



Siri Gurdawa Ramgarhia Railway, Nairobi Registered Trustees v Hussein & 5 others; Kenya Rural Roads Authority (Interested Party) (Environment & Land Case E163 of 2022) [2023] KEELC 119 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 119 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E163 OF 2022
EK WABWOTO, J
JANUARY 19, 2023**

BETWEEN

SIRI GURDAWA RAMGARHIA RAILWAY, NAIROBI REGISTERED TRUSTEES PLAINTIFF

AND

**ENGLAND ADAM HUSSEIN 1ST DEFENDANT
ABDULLAHI IBRAHIM ALI 2ND DEFENDANT
JAMES MWANGI KAGUCHA 3RD DEFENDANT
NAIROBI CITY COUNTY 4TH DEFENDANT
THE REGISTRAR OF TITLES-NAIROBI 5TH DEFENDANT
NATIONAL LAND COMMISSION 6TH DEFENDANT**

AND

KENYA RURAL ROADS AUTHORITY INTERESTED PARTY

RULING

1. This ruling is in respect to the 1st-3rd Defendants application dated October 6, 2022 and the Plaintiff's preliminary objection dated October 17, 2022.
2. The 1st-3rd Defendants' application sought the following:
 - i) That this Honourable Court do certify this Application as urgent and one deserving to be heard *ex-parte* in the first instance.



- ii) That this Honourable court be pleased to vary, review or set aside the Orders issued on 2 September 7, 2022 in favour of the Plaintiff with regard to Order Number 2 of the said order pending the hearing and determination of this Application.
- iii) That this Honourable court be pleased to vary, review or set aside the Orders issued on 27th September, 2022 in favour of the Plaintiff with regard to Order Number 2 of the said order pending the hearing and determination of this Suit.
- iv) That pending the hearing and determination of prayers 2 and 3 above and pending the hearing and determination of this Application, that this Honourable Court do issue a restraining Order against the Plaintiffs whether by themselves, their servants, employees, agents or any other person from constructing, erecting any structures on the said land and/or in any manner and from forcefully taking possession, entering LR No 209/12596, Nairobi, or interfering with the Defendants' access to parking space of the said property in any way whatsoever or in any other manner whatsoever, depriving the Defendants' right of access to the parking space of the suit property LR No 209/12596, Nairobi reserved for use as 2 Parking space, loading and offloading zone for the Plaintiffs' and their visitors and/or customers.
- v) That pending the hearing and determination of prayers 2 and 3 above and pending the hearing and determination of this suit, that this Honourable Court do issue a restraining Order against the Plaintiffs whether by themselves, their servants, employees, agents or any other person from constructing, erecting any structures on the said land and/or in any manner and from forcefully taking possession, entering LR No 209/12596, Nairobi, or interfering with the Defendants' access to parking space of the said property in any way whatsoever or in any other manner whatsoever, depriving the Defendants' right of access to the parking space of the suit property LR No 209/12596, NAIROBI reserved for use as Parking space, loading and offloading zone for the Plaintiffs' and their visitors and/or customers.
- vi) That the Officer Commanding Station (OCS) Pangani Police Station to assist to enforce, supervise, ensure peace prevails and ensure compliance with orders issued by the court for purposes of maintaining law and order.
- vii) That the costs for this Application be provided for

3. In opposition to the said application, the Plaintiff raised a Preliminary Objection relying on the provisions of Section 1A, 1B, 3A, 7 and 8 of the *Civil Procedure Act* in the following terms:

“That the Prayers 4, 5, and 6 in the instant application are for all the intents and purposes similar substantially in effect and purposes thereof to the prayers 3,4 and 5 of the previous Notice of Motion dated 1 July 4, 2022 and filed herein by the said 1st Defendant/Applicant and as such the instant application is res judicata in as far as 4, 5, and 6 are sought and offends the mandatory provisions of Section 7 & 8 of the *Civil Procedure Act*.”

4. In submissions dated November 11, 2022, it was argued that the prayers sought in the application dated October 6, 2022 had been declined and a ruling rendered in respect to the same. Moreover, by virtue of the application being res judicata, it was an abuse of the court process.



5. The 1-3rd Defendants submitted that there was an error on the face of the record occasioned by the Plaintiff's misrepresentation and lack of incorporation under the *Trustees (Perpetual Succession) Act*. The 4th Defendant's submitted that it in line with the principles of natural justice, setting aside the orders would afford them the opportunity to be heard.
6. I have considered the application, the preliminary objection filed and the respective written submissions and the authorities cited. The issues for determination are:
 - i) Whether the preliminary objection is merited?
 - ii) Whether the threshold for grounds for review have been met.
7. It is trite law that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukbisa Biscuits Manufacturing Co. Ltd v West-End Distributors Limited* (1969). EA 696. Having raised the objection on a specific provision of the law, the preliminary objection would be alive and within the jurisdiction of this court.
8. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR highlighted the principle when it stated:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
9. Section 7 of the *Civil Procedure Act*, reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated as follows :-
 - i) The suit or issue raised was directly and substantially in issue in the former suit.
 - ii) That the former suit was between the same party or parties under whom they or any of them claim.
 - iii) That those parties were litigating under the same title.
 - iv) That the issue in question was heard and finally determined in the former suit
 - v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
10. My perusal of the ruling of September 27, 2022 highlights that the issue of injunction has been dealt in the following terms:

“That pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the Defendants/respondents whether by themselves or through their servants, employees, agents or any other person acting at their behest or whatsoever from trespassing entering into or in any manner interfering with the Plaintiff's ownership, quiet possession, fencing and use of the property, LR No 209/12596, Nairobi”
11. To my mind, prayer 4 and 5 of the application mirrors the same issues addressed in the ruling. Additionally, the involved parties and subject matter are similar. For this reason, I find that the Court has already pronounced itself on the issue hence it would be a waste of judicial resources to indulge the



- parties for a second bite to the cherry. The preliminary objection is merited and partially extinguishes the prayers sought in the application.
12. With regard to review of the orders, Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya provides as follows:
- Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
13. Order 45 Rule 1 (1) of the *Civil Procedure Rules* provides as follows:
- 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 the 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 judgement to the court which passed the decree or made the order without unreasonable delay.
14. Rule 3(2) of the same Order provides that:
- Where the court is of the opinion that the application for review should be granted, it shall grant the same:
- Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.
15. The Defendants have not presented any sufficient cause to justify review of the orders. From the pleadings and the information availed by the parties, it now appears that the Defendants are trying to litigate the dispute through interlocutory applications. It will not be in the best interest of justice to review the orders issued herein at this stage. In the circumstances, I direct that the issues raised by the Defendants be considered during trial.
16. In the foregoing, the Court hereby finds that the Application dated October 6, 2022 is unmerited and the same is hereby dismissed with no orders as to costs.
17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY, 2023

E. K. WABWOTO
JUDGE



In the presence of: -

N/A for the Plaintiff.

Mr. Lakicha for the 1st, 2nd and 3rd Defendants.

Mr. Gatundu for the 4th Defendant.

N/A for the 5th Defendant.

Ms. Njuguna for the 6th Defendant.

N/A for the Interested Party.

Court Assistant; Caroline Nafuna.

