



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. E256 OF 2021**

**KENT ESTATES LIMITED..... PLAINTIFF**

**VERSUS**

**ZAKARIA GATHOGA NDUNGU.....DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. This ruling is in respect to two applications. They are the Plaintiff's Notice of Motion application dated 12<sup>th</sup> July 2021 and the Defendant's Notice of Motion application dated 19<sup>th</sup> September 2021.

2. The application dated 12<sup>th</sup> July 2021 seeks the following orders:

i) *Spent.*

ii) *THAT pending the hearing and determination of this suit, the Honourable Court does order that the Defendant/Respondent unconditionally removes his excavator machine and Tipper Lorry from the Plaintiff's land parcels numbers L.R 27903/292 and L.R 27903/293 situated in Embakasi, Nairobi.*

iii) *THAT if the Defendant/Respondent does not comply with Order No. 2 above, the Plaintiff/Applicant be at liberty to remove and park the same at Embakasi Police Station or any other place as directed by the OCS, Embakasi Police Station.*

iv) *THAT the Defendant/Respondent shall bear the costs of the removal of the Excavator machine and Tipper Lorry from the land parcels No. L.R 27903/292 and L.R 27903/293.*

v) *THAT pending the hearing and determination of this suit a temporary injunction be and is hereby issued restraining the Defendant/Respondent, his servants, employees and or agents from trespassing onto, appropriating, construction upon, using and or in any other way interfering with parcels numbers No. L.R 27903/292 and L.R 27903/293 situate at Embakasi.*

vi) *THAT the orders issued herein be enforced by the OSC Embakasi Police Station.*

vii) *THAT the costs of this Application be in the cause.*

3. The application is based on the grounds on its face and supported by the affidavit sworn by **Geoffrey Mungai Thiong'o** one of the Directors of the Plaintiff company sworn on the 12<sup>th</sup> July 2021.

4. The second application dated 19<sup>th</sup> September 2021, seeks for the following prayers: -

i) *THAT an order be and is hereby issued staying the proceedings herein pending hearing and determination Milimani ELC No. 7 of 2012.*

ii) *THAT an order be and is hereby issued dismissing ELC No. E256 of 2021 for being subjudice.*

iii) *THAT an order be and is hereby issued striking out the pleadings in ELC E256 of 2021 for gross abuse of the court process.*

iv) *THAT the costs of this application be provided for.*

5. The application is supported by the affidavit of the Defendant sworn on 19<sup>th</sup> September 2021.

6. When the matter came up for hearing on 21<sup>st</sup> September 2021, parties agreed to have both applications heard together and further to have the same disposed of by way of written submissions. Both parties filed their written submissions on 18<sup>th</sup> October 2021.

## **B. PARTIES RESPECTIVE SUBMISSIONS**

### **Plaintiff's submissions**

7. The Plaintiff submitted that the suit relates to two properties L.R No. 27903/292 and L.R No. 27903/293 situate in Embakasi, Nairobi which were initially part of the larger 50 acres parcel L.R No. 7107/2 owned by the late Joseph Maingi Muriithi which Benson Ritho Muriithi was currently the sole administrator.

8. The Plaintiff also submitted that on 2<sup>nd</sup> November 2010, Benson Ritho Muriithi executed the conveyance of the two suits properties in favour of Ecoprime Properties Limited who later sold off the two plots to the Plaintiff herein.

9. The Plaintiff further submitted that they became aware that the Defendant had trespassed in the suit properties in November 2020 and as such they are seeking orders to stop the trespass and compelling the Defendant to remove their lorry and tipper from the suit properties.

10. It was submitted that the sale agreements upon which the Defendant was basing his claim for the acquisition of the suit properties were a forgery and could not be used to support the Defendant's case.

11. The Plaintiff contended that his claim and ownership to the suit properties was not contestable having acquired the same for value and lawfully.

12. In respect to whether or not the suit case was *sub-judice*, the Plaintiff vehemently denied the same being similar to **NAIROBI ELC No. 7 of 2012**. The Plaintiff stated that the parties to the two suits were different, the causes of action was different and further that the reliefs sought in both matters were equally different.

13. In support of their case, the Plaintiff relied on **sections 25 and 26 of the Land Registration Act 2012** on the aspect of their stake to the suit properties.

14. The Plaintiff further urged the court to protect its interests to the suit property and allow its application dated 12<sup>th</sup> July 2021 while dismissing the Defendant's application dated 19<sup>th</sup> September 2021.

### **Defendant's submissions**

15. The Defendant opposed the Plaintiff's application on various grounds while also filing his application dated 19<sup>th</sup> September

2021. He submitted that this suit was *subjudice* in view of NAIROBI ELC No. 7 of 2012 wherein the two parcels of land Reference No. 27903/292 and 293 were part of the property named therein.

16. He further submitted that on 25<sup>th</sup> February 2013 Nyamweya J (as she then was), in NAIROBI ELC No. 7 of 2012 had issued orders barring any dealings and transfer of the suit properties pending the hearing and determination of that suit and as such this court could not deal with any matter referring to the suit properties. The Defendant evoked the doctrine of *lis pendens* and further referred to the Court of Appeal case of *Naftali Ruthu Kinyua vs Thuita Gachure & Another [2015] eKLR* where the court pronounced itself as to the applicability of that doctrine.

17. The Defendant also urged the Court to dismiss the Application with costs to him.

### C. ISSUES AND DETERMINATION

18. I have considered the Applications, the responses filed thereto and submissions by parties. I have also considered the decisions relied on by parties. The issues which in my opinion arise for determination are as follows:

- i) *Whether the suit filed herein is sub judice in view of NAIROBI ELC No. 7 of 2012.*
- ii) *Whether the Plaintiff has met the threshold for the grant of temporary orders of injunction sought.*

#### Issue No. I

*Whether the suit filed herein is sub judice in view of NAIROBI ELC No. 7 of 2012.*

19. The Defendant submitted that the suit herein is an abuse of the Court process and the same is *subjudice* in view of ELC No. 7 of 2012. The Defendant contended that the ELC No. 7 of 2012 was still pending and that orders had been issued therein restraining the transfer of the subject matter herein and transfer of L.R No. 27903/292 and 27903/293 pending the hearing and determination of that case.

20. The Plaintiff countered the Defendant's assertion and contended that the suit cannot be *subjudice* since in his view parties to the two suits were different, the causes of action too was different and further that the reliefs sought in both matters were equally different.

21. The *subjudice* principle is captured in **Section 6 of the Civil Procedure Act**, which provides as follows: -

***“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”***

22. Where the test of *subjudice* is established or met, the explanatory notes to the **Section 6 of the Civil Procedure Act** stipulates that the latter suit would be stayed until the earlier suit is heard or determined.

23. With a large number of pending cases, the judiciary is overburdened and faces a stark lack of resources. When two suits arising out of the same issues between the same parties are brought before the courts, there is bound to be wastage of resources and frivolous litigation.

24. In order to check this very problem, there exists the concept of *subjudice* which in Latin means “*under Judgement.*” It denotes that a matter is being considered by a court or judge. The concept of *subjudice* that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

25. In this regard, **section 6 of the Civil Procedure Act** expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

26. The basic purpose and the underlying object of *subjudice* is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.

27. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR*, had occasion to pronounce itself on the subject of *subjudice*. It aptly stated: -

*The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.*

28. In the case of *David Ndi & others versus Attorney General & Others 2021 eKLR*, a bench of five Judges inter alia stated;

*“The rationale behind this provision (Section 6 of the Civil Procedure Act) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”*

29. It is common ground that the instant suit was filed despite the existence of a pending civil suit Nairobi ELC No. 7 of 2012. I have had the occasion to peruse and read the file in ELC No. 7 of 2012 now pending before this Court. It is worth noting that the parties to both suits are different, *Nairobi ELC No. 7 of 2012 (Consolidated with Nairobi ELC No. 814 of 2013) Benson Rittho Muriithi (Suing as the Administrator of the Estate of the late Joseph Maingi Muriithi) vs George Ngugi Karungo & Others* and the claim in that suit is for inter alia a permanent injunction seeking to restrain the Defendants and interested parties joined in the suit from trespassing and or dealing with several parcels of land including L.R No. 27903/292 and 27903/293 which happen to be the suit properties herein. While the claim in the instant suit is against trespass by the Defendant and the prayers sought are inter alia an order compelling the Defendant to remove his excavator and tipper from the suit property and a permanent injunction barring him from trespassing onto the suit properties.

30. However, as aptly stated by the Defendant, the record in ELC No. 7 of 2012 indeed confirms that orders were issued by **Nyamweya J.** (as she then was) on 12<sup>th</sup> January 2012 and 25<sup>th</sup> February 2013 restraining any sale, transfer, disposal and undertaking any further construction in respect to the suit properties pending the hearing and determination of that suit or until such further orders are issued. As per the court record in that case, the said orders have not been varied nor set aside. One wonders how then the Plaintiff was able to acquire the suit properties in the year 2019 from Ecoprime Properties Limited despite the existence of the said orders.

31. In my view, whichever way we may wish to look at the issues herein, there is a high probability that the issues touching on both files in respect to the suit properties may affect the future dealings of the said properties. This Court must therefore be aware of such a possibility and be alive to the underlying need to protect the integrity of the court process and render substantive justice to the parties.

32. Accordingly, I find that the issues in this suit have a nexus with Nairobi ELC No. 7 of 2012 to the extent that they relate to the same properties L.R No. 27903/292 and 27903/293 which has orders restraining any dealings pending the hearing and determination

of that suit.

33. In the circumstances, the appropriate order that comments itself for granting at this stage is to pend this suit and await the outcome of ELC No. 7 of 2012.

## Issue No. 2

### *Whether the Plaintiff has met the threshold for the grant of temporary orders of injunction sought*

34. In an application for interlocutory injunction, the onus is on the applicant to satisfy the court that it should grant the injunction sought. In so doing, the Applicant must satisfy the requirements laid down in the celebrated case of *Giella vs Cassman Brown Co. Ltd (1973) EA 358* which are that a prima facie case with a probability of success must be established and that the applicant would suffer irreparable loss that cannot be compensated by an award of damages and where in doubt, the court will decide whether or not to grant the injunction on a balance of convenience.

35. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 1215* as follows:

*“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”*

36. It was the Plaintiff’s case that they are the legal owners of the suit property having acquired the same lawfully from Ecoprime Properties Limited in the year 2019 and that the Defendant without any justification had trespassed onto the said properties as from November 2020 by parking his Excavator machine and a Tipper lorry without their knowledge and consent.

37. In support of his case, the Plaintiff also annexed in his supporting affidavit sworn on 12<sup>th</sup> July 2021 the sale agreements dated 16<sup>th</sup> July 2019 and 23<sup>rd</sup> August 2019 for purchase of L.R No. L.R No. 27903/292 and 27903/293 respectively. They also annexed the photos of the Excavator machine and a Tipper lorry that is permanently parked at the suit properties.

38. It was also the Plaintiff’s case that the sale agreement purportedly used by the Defendant in acquiring the suit properties was found out to be forgeries pursuant to a forensic evaluation conducted by the Police Document Examiner and a copy of the said report was attached to substantiate the same.

39. The Defendant on his part did not adduce any evidence to counter the allegations of forgeries that were averred by the Plaintiff save to merely state that the Plaintiff has been using Police officers to harass him and level all manner of trumped up charges against him with the intention of acquiring the suit properties.

40. The Defendant also submitted that he had purchased the suit properties from **Benson Ritho Muriithi (The Plaintiff in ELC No.7 of 2012)** vide a sale agreement dated 24<sup>th</sup> May 2011 for valuable consideration and has been in occupation since then on the basis of subsisting preservation orders of status quo issued on the 12<sup>th</sup> January 2012 and 25<sup>th</sup> February 2013 which continue to be in force.

41. It is my view that the Plaintiff has not established that he has a right which has been infringed having acquired the suit properties in the year 2019 when there was an existing order against any dealings in respect to the suit properties. In the circumstances, no prima facie case has been established.

42. In respect to irreparable damage, the Plaintiff has not demonstrated what damage he would suffer and to what extent. In any event it’s the Plaintiff who proceeded to acquire the suit properties despite the existence of earlier orders barring any dealings in respect to the same. The Plaintiff has accordingly not satisfied the second condition for the grant of a temporary injunction.

43. Lastly, the balance of convenience does not lie in favour of allowing the Plaintiff’s application. The Plaintiff’s right to property

as enshrined under Article 40 of the Constitution cannot be upheld by this Court if the said properties was acquired in existence of orders restraining any dealings, transfer and undertaking of any developments in respect to the suit properties.

44. I therefore find that the Notice of Motion dated 12<sup>th</sup> July 2021 has no merit and decline to grant the orders sought therein.

45. In the end, I partially allow the Defendant's Application dated 19<sup>th</sup> September 2021 and make the following orders: -

*i) The suit pending/proceedings herein, is hereby stayed under Section 6 of Civil Procedure Act, pending determination of Nairobi ELC No. 7 of 2012 (Consolidated with Nairobi ELC No. 814 of 2013) Benson Ritho Muriithi (Suing as the Administrator of the Estate of the late Joseph Maingi Muriithi) vs George Ngugi Karungo & Others.*

*ii) Each party to bear their own costs of the application.*

46. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF NOVEMBER 2021**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Peter Kimani for the Plaintiff**

**N/A for the Defendant.**

**Court Assistant; Caroline**



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