



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO.30 OF 2018

HENRY KIMANI THAIRU.....PLAINTIFF/RESPONDENT

VS

JAMES KIMANI THAIRU1STDEFENDANT/APPLICANT

FRANCIS KARIUKI KIMANI.....2NDDEFENDANT/APPLICANT

TERESIA WANJIRU NGARI3RDDEFENDANT/APPLICANT

ELIZABETH WANJIRU MAINA..... 4THDEFENDANT

AGNES NYAMBURA KIHARA..... 5THDEFENDANT

RULING

1. The Applicants filed Chamber summons dated the 15/11/2019 seeking orders that the Plaintiff's case before the honourable Court be dismissed in its entirety for being misplaced, untenable and an abuse of the process of the Court.

2. The application is based on the grounds annexed thereto and the supporting affidavit of the Francis Kariuki Kimani, the 2nd Applicant who deposed that this case was instigated by the Plaintiff/Respondent after their acquittal in the criminal case No CMR 190/2013 where the 1st -3rd Respondents were charged in respect to parcel NoLOC20/MIRIRA/816, the suit land. That the subject of the criminal case as well as in this suit is similar. That this suit is an attempt to relitigate the criminal case which was heard and determined by a Court of competent jurisdiction. That the only recourse open to him was to Appeal the decision of the Court in the criminal case but not to file a fresh suit in this Court. That they stand to be prejudiced through being put through another trial having been successfully tried and found not guilty in the criminal case.

3. The application has been opposed by the Plaintiff/Respondent through his replying affidavit dated the 14/1/2020 and filed in Court on even date. He deposed that the Defendants were charged in CMR 190/2013 with two counts namely obtaining registration of the subject land by false representation contrary to Section 320 of the Penal code and false swearing contrary to section 114 of the Penal Code.

4. That although the Defendants were acquitted of all the charges there still remains the question for determination by this Court as

to which of the two titles held by the parties herein is valid. That the criminal suit did not determine the issue of title to land.

5. The application was canvassed through oral submissions in open Court. The 2nd Applicant adopted the grounds in his application together with the replying affidavit and stated that the suit has been dormant for more than 8 years. That the Plaintiff is not the same person as the original owner of the suit land, who was his father. That they were acquitted in the criminal case which judgement has not been vacated, set aside or appealed.

6. The 3rd Defendant/Applicant added that they have the original title to the suit land. That having been charged and acquitted in the criminal case they are not ready to defend another case in this Court.

7. The 2nd Defendant/Applicant adopted the submissions of the 1st and 3rd Applicants in toto.

8. The Respondent/Plaintiff opposed the application through Learned Counsel on record, Mr Ndung'u. He adopted the Replying Affidavit sworn and filed by the Plaintiff on the 14/1/2020. He informed the Court that though the Defendants were charged in the criminal case, they were acquitted. That the issue before this Court is the ownership of the suit land given that both the Plaintiff and the Defendants wield titles each and it is for the Court to determine which title should stand. That this Court has jurisdiction to hear the matter and urged the Court to dismiss the application.

9. The Applicants filed written submissions on the 9/3/2020. They submitted that they acquired the title through transmission in a succession cause in respect to the estate of Kimani Thairu, deceased who was the original owner of the suit land. They faulted the Respondent for failing to Appeal the judgement in the criminal case and instead preferring a fresh suit in the ELC Court. They argued that it is for the Plaintiff to prove his case in this Court through evidence to demonstrate that he has a good title to the suit land. In addition, that he has the onus to prove that Henry Kimani Thairu and Kimani Thairu are one and the same person and that both names refer to the Plaintiff.

10. In addition, the Applicants averred that the Plaintiff used the police to intimidate them to give up their entitlement in the suit land. That the Plaintiff is not the owner of the suit land and has taken advantage of the similarity of the names to mount a claim which is unfounded.

11. The key question for determination is whether the suit before me is an abuse of the process of this honourable Court in view of the judgement of the Court in criminal case No 190/2013-Muranga.

12. The Applicants have not disclosed the provisions of the Civil Procedure under which the application has been filed. I am prepared to excuse the Applicants being lay persons and not trained in the art of pleading. Guided by Art 159 (d) of the Constitution and section 1A the Civil Procedure Act which binds me to deliver substantive justice, I shall proceed with the application despite the procedural gaps. I am also fortified by the provisions of Order 51 Rule 10 (1) of the Civil Procedure Rules which provides that every order rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule. Rule 10(2) is more emphatic that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

13. The term an abuse of the process of the Court is not defined in the Civil Procedure Act nor the Civil Procedure Rules. The Black Law Dictionary defines abuse as "everything which is contrary to good order established by usage that is a complete departure from reasonable use."

14. In the case of **Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** the Hon Justice Mativo attempted to define the concept as follows;

"The concept of abuse of Court/judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents. The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the

detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations: -

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different Courts even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example a cross Appeal and Respondent notice.
- d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
- e. Where there is no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.
- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an Appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.

