



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

MOMBASA LAW COURTS

CIVIL SUIT NO. 465 OF 2011

MASUDI TSUMO HAMISI.....1ST PLAINTIFF

TIMA KADIRI TSUMO.....2ND PLAINTIFF

- VERSUS -

RAMA HUSSEIN BWAFUMO

MOHAMED ISSA.....DEFENDANTS

RULING

I. PRELIMINARIES

1. The 1st and 2nd Defendants raised a Notice of Preliminary Objection dated 2nd November 2021 under the following grounds:-

a) That the matters pleaded by the Plaintiffs herein are “Res judicata” the same having been directly and substantially in issue in the Land Case No. 29 of 2005 and 8 of 2009 filed by the Defendants against the Plaintiffs herein.

b) That judgement on the above matters were issued and or delivered on 22nd March 2006 and 26th February 2009 respectively.

c) That the suit herein is therefore bad in law, incompetent; an abuse of the court process and the same should be struck out with costs to the Defendants.

II. SUBMISSIONS

2. On 1st November, 2021, in the presence of all the parties, the Honorable Court directed that Notice of Preliminary Objection be canvassed by way of written submissions. While, during a mention date of the matter on 7th December, 2021 it was confirmed its only the 1st and 2nd Defendants who filed their written submissions dated 9th November, 2021 and filed on 16th November, 2021.

3. For reasons not clear to Court, the Plaintiff/Respondent have to date NOT filed their written submission. In the given circumstances, Court proceeded to reserve a ruling date for 22nd February, 2022.

THE DEFENDANTS WRITTEN SUBMISSIONS

4. On 16th November 2021, Learned Counsel for the 1st and 2nd Defendants, the law firm of Messrs. A. O Aminga & Company Advocates filed their written submissions in support of the Notice of Motion application. The Learned Counsel provided a brief history of the case. They stated that this suit was filed by the Plaintiff against the 1st and 2nd Defendants over the ownership of all that parcel of land known as land Reference Numbers “Kwale/Mswambweni ‘A’ 2830” as heirs of Kadiri Hamisi. Separately, the Plaintiffs filed another Civil Suit No. 466 of 2011 against the 1st and 2nd Defendants over the ownership of all that parcel of land known as Land Reference numbers Kwale/Msambweni ‘A’ 1781 as heirs to Mwanakombo Jumaa Mwendo. Prior to filing these two suits in court, the same suit properties had been adjudicated upon in the Land Dispute Tribunal; Land Dispute No. 30 of 2005 for Kwale/Mswambweni ‘A’ 2830 and Land Dispute No. 8 of 2005 for Kwale/Msambweni ‘A’ 1781. After being dissatisfied with the decision of the land tribunal in Land Dispute No. 30 of 2005, the Plaintiffs appealed vide Appeal No. 20 of 2009 for Kwale/Mswambweni ‘A’ 2830; the judgement was delivered on 8th July 2008 to the effect that the land be reinstated back to the Bwafumo family. The two decisions emanating from the land dispute, were adopted in court vide Kwale SRM Land Case No. 29 of 2005 and Land Case No. 8 of 2009.

5. The Learned Counsel based his argument on the above set of facts and the provisions of Section 7 of the Civil Procedure Act, Cap. 21 and the Court of Appeal decision in “**IEBC – Versus - Maina Kiai & 5 others (2017)eKLR**, to submit that the suit herein offended the Doctrine of Res judicata. The Learned Counsel submitted that the subject matter in the previous litigation and current suit were the same, between the same parties and the judgement rendered therein was adopted by court vide Land Case No. 29 of 2005 and Land Case No. 8 of 2009. The Learned Counsel argued that the suit property have been litigated upon and to re-litigate on the same would be in violation of the sanctity of res judicata. The Learned Counsel contended that the Plaintiffs were re opening issues that were raised before and determined, and cannot escape res judicata by merely adding other parties or causes of action in a subsequent suit. Court was urged to allow the preliminary objection and strike out the suit with costs.

III. ANALYSIS AND DETERMINATION

6. I have read the pleadings and the written Submissions by the Defendant with regard to the Notice of Preliminary objection. In order to make a fair, just and informed determination, the Honorable Court has framed these two issues. These are:-

a) Whether a suit instituted by the Plaintiffs herein offends the doctrine of Res judicata and the provisions set out under Section 7 of the Civil Procedure Act, 21;

b) Who will bear the Costs of the Preliminary Objection.

ISSUE No. a). Whether a suit instituted by the Plaintiffs herein offends the doctrine of Res judicata and the provisions set out under Section 7 of the Civil Procedure Act, 21;

7. The legal substratum of the doctrine of “Res Judicata” is founded under the provision of Section 7 of the Civil Procedure Act, 21. Section 7 provides, *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 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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question 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 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 denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such 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 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 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.

8. The Supreme Court considered the provisions of Section 7, and identified the elements that must be satisfied for the doctrine of res judicata to be invoked in “**Independent Electoral & Boundaries Commission – Versus - Maina Kiai & 5 Others [2017] eKLR**:-

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.”

9. Based on the above stated legal ingredients of Section 7, this Honorable Court now turns to the facts set out in the proceedings of this instant case. For clarity sake, the Court will make reference to Civil Suit 466/2011 and 465/2011 since they have been consolidated into one file. In order to fully appreciate the issues of law raised herein, its imperative that the Honorable Court first and foremost extrapolates on the facts surrounding these matters. In CC NO. 466 of 2011, the Plaintiffs are Masudi Tsumo Khamisi and Tima Kadiri Tsumo, while the Defendants are Rama Hussein Bwafumo and Mohamed Issa. While in the Msambweni Land Dispute Tribunal No. 8/2005 the Claimants were Mohammed Issa and Rama Hussein Bwafumo, the objector was Tima Kadiri Tsumo.

10. On 29th August 2005, the tribunal upon hearing the dispute it arrived at a decision to the effect that Kwale/Msambweni 'A' 1781 is owned by Bwafumo family and directed the Land Registrar to remove the name of Mwanakombo from the register and title to appear in the names of Mwanamkasi Bwafumo and Huseein Shee Bwafumo as the proprietors of the said land. The decision and award of the Land Tribunal in Dispute No. 8 of 2005 was adopted by Kwale SRMC Land Case 29 of 2005 on 22nd March 2005 as judgement of the Court.

11. In the civil case of CC NO. 465 of 2011, the Plaintiffs are Mwakidziru Tsumo and Tima Kadiri Tsumo, while the defendants are Rama Hussein Bwafumo and Mohamed Issa. While in the Msambweni Land Dispute Tribunal No. 30/2005 the Claimants were Mohammed Issa and Rama Hussein Bwafumo while the objectors were Mwakidziru Tsumo, Tima Kadiri Tsumo, Masudi Tsumo, Mwanasha Tsumo, Hassan Tsumo, Rashid Tsumo and Juma Tsumo. On 8th July 2008, the tribunal reached a decision to the effect that Kwale/Msambweni 'A' 2830 be reinstated back to the Bwafumo family and directed the Land Registrar to withdraw the title deed issued to the objectors and revoke all allocations, and issue fresh title to the claimants Mohamed Isaa and Rama Hussein Bwafumo without any endurances immediately. The decision and award of the Land Tribunal in Dispute No. 30 of 2005 was adopted by Kwale SRMC Land Case 8 of 2009 on 26th February 2009 as judgement of the Court.

12. Having fully and indepth analyzed the facts, now the Court wishes to apply the law to the said facts. The Honorable Court finds that the parties in the civil case - CC 466/2011 are similar to that of the suit - Kwale SRM 29/2005, while CC 465/2011 is similar to the civil case SRM 8/2009. Likewise, the Honorable Court also establishes that the parties are litigating under the same title and/or same subject matter, in CC 466/2011 the suit land, Kwale/Msambweni 'A' 1781 is similar to Land Tribunal 8/2005; while CC 465/2011, the suit land Kwale/Msambweni 'A' 2830 is Similar to Land Tribunal 30/2009.

13. In both former suits, at Kwale Magistrate's court, the issues were heard and finally determined. In both the civil cases SRM CC 29/2005 and CC 8/2009, the lower court adopted the awards of the Land Dispute Tribunal as the judgement of the court. The Kwale/Msambweni Land Dispute Tribunal, was a creation of the repealed **Land Dispute Tribunal Act, Cap 303A**, which established land tribunals to hear certain land dispute, as the one between the parties herein. Section 7 of the Act, provided that the decisions of the tribunal would be filed in the Magistrate's court and entered as the Judgement of court. The decisions of the Land Dispute Tribunal in No.29/2005 and 8/2009 once adopted by the magistrate court were decisions that could be termed within the meaning of Section 7 of the Civil Procedure Act as *"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. Indeed, I find that the issues on ownership of Kwale/Msambweni 'A' 1781 and Kwale/Msambweni 'A' 2830, was conclusively heard and determined by the awards delivered by the Land Dispute Tribunal, which were later adopted as the judgement of the magistrate court. The option that the Plaintiffs had, if they were dissatisfied with the decision of the tribunal, was to appeal to the High Court. The Plaintiffs did not take that step, the decisions remains unchallenged till date and they still stands. Litigation has to come to an end, the Plaintiffs cannot be allowed to litigate on the same issues over and over again even after courts of competent jurisdiction have heard and determined the issues.

15. I wish to rely on the decision of the Court of Appeal in **"John Florence Maritime Services Limited & Another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows with regard to the doctrine of res judicata, *"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."*

IV. DETERMINATION.

16. Consequently, based on the above detailed analysis, I find that filed civil suits - ELC No. 466/2011 and 465/2011 respectively are res judicata to Kwale SRM 29/2005 and 8/2009. A suit that has been found res judicata cannot be cured by the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010, as by no means it is not a technicality at all. The only remedy left to the Honorable Court is to dismiss the suits in their entirety with costs. I therefore proceed to dismiss the suit filed by the Plaintiff hereof with costs to the 1st and 2nd Defendants herein.

IT IS OREDERD ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF FEBRUARY 2022

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumnah, Court Assistant

No appearance Advocate for the 1st and 2nd Plaintiffs.

Mr. Otieno Advocate for the 1st and 2nd Defendants.