and neither was a review sought by the Plaintiff.

The law pertaining to the doctrine of *res judicata* is captured under the provision of 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 issue has been subsequently raised, and has been heard and finally decided by such court.”

While faced with a similar case of *res judicata* concerning applications, the Honourable Court quoted the above section in **Julia Odhiambo Ogina v. Andrew Horace O. Omondi (2014) eKLR** and held as follows:

“While the above legal provision seems to address similar suits as opposed to similar applications as in this matter, the following decision sheds light on whether interlocutory findings on matters of fact will constitute *res judicata* where a similar application is filed in the future. This is what the Court of Appeal had in mind when it held in **Uhuru Highway Development Ltd v. Central Bank of Kenya & 2 Others Civil appeal No. 36 of 1996** that,

“There is not one case cited to show that an application in a suit once decided by courts of

competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature... that is to say, there must be an end to applications of similar nature: that is to say further, wider principles of res judicata apply to applications within the suit”

The reasoning of this decision is clear. If there was no bar to filing of related applications, the courts would be swamped with similar applications, or applications raising same or similar issues. There would be not end to this, defeating the cardinal principle of justice that there must be an end to litigation.”

I completely agree with this decision and apply the same in this matter. I find that the First Injunction Application is substantially similar to the Second Injunction Application. I further find that a ruling was delivered in respect of the First Injunction Application and that the Second Injunction Application is therefore res judicata. The upshot of this is that the Second Injunction Application is therefore hereby dismissed with costs to the Defendant/Respondent.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS __4TH__

DAY OF _____JULY_____ 2014

MARY M. GITUMBI

JUDGE