



Munyao & another v Makovo (Environment & Land Case E018 of 2021) [2023] KEELC 17064 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E018 OF 2021**

CA OCHIENG, J

APRIL 25, 2023

BETWEEN

NAOMI KALONDU MUNYAO 1ST PLAINTIFF

JIMNA KALOKI 2ND PLAINTIFF

AND

ANN M MAKOVO RESPONDENT

RULING

1. What is before Court for determination is the Defendant’s Notice of Preliminary Objection dated the 26th November, 2021 where she sought for this suit to be dismissed with costs. The said Notice of Preliminary Objection is premised on the following grounds:

- 1. This court lacks the Jurisdiction to entertain this suit.
- 2. This suit is res judicata as the subject matter of the suit was conclusively heard and determined in Civil Case No. 769 of 1992 at the High Court in Nairobi and the prayers sought herein issued to the Defendant’s late father James Makobo Muthwa.
- 3. The suit is an abuse to court process.

2. The Notice of Preliminary Objection was canvassed by way of written submissions, although I note it is only the Defendant who filed hers.

Analysis and Determination

3. Upon consideration of the instant Notice of Preliminary Objection including the Defendant’s submissions, the only issue for determination is whether this suit should dismissed for being res judicata.



4. The Defendant who is an administrator of the Estate of the late James Makobo Muthwa, in her submissions provided a background of this suit and stated that the deceased prior to his demise was a member of Matungulu Farmers Co. Limited. Further, that the deceased was owner of Plot No. 1 measuring 22 acres and Plot No. 12 measuring 100 acres respectively. She explains that there was an ownership dispute culminating in the deceased filing a suit against Matungulu Farmers Co. Limited being Nairobi Civil Suit No. 769 of 1992 which was determined on 10th February, 2006 vide a Judgment wherein Justice R. Wendoh held that Plot Nos. 1 and 12 belonged to the deceased and permanently restrained the aforementioned company from dealing with the said parcels of land. The Defendant hence insists that the Plaintiffs' suit is res judicata. She contends that this suit or the issues herein were directly and substantially in issue in the former suit as the instant dispute relates to ownership of land known as Ndithini/Mananja/6/267 which was dealt with in Civil Case No. 769 of 1992 wherein the court took notice that Plot No. 12 had been resurveyed and the subsequent registration was Parcel No. 267 from which the Plaintiffs' parcel of land is derived from. She avers that the former suit was between the same parties or parties under whom they or any of them claim and those parties were litigating under the same title. Further, that she is an Administrator of the Estate of the late James Makobo who was a Plaintiff therein while the Plaintiffs substitution in place of the Company is but a cunning tactic employed in an attempt to circumvent the doctrine of res judicata. She argues that the Plaintiffs have admitted in their pleadings that their association with the Company dates back to 1989 before the inception of the suit by the deceased. Further, that at the time of resurvey when the 1st Plaintiff was approached, there existed a court order restraining the Defendant from dealing with Plot No. 12 but the said Defendant proceeded to resurvey Plot No. 12 and gave it parcel number 267 but the said resurvey was declared null as well as void by the Court and of no consequence at all. She reiterates that the issue was heard and finally determined in the former suit by a court of competent jurisdiction. Further, that the Judgment in the former suit determined the question of ownership of the subject land in favour of the deceased conclusively and hence this court lacks jurisdiction to determine this matter. To support her arguments she relied on Section 7 of the *Civil Procedure Act* as well as the following decisions: *Independent Electoral and Boundaries Commission vs Maina Kiat & 5 Others* (2017) eKLR; *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* (2020) eKLR; *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others* (2018) eKLR; *Suleiman Said Shabbal v Independent Electoral & Boundaries Commission & 3 Others* (2014) eKLR; *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* (2009) eKLR and *Stephen Somek Takwenyi & Another v David Mbutia Githare & 2 Others* Nairobi (Milimani) HCCC No. 363 of 2009.
5. The Plaintiffs though duly granted leave to file their written submissions in respect to the instant Notice of Preliminary Objection, have failed to do so.
6. Before I proceed to make a determination of the instant Notice of Preliminary Objection, I wish to provide a background of the said objection by highlighting various excerpts from the Judgment in Nairobi HCCC No. 769 of 1992 James Makobo Muthwa v Matungulu Farmers Co. Ltd which was delivered on 10th June, 2006. The matter had proceeded for hearing where each party presented witnesses who testified. In its Judgment, Justice R. Wendoh observed that:-

I have now considered the pleadings, the evidence of all the witnesses and submissions filed by Counsel. PW1 produced ample evidence to show that he was a shareholder of the Defendant Company and was allocated plots No. 1 and 12 by the Defendant Company... Though DW2 was instructed to do re survey and subdivision of the Defendant's land in Matungulu in 1987, it seems the exercise did not start till 1995 when the agreement (DX1) was signed on 8th February, 1995. DW1 said that they gave DW2, 3 years to complete the



work but he did not, they extended the period. DW2 told court that Plot 12 is now plot 267. This meant that even when the Defendants advertised plot No. 12 for sale on 9th November, 1991 and 12th November, 1991 the survey work had not yet started. It seems the Defendant wanted to take away this plot from the Plaintiff even before arrangements were to compensate the Plaintiff elsewhere. Besides, by the time DW2 was doing the subdivision and resurvey in 1995, this court had given an injunction restraining the Defendants from dealing with Plot No. 12 in any manner till further orders of the court. DW2 however went ahead and even gave plot 12 a different number, that is 267, contrary to the courts order of 2nd April, 1992. It is this court's finding that the said resurvey and dealing with Plot No. 12 is of no consequence as it was a clear and flagrant disobedience of a court's order and Plot No. 12 cannot be given any other number nor can it have been transferred to the Defendants when a court order was subsisting."

7. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 which stipulates inter alia:

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 can 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."

8. The *Civil Procedure Act* provides explanations with respect to the Application of the res judicata rule. Explanations 1-6 states thus:

Explanation 1. The expression "former suit" means a suit which has been decided before the suit in question —(1) whether or not it was instituted before it.

Explanation 2. For the purposes of this section, the competence of a court shall be determined irrespective of — (2) any provision as to right of appeal from the decision of that court.

Explanation 3. The matter above referred to must in the former suit have been alleged by one party and either — (3) denied or admitted, expressly or impliedly, by the other.

Explanation 4. A matter which might and ought to have been made ground of defence or attack in such —(4) former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation 5. Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes —(5) of this section, be deemed to have been refused.

Explanation 6. Where persons litigate bona fide in respect of a public right or of a private right claimed in —(6) common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

9. In the case of Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696, the Court held that:-

A Preliminary Objection is in the nature of what used to be a demurrer. 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 is 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 issues. This improper practice should stop."



10. On res judicata, the Court of Appeal in the case of Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996 held that: -

In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

11. Further in the case Nancy Mwangi t/a Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR, J Gikonyo while dealing with the issue of res judicata stated that:-

The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and others (2001) EA 177, the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J.. in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.”

12. In this instance the Plaintiffs filed this suit on 22nd February, 2021 seeking a permanent injunction restraining the Defendant including her agents or employees from interfering or dealing with land title number Ndithini/ Mananja Block 6/267. From the excerpt I have cited above, I note the issue in dispute in both suits was the said land previously known as Plot 12 and later resurveyed and renamed No. 267. The Nairobi High Court which is a court of competent jurisdiction after considering the evidence of the parties therein, declared the deceased James Makobu as owner of Plot No. 12. I note the Plaintiffs herein who purchased their parcel of land No. 267 from Matungulu Farmers Co. Limited have actually admitted that Plot No. 12 and 267 are the same. Further, they have also admitted having purchased the parcel of land from Matungulu Farmers Co. Limited who was the Defendant in the previous suit. It has also emerged that by the time the Plaintiffs herein were purchasing their land from Matungulu Farmers Co. Limited, there were subsisting court orders restraining the said Company from dealing with the said land and Justice R. Wendoh in her Judgment declared the resurvey as inconsequential. In applying the legal provisions quoted above including associating myself with the decisions cited, I find that the instant suit indeed fulfills the tenets of res judicata as the matter which is in issue had directly and substantially been in issue in the former suit. Further, even if the Plaintiffs were not parties in the former suit, the vendor Matungulu Farmers Co. Ltd was a party therein and litigated under the same title. It is my considered view that the dispute over ownership of Plot 12 (267) was already determined but the only thing the Plaintiffs have done is to cloth the cause of action in a different apparel but if the same is dissected it remains one and the same. I opine that the Plaintiffs by suing the Defendant has merely added her to the same cause of action so as to keep the case over the suit land alive. It is my observation that Litigation must come to an end. In the current suit the Plaintiffs or Matungulu Farmers Company Ltd are trying to introduce a cause of action against the Defendant so as to achieve the remedy against the late James Makobo Muthwa, yet the issue had already been resolved.



13. It is against the foregoing that I find that this instant suit indeed is res judicata and in borrowing the words of Kuloba J (as he then was) state that this is indeed a cosmetic facelift to give the suit a different face.
14. It is in that regard that I find the instant Notice of Preliminary Objection merited and will proceed to strike out this suit with costs to the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25TH DAY OF APRIL, 2023

CHRISTINE OCHIENG

JUDGE