15. The list is in exhaustive. In the case of **Debi Bakshi Vs Habib Shah AIR 1916 PC 151** the Privy Council held that a process of the abuse of the Court may be committed by the Court or by the parties. In a case where the Court dismissed a suit for default of appearance of the Plaintiff who was infact dead at the time the order was made, the Privy Council observed that default rules are not applicable to a dead man and the orders of the Court amounted to an abuse of the process of the Court, an outcome that was never intended. Abuse of the process of Court manifest in such instances as filing multiplicity of suits, bringing vexatious obstructive and dilatory actions, institution of suits by puppet plaintiffs and so forth.

16. The Court has inherent power in order to meet the ends of justice or to prevent the abuse of the process of the Court. These inherent powers are saved in section 3A of the Civil Procedure Act. It is to be noted that Section 3A does not confer the said powers because they are inherent in the architectural authority of the Court. These are powers in addition to the powers conferred by statute. It is a power inherent in the Court by its very virtue and nature to do justice to the parties.

17. In the of **Satya Bhama Gandhi (supra)** the Judge whilst quoting the case of **Clark vs R {2016} VSCA 96 at [14]** observed that the concept of abuse of process extends to the use of the Court's processes in a way that is inconsistent with two fundamental requirements arising in Court proceedings. These are, *first*, that the Court protect its ability to function as a Court of law by ensuring that its processes are used fairly by State and citizens alike. The *second* is that unless the Court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The abuse of the Court's processes therefore will be seen as lending themselves to oppression and injustice.

18. Back to the case at hand, the suit was filed on the 30/6/16 in Nyeri before it was transferred to this Court at the establishment of the ELC Court in Murang'a, which is the territorial jurisdiction of the subject suit land. The Plaintiff sought inter alia, declaratory orders against the Defendants that he is entitled to the suit land GIKUNDU/MIRIRA/816 and further that the title held by the Defendants be cancelled. Simultaneously the Plaintiff successfully sought a temporary injunction against the Defendants from interfering with the suit land, which was granted pending the hearing and determination of the suit.

19. The Defendants filed a joint statement of defence on the 14/11/16 in which they denied the claim of the Plaintiff and termed it as baseless, false and fraudulent. They insisted that they are the rightful owners of LOC 20/MIRIRA/816, the suit land. They urged the

Court to dismiss the suit for being an abuse of the process of the Court.

20. The case of the Plaintiff as I understand from the pleadings is that he is the registered owner of the suit land which in this case is disclosed as GIKUNDU/MIRIRA/816. According to the pleadings on record the Defendants lay claim to the suit land being LOC 20/MIRIRA/816. The issue for determination will then be inter alia whether or not the suit land being referred variously as GIKUNDU/MIRIRA/816 and or LOC 20/MIRIRA/816 is the same land on the ground or are the parties referring to two different parcels of land.

21. The claim of the Plaintiff is premised on his averment that Henry Kimani Thairu and Kimani Thairu refers to him and therefore he is the registered owner of the land. The Defendants on the other hand are insistent that the name Kimani Thairu belongs to their partriach father and father in law respectively from whom they inherited the land through succession proceedings in a Thika Court. This is an issue that goes to the root of the controversy which relates to the ownership of the land.

22. The jurisdiction of this Court is derived from Art 162 (2) (b) of the Constitution as read together with section 13 of the ELC Act which provides inter alia that the Court shall have original and Appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

23. In the main, the issue before the Court is that of ownership of the suit land. As can be clearly seen from the provisions of the Constitution and statute this Court is empowered to hear and determine disputes in respect to title to land. This suit falls for determination within the jurisdiction of this Court.

24. The Defendants have averred that they were charged and acquitted in the criminal case CMCr No 190/2013 on two counts namely; obtaining registration of the suit land by false representation contrary to section 320 of the Penal code and false swearing of documents contrary to section 114 of the Penal Code. I have perused the judgment of the Honourable Court annexed to the pleadings of the Defendants and the issue of ownership of the suit land was not one of those determined. The criminal Court that heard the matter enjoys criminal jurisdiction as per the Constitution and not civil jurisdiction. The issue in the criminal case was whether or not the Defendants were criminally culpable. Evidently their innocence was proved and hence their acquittal. The matter before me is of a civil nature and has been brought before the right forum.

25. The Defendant's application is based on the doctrine of resjudicata, as I can glean from the pleadings before me. They argue that they have been tried and acquitted by the Court and this suit is going to subject them to another trial. It is their position that they will be prejudiced as the subject matter is similar and that the Plaintiff is having another bite at the cherry in prosecuting the same case in two forums. I have explained in para 21 that the issues before this Court were not tried in the criminal Court and these issues are best left for the trial Court to hear and determine so that each party can have their day in Court. Indeed, the parties and the subject matter are by and large similar.

26. In the upshot I find that the suit is not an abuse of the process of the Court. This is the right forum for the parties to prosecute their dispute so that their rights may be adjudicated once and for all.

27. The application is unmeritorious. It is dismissed with costs in favour of the Respondent/Plaintiff.

28. It is so ordered.

DATED, SIGNED & DELIVERED AT MURANG'A THIS 18TH DAY OF JUNE 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ndungu for the Plaintiff/Respondent

1st – 3rd Defendants/Applicants - Present in person

4th Defendant/Applicant – Deceased

5th Defendant/Applicant - Absent

Njeri, Court Assistant



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