Benjamin & 7 others v Nganga & 9 others (Environment & Land Case E017 of 2024) [2024] KEELC 4435 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4435 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE E017 OF 2024

A OMBWAYO, J

MAY 30, 2024

BETWEEN

MBUGUA GATEMBU BENJAMIN .... 1ST PLAINTIFF

PETER NYOIKE KIBE .... 2ND PLAINTIFF

JOHN NGANGA KINAMA .... 3RD PLAINTIFF

MWAURA WANJOHI .... 4TH PLAINTIFF

ROBERT MUTURA KIBE .... 5TH PLAINTIFF

JOHN NJOROGE KIBE .... 6TH PLAINTIFF

JOSEPH KAMAU MWANGI .... 7TH PLAINTIFF

DAVID NGANGA MACHARIA .... 8TH PLAINTIFF

AND

HIRAM GANJU NGANGA .... 1ST DEFENDANT

JOHN GITHIRI NDURU .... 2ND DEFENDANT

FRANCIS NYABUTO OTUMO .... 3RD DEFENDANT

JOSEPH KAMAU MWANGI .... 4TH DEFENDANT

SAMUEL MACHARIA MWANGI .... 5TH DEFENDANT

RAPHAEL GICHEHA NJUGUNA .... 6TH DEFENDANT

GITAHI KARIUKI .... 7TH DEFENDANT

MWANGI MUNGAI .... 8TH DEFENDANT

FRANICS KANGERE KINYANJUI .... 9TH DEFENDANT

WILLIAM WERUHIA .... 10TH DEFENDANT

RULING

1. The plaintiffs applicants have come to this court with an application dated 7th March 2024 seeking orders that Pending hearing and determination of this suit, a temporary injunction do issue restraining the Defendants, their agents, servants or assigns from conducting any further survey activities, including but not limited to land surveying, boundary marking or any other similar activity on the Plaintiffs' parcels of land to wit;

    a. Two acres out of Kamara/Mau Summit Block 6/167 belonging to Joseph Kamau Mwangi

    b. Kamara/Mau Summit Block 6/1239(Haraka) belonging to John Njoroge Kibe

    c. Kamara/Mau Summit Block 6/1238(Haraka) belonging to Robert Mutura Kibe

    d. One acre out of Kamara [Mau Summit Block 6/261 (Haraka) jointly belonging to Peter Nyoike Kibe and Simon Kibe Mutara

    e. Kamara/Mau Summit Block 6/330(Haraka) belonging to Mwaura Wanjohi

    f. Kamara /Mau Summit Block6/576(Haraka) belonging to David Nganga Macharia

    g. Kamara [Mau Summit Block6/2(Haraka) belonging to Mbugua Gatembu Benjamin Kamara [Mau Summit Block6/289(Haraka) belonging to John Nganga Kiinarna

2 The costs of this Application be provided for.

3. The applications is based on the grounds that the applicants are the lawful owners /occupants of all the following parcels of land, all forming part of what was previously called baraka Farm:

    a. Two acres out of Kamara/Mau Summit Block 6/167 belonging to Joseph Kamau Mwangi

    b. Kamara /Mau Summit Block 6/1239(Haraka) belonging to John Njoroge Kibe

    c. Kamara/Mau Summit Block 6/1238(Haraka) belonging to Robert Mutura Kibe.

    d. One acre out of Kamara /Mau Summit Block 6/261 (Haraka)jointly belonging to Peter Nyoike Kibe and Simon Kibe Mutara

    e. Kamara/Mau Summit Block 6/330(Haraka) belonging to Mwaura Wanjohi

    f. Kamara (Mau Summit Block6/576(Haraka) belonging to David Nganga Macharia

    g. Kamara (Mau Summit Block6/2(Haraka) belonging to Mbugua Gatembu Benjamin

    h. Kamara/Mau Summit Block6/289(Haraka) belonging to John Nganga Kiinama

4. The applicants allege that the respondents, are purportedly engaged in an illegal and unlawful land survey on property belonging to the Applicants herein without any lawful authority of consent. The applicants allege to have strong grounds to believe that the survey process initiated by the Respondents is illegal, unlawful, and in contravention of Section 19 of the *Land Registration Act*, 2012. Moreover, that the purported Survey being conducted by the Respondents is against public good, public order and public interest and unless it is halted, it may precipitate unprecedented public unrest, chaos and a breach of peace.

5. If the purported survey process which is currently ongoing is not halted immediately, irreparable harm will be caused to the Applicants' rights and interests in the said property. Any delay in halting the survey process will render the substantive matter herein moot and infringe upon the Applicants' constitutional right to fair hearing as well as their property rights. It is in the interest of justice that this Application is allowed as prayed.

6. The respondents have opposed the application based on the affidavit of Joseph Kamau Mwangi. The respondent states that the plaintiffs are guilty of non-disclosure of material facts. That this matter is similar to Nakuru ELC No.161 of 2013, *Charles Ngaruiya Ngotho & Others v Haraka Farmers Co Ltd and John Njogu Mbugua & 78 others* where Haraka Company had been sued by its shareholders demanding that the Registry Index maps (RIM) which was not in tandem with the 1977 demarcation Map be demarcation maps be declared a nullity and illegal. That judgment was made on 12th July 2022. The judgment binds the plaintiff's applicants herein. That as per the decree of the court on 21st September 2022 informed the decision of survey of the outcome of the case as the court had ordered a fresh RIM to be prepared. That on 6th June 2023 the company was allowed to hire a private surveyor to prepare a fresh RIM. This was done as per the court order. The resurvey has been concluded in compliance with the judgment of the court.

7. In the supplementary affidavit, John Nganga Kiinama concedes that this court in *Nakuru ELC No.161 of 2013* issued far reaching orders but the plaintiffs cause of action arises from implementation of the orders by the 1st to 9th defendants. He states that the suit is not similar to the previous suit as parties are not the same. He states that the issue of resurveying is not within the powers of the Land Registrar and that the 1st- 9th defendants have misused the powers.

8. According to the applicant the suit is not *res judicata*. The applicant submits that the suit raises a *prima facie* case with a likelihood of success.

9. The respondents on his part submits that the applicant's suit is a desperate attempt to stop a process that was sanctioned by the court. The issues raised in the case have been raised in the previous suit. They have been heard and determined. The respondent argue that the suit is *res judicata*.

10. I have considered the application, replying affidavit and supplementary affidavit and do find that the respondents have demonstrated that the plaintiff's is guilty of non- Disclosure of material facts. That there is a far reaching judgment by this court dated 12th July 2022 wherein the court declared the decision by the defendant (Haraka Farms Ltd) to re-survey the lands null and void and an illegality. The shareholders of the company were to remain in possession of land as occupied and developed. The RIM was found to be inapplicable for further issuance of titles and was to be cancelled. The title deeds issued on the basis of the RIM were to be cancelled and the Director of Survey was to prepare a fresh RIM observing occupation of land by the shareholders. Fresh titles were to be prepared using the Fresh RIM. Lastly, public amenities and the riparian land were to be restored.

11. The plaintiffs are mischievously dangling the title deeds that were cancelled by this court in Nakuru ELC No 161 of 2013,*Charles Ngaruiya Ngotho and 8 others v Haraka Farmers co Ltd and 78 others*, before the same court in a fresh Suit. The plaintiffs are shareholders of Haraka Farmers Ltd and therefore can't run away from suit No. 161 of 2013. The issue in this suit that is the survey of the suit land in the same issue that was determined by the court in 161 of 2013. The law on *res judicata* is as follows:-

12. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " 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"

13. The *Black's law Dictionary* 10th Edition defines "*res judicata*" as

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

14. Kuloba J., in the case of *Njangu v Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), held that:

> " If parties were allowed to go on litigating forever over 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 court, then I do not see the use of the doctrine of *res judicata*...."

i. what issues were really determined in the previous Application;

ii. whether they are the same in the subsequent Application and were covered by the Decision.

iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

15. In the Court of Appeal case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that: -

> " The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...
>
> The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

16. In *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was *res judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against.

17. The court further emphasized that the same Application having been finally determined

> " thrice by the High Court and twice by the Court of Appeal",

it could not be resuscitated by another Application.

The Court of Appeal further stated that:

> " That is to say, there must be an end to Applications of similar nature, that is to further, under principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

18. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.

19. I do find that the suit is *res judicata* as the issues raised by the plaintiffs have been determined in *Nakuru ELC No 161 of 2013*. The plaintiff's interest in the matter was taken care, or ought to have been taken, by the company in which they held shares and which was a party. The judgment by the court was so elaborate and far reaching in the suit which was a representative in nature and binds all shareholders.

20. Moreover, even if the suit was found to be with a basis, which is not the case, the plaintiffs are guilty of non-disclosure and that. They have not disclosed the existence of the suit and therefore the court cannot exercise the discretion of granting an injunction in their favor.

21. In any event the plaintiff have not established a prima facie case with a likelihood of success because the titles relied upon were cancelled by the court. Failure to establish a prima facie case with a likelihood of success makes the application incompetent application fail. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

> " in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
>
> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states

are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

22. Consequently, the Plaintiff ought to, first, establish a prima facie case. The plaintiff/Applicant submitted that they have established a prima facie case and relied on the judicial decision of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR in which the Court of Appeal gave a determination on a prima facie case. The court stated that:

> "… in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

23. The upshot of the above is that whole suit is *res judicata* and therefore struck out with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MAY 2024.

A O OMBWAYO

JUDGE