Olunga & 7 others v Obanda & 2 others (Environment & Land Case 51 of 2021) [2023] KEELC 16626 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16626 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 51 OF 2021

FO NYAGAKA, J

MARCH 27, 2023

BETWEEN

EZEKIEL OBANDA OLUNGA ..... 1ST PLAINTIFF

HEZEKIAH BUNDE OBANDA ..... 2ND PLAINTIFF

MARGARET ADHIAMBO OLUNGA ..... 3RD PLAINTIFF

CAROLINE WASONGA ..... 4TH PLAINTIFF

PHILIP WASONGA ..... 5TH PLAINTIFF

FLORENCE ADOYO ..... 6TH PLAINTIFF

FLORIDA ADONGO ..... 7TH PLAINTIFF

JANET NJERI OBANDA ..... 8TH PLAINTIFF

AND

EMMANUEL NYONGESA OBANDA ..... 1ST DEFENDANT

GABRIEL MUNENE ..... 2ND DEFENDANT

FRANCIS MWAURA ..... 3RD DEFENDANT

RULING

(On an Application for both a mandatory and temporary injunction)

The Application

1. The 8th Applicant moved this Court by way of a Notice of Motion dated February 28, 2023. She did so under Sections 3A and 63(c) and (e) of the *Civil Procedure Act* and Order 40 Rules 1(a) and Order 51

Rule 1 of the *Civil Procedure Rules* and what he termed as "all enabling provisions of law". Through it she sought the following orders:

1. ...spent

2. ...spent

3. That an injunction do issue ordering the 1st Defendant himself, his agents, servants or workers or whomsoever is acting on his behalf from trespassing on, leasing, cultivating, planting or dealing in any way with the 7th and 8th Plaintiff's/ Applicant's 8 acres of land to be excised from land parcels numbers Kingeleni Intra No. 2073/26, 2073/27 and 2073/28 pending the hearing and determination of the substantive suit.

4. ...spent.

5. Costs of the Application be provided for.

2. The Application was based on seven (7) grounds and supported by an affidavit sworn by Jane Njeri Obanda on February 28, 2023. The grounds of the Application were that the instant suit was pending before the Court; the 7th and 8th Plaintiffs were beneficial owners of the 8 acres of land to be excised from Kingeleni Intra No. 2073/26, 2073/27 and 2073/28; the 7th and 8th Plaintiffs leased their 8 acres of land described above to one George Kapchanga and Francis Mwaura through an agreement dated 4/11/2022 but when the two came to the land to plough it they found that the 1st Defendant had leased it to some people who had already ploughed it; upon inquiry from the 1st Defendant he chased them away with a panga and bow and arrows; the applicant's lessees had since demanded their money back with intent to sue; the 1st Defendant leased out the portion without the consent of the 7th and 8th Applicants; and the actions of the 1st Defendant were unlawful and ought to be stopped.

3. The Applicant repeated the contents of the grounds of the Applicant in the Affidavit she swore in support of the Application. But in addition, she annexed to it and marked as JJO-1 a copy of the Certificate of Confirmation of Grant of 8/06/2008. Contents of both the grounds of the Application and the Affidavit are basically the same. She annexed also and marked as JJO-2(a) a copy of the lease agreement between herself together with Florida Adongo Olunga on the one hand and George Kapchanga and Francis Mwaura Chege on the other, and JJO-2(b) being photographs of the ploughed land. She also annexed and marked as JJO-3 a copy of a demand notice dated 2/02/2023 Mwangangi Nzisa & Associates for the refund of the leased sum of Kshs. 104,000/=. She deponed that as a result of the fracas that ensued when they inquired about who had ploughed, they reported the matter to Kiminini Police Station and were issued with Occurrence Book (OB) Number 34/17/02/2023. They then argued that the Application had high chances of success, was brought without undue delay and should be allowed as prayed.

4. The 1st Defendant/Respondent opposed the Application though a Notice of Preliminary Objection dated 10/03/2023 and a Replying Affidavit sworn by him on the same date. The Preliminary Objection was simple: that the application was similar to the one dated September 21, 2021 which was dismissed on 21/04/2022 and it was *res judicata* while the applicants came to court with unclean hands.

5. In his affidavit, he stated that the Application was frivolous, vexatious and an abuse of the process of the Court. He deponed that the suit land was yet to be subdivided, the process was on-going and a ruling in Kitale High Court Succession Cause No. 122 of 2021 had been reserved for ruling. He annexed and marked as ENO 1 a copy of the Directions of the Court in the Succession matter. He then annexed to the Affidavit a copy of objection filed challenging the Grant in the Succession Cause and stated that it was not true that the Applicants were sole beneficial owners. He stated that he has been utilising the

land since 2009 and in 2022 he had leased the same to Francis Mwaura. He annexed and marked as ENO 2 a copy of the agreement with Mr. Francis Mwaura. He then stated that this year it was he who had ploughed the land. He stated that he was grazing his cows on the land and had erected a permanent structure thereon which took him ten years to complete. He annexed and marked as ENO 3 (a), (b) and (c) a set of three photographs. He deponed that he had buried his wife and son on the land and the Applicants had always resided in Nairobi and never used the land. He accused his brother Ezekiel of inciting the Applicants against him. He deponed how his late father gave him the land and even blessed it before he began to construct thereon. He deponed further that his father gave a will that his sons get fifteen (15) acres each and five (5) at Ndalu. His sisters were to be given twenty (20) acres each and 4 at Kengeleni farm. He swore that his brothers and sisters were secretly working to see to it that he relocated to Ndalu and that the Application was mischievous.

6. When the Application came up for inter partes hearing, the parties indicated that they would not be submitting on it hence the Court could make a ruling on it. The Court reserved the ruling on both the Preliminary Objection and the Application for the same date, being March 27, 2023.

7. I have considered the Application, the law upon which it is brought, the Preliminary Objection and the Replying Affidavit thereto. It is my view that the main issue that the preliminary objection raises in the Application is the doctrine and therefore rule against *res judicata*. Since that it a point of law which goes to the root of any issue before the Court, in my view this Court has to consider it first before the merits or otherwise of the issue. Thus, before I decide on the merits of this application I need to consider if it is indeed res judicata or not.

8. I will not take much time to define what a preliminary objection is. But it is important to underscore the definition as was given in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

> "....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

9. Sir Charles Newbold, P. added as follows, from page 701 at paragraph B-C:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...."

10. Therefore, a preliminary point of law must be an issue of law that clearly flows from the pleadings before the Court. It does not require to involve the Court in searching for facts to clarify it on and in any one point. The pleadings must speak for themselves about the breach of the law being raised. So, much so that even the point of *res judicata* should be clearly noted from the pleadings the Court is called upon to consider.

11. In the instant case, documents I am called upon to consider, though not pleadings as defined by Section 2 of the *Civil Procedure Act*, are the Application and Response thereto. The 8th Respondent stated that the Application was a replica of the one which was filed on 06/10/2021 and ruled on April 21, 2022 hence it was *res judicata*. The Applicant contended that it was not.

12. The doctrine is *res judicata* has been a subject of litigation in Courts from the time procedure began to be applied in the practiced of law. Even in Kenya, the law reports are replete with decision over the doctrine. The principles governing it are now well settled.

13. In civil matters, its application grounded in the law under Section 7 of the *Civil Procedure Act*. The Section 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."

14. According to Bryan Garner (2019). *Blacks Law Dictionary*, an issues is *res Judicata* if it "...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..." The Court of Appeal has ably put it succinctly in the case of *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR that "To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

15. Put in another way, for an issue to be res judicata, the parties must be the same ones or must be claiming through other persons but be litigating under the same title over an issue that was directly and substantially between them in a previous suit either before the same Court or another of competent jurisdiction. It should be clear here that an issue can be *res judicata* in the same suit if that issue has been litigated over between the parties and determined on merits.

16. About the doctrine, in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held as follows:

> " Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disinjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

17. The Court went further to explain the role of the doctrine. It stated as follows:

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an

endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

18. Incidentally, the issue alleged to be *res judicata* relates to the decision of this Court in this file. In the former Application, dated September 21, 2021, all the Plaintiffs who included the 7th and 8th who are now the Applicants were the Applicants. All the Defendants, including the 1st who is now the only Respondent herein were Respondents. Their titles did not change. The Application was determined on merits by this Court on April 21, 2022. In the determination the Court found the Application not merited and dismissed it with no order as to costs. What then remains to consider is, what were the prayers in the previous Application?

19. In the previous Application the Applicants sought the following prayers:

" 1. ...Spent

2. That a mandatory order of injunction do issue ordering the Defendants by themselves, their servants or agents to deliver forthwith vacant possession of Kingeleni Intra LR. No. 2073/26, 2073/27 and 2073/28 to the Plaintiffs and permanently restraining the Defendants by themselves, their servants or agents from entering upon, remaining on, cultivating or howsoever farming, using or dealing with the Plaintiffs' property known as Kingeleni Intra LR. No. 2073/26/ 2073/27 and 2073/28.

2. The Honourable Court be pleased to make further orders deemed fitting within its inherent jurisdiction.

3. The Defendants be condemned to pay costs occasioned to the Plaintiff by this action."

20. Of importance to consider is the content of prayer 2 of the previous Application, in as much as 3 may be directly compared with prayer 2 of the instant Application. As can be seen, prayer 2 of the previous Application was for grant of an injunction which was two-fold: the first was a mandatory one and the second one though not well crafted was for a permanent injunction against the Defendants. This is because the second limb was aimed at restraining the Defendants, including the 1st one as explained above, from "entering upon, remaining on, cultivating or howsoever farming, using or dealing with the Plaintiffs' property," which was described as the one herein. In the instant application the prayer is for injunction restraining the 1st Defendant certain activities.

21. It does not require greater knowledge than that of an Early Childhood Development Education (ECDE) baby to compare and quickly find that the activities the 1st Defendant is sought to be restrained from are similar in all fours to those sought in the previous application over the same parcel of land. In where candidates used to be tested on how to put likes together and dissimilar items separately. Sufficiently intelligent ones would pass this test hereinabove with flying colors.

What orders to issue and who to bear costs

22. The above having been said, I find that the instant application is *res judicata*. Dismissing it is the only option available and I hereby do so. Thus, there is no need to consider the merits or otherwise therein.

23. In the previous Application this Court considered that the Applicants and the Respondents were related in one way or the other and exercised its discretion to order each party to bear their own costs. But since the Applicants appear to have been buoyed to misuse the process of the Court to drag the Respondent to Court over the same issue once more, this Court can only apply the provisions of Section 27 of the *Civil Procedure Act* accordingly so that the Applicants learn a bit of the lesson therefrom when execution for the costs shall be levied against them. Thus, the 7th and 8th Applicants shall bear the costs of this Application dated February 28, 2023.

24. This suit shall be mentioned now on a new date, being April 25, 2022 for compliance, as the law requires.

25. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 27TH DAY OF MARCH, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE