Michuki v Kitsao & 2 others (Environment and Land Appeal 9 of 2022) [2023] KEELC 16503 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16503 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 9 OF 2022

NA MATHEKA, J

MARCH 22, 2023

BETWEEN

SOLOMON MUIGAI MICHUKI ..... APPELLANT

AND

LEILA SANTA KITSAO ..... 1ST RESPONDENT

CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

1. This is an Appeal against the entire Ruling/Order delivered on February 17, 2022 by the Honourable D O Mbeja Principal Magistrate at Mombasa in the Magistrate's Court ELC No 20 of 2020. The Appellant herein Solomon Muigai Michuki Appeals to the entire Ruling/Order of the Honourable D O Mbeja delivered on the February 17, 2022 on the following grounds;

    1. That the Learned Magistrate erred in law and in fact by failing to consider the Notice of Preliminary Objection filed by the Appellant.

    2. That the Learned Magistrate erred in Law and in fact by failing to consider the evidence tendered by the Appellant.

    3. That the Learned Magistrate erred in Law and in fact by failing to agree with the Appellant that the matter for determination before at Mombasa had become res-judicata as similar matter was concluded by Hon EK Makori.

    4. That the Learned Magistrate erred in Law and in fact that the suit is time barred by virtue of limitation of action since the Appellant has become owner of the said parcel of land by way of adverse possession and title deed was issued to him on October 30, 2007.

5. That the Learned Magistrate erred in Law and in fact by failing to consider the Preliminary Objection dated July 28, 2021 filed by the Appellant especially that the Respondent had filed a similar case being MC/CC Suit No 984 of 2015 over the same parties and the same subject matter.

6. That the Learned Magistrate erred in Law and in fact by failing to consider that the 1st Respondent committed perjury under Section 108 of the *Penal Code Act* of Kenya by knowingly giving false information before the court by swearing that there has never been any previous matter involving the said parties and same property facts which she knows to be untrue.

7. That the Learned Magistrate erred in Law and in fact by allowing the Application February 19, 2020 by allowing all the prayers sought by the Respondent in the said Application dated February 19, 2020.

2. The Appellant prays for orders that;

a) That the Appeal be allowed with Costs.

b) That this Honourable Court do find that the Ruling and Order of the Principal Magistrate Honourable DO Mbeja delivered on the February 17, 2022 be set aside and substituted with an order that the 1st Respondent's/Plaintiffs Notice of Motion Application dated February 19, 2020 be dismissed with Costs

3. Appellant filed submissions vide the law firm of Angeline Omollo & Associates dated December 7, 2022. It was submitted that the matter was res judicata as it was similar to proceedings of MC/CC Suit No 984 of 2015 and matter had been concluded and execution began. Reliance was placed on *Uhuru Highway Development v Central* [1996] LLR CAK 2126. *John Florence Martime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR. It was submitted that the that the matter was time barred as the title to suit property was awarded vide adverse possession on October 30, 2007, and this made it into a point of a law which should have estopped an action for recovery after twelve years. It was further submitted that the 1st Respondent committed perjury against section 108 (e) as they swore that they had never been in any previous matter involving the said parties and same property facts. It was submitted that Respondent should not have been granted injunctive orders on her application dated February 19, 2020 as she did not meet requirements for grant of injunction as provided in *Geilla v Cassman Brown*.

4. 1st Respondent submitted that the Plaintiff/Respondent in Civil Case No 984 of 2015 filed case against the Appellant herein because the Appellant had obtained a land which has been earlier before given to 1st Respondent by allotment. The same plot was given to the Appellant through a second allotment and the 1st Respondent went to court against this. The 1st Respondent claimed that the Appellant and refused to go to lands office to collect the correct allotment certificated and that the Appellant had obtained a title deed incorporating hers as well. So the 1st Respondent asked for mandatory injunction to stop the Appellant and a declaration that the land was hers. Hon Makori heard the claim and by judgment dated April 9, 2019 Hon Makori gave costs to the Appellant and dismissed the case.

5. The 1st Respondent did not know when the judgment had been read and she moved to another advocate. She filed a new claim on which she sued the Appellant, The Attorney General and Chief Land Registrar alleging fraud by the Registrar of titles in issuing title deed to the Appellant without informing her. The claim was filed on February 19, 2019. On being served with the plaint counsel for Solomon Messers Angeline Omollo Advocate filed Notice of preliminary objection dated July 28,

2021 saying that the new advocate did not obtain consent from the previous advocate. That the case is time barred as the plaintiff had become owner by virtue of adverse possession. That the Plaintiff was guilty of purgery under Section 108 of *Penal Code* by not disclosing that there was another case. That the case was Res judicata. The Trial Court made a decision on a preliminary objection on February 17, 2021 dismissing the same.

6. They submit that Res judicata cannot be imposed on the case as to do so would also bar from suing parties, the 1st Respondent has a cause of action against an action that would also be against her Constitutional right under Section 159 of the *Constitution*.

7. This court has considered the Appeal and submissions therein. The Appellants grounds of appeal are that the Learned Magistrate erred in law and in fact by failing to consider the notice of preliminary Objection filed by the Appellant and the evidence tendered before dismissing the same. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

8. The above legal preposition has been made in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 where the court held that;

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

9. In the case of *Attorney General & Another v Andrew Mwaura Githinji & another* [2016] eKLR the court outlined the scope and nature of preliminarily objection as;

   (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

   (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

   (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

10. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the Appellant herein was properly brought before the court. Section 7 of the *Civil Procedure Act* on Res judicata, reads as follows:

> " 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."

11. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

12. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. In that respect, the Court of Appeal held in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, that.

> "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."

13. Expounding further on the essence of the doctrine this Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows;

> "The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

14. In the instant suit it was submitted that the matter was res judicata as it was similar to proceedings of MC/CC Suit No 984 of 2015 and matter had been concluded and execution began.

15. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* (*supra*), the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

(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."

16. I have perused the court record and find that in Civil Suit No 20 of 2020 the parties to the suit were Leila Santa Kisao Masha v Solomon Muigai Michuki, Chief Land Registrar and Attorney General. In their pleadings Leila the 1st Respondent averred that the Chief Land Registrar had fraudulently issued title to the Appellant for Plot No 848 in Shanzu that had been allocated to her with the intent to dispose her of the land. She sought the following reliefs; -

I. A declaration that the Plaintiff is the rightful owner of the suit land

II. An order for cancellation and/ or rectification b the 2nd Defendant of the title deed issued to the 1st Defendant.

III. A permanent injunction restraining the 1st Defendant from interfering with the suit land.

IV. Permanent injunction restraining the 1st Defendant from trespassing into transferring, leasing or in any way interfering with the Plaintiff's possession, occupation, use and or enjoyment of the suit land.

V. An order for the Defendants by themselves, their servants, employees and/ agents to vacate from the suit property and to return the same to the state it was before the encroachment.

VI. Costs and interests of the suit.

17. In Civil Suit Number 984 of 2015 the parties are Leila Santa Kisao Masha, Solomon Muigai Michuki. The matter was in regards to plot No 848 in Shanzu Squatter settlement that had been issued to the 1st Respondent only for her to go to the land's office and find that the land tittle had been issued to the Appellant. The 1st Respondent sought for the following orders; -

I. A mandatory injunction to issue compelling the defendants to deposit title for plot No 950 in Shanzu Settlement Scheme in court until further orders of this court.

II. A declaration that Plot No.950 in Shanzu settlement scheme is co-owned by the plaintiff and the defendant.

III. An order to issue revoking and removing the defendant title to plot No 950 in Shanzu settlement scheme.

IV. An order to issue for subdivision and registration of plot No 950 at Shanzu Settlement scheme in two names of the plaintiff and defendant.

V. Costs of the suit.

VI. Any other remedy the court deems reasonable and available to be awarded in the circumstances.

18. I find that both suits are over the same subject matter and though in Civil Suit No 20 of 2020, the issue of fraud is brought against the Chief Land Registrar, but the reliefs sought are not targeted at the Chief Registrar but the 1st Respondent would have yielded the same results as those sought in Civil Suit Number 984 of 2015 had they been granted. From the foregoing I find that though coached differently the matters are the same and involve the same parties and meet the bar of res judicata. Having found so there would be no need to go into the issue of perjury and limitation of actions. I find this appeal is merited and allowed as prayed. I strike out Civil Suit No 20 of 2020 for being res judicata with cost to the Appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE