



**Abdallah & 4 others v Ali & 2 others (Environment & Land Case
8 of 2020) [2023] KEELC 18995 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18995 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 8 OF 2020
NA MATHEKA, J
JULY 27, 2023**

BETWEEN

**MOHAMED KHAMIS ABDALLAH 1ST PLAINTIFF
KHAMIS HAMAD 2ND PLAINTIFF
NASSIR ALI SUDI 3RD PLAINTIFF
SWALEH AHMED MWINYI 4TH PLAINTIFF
MOHAMED ABDALLAH SHEKUE 5TH PLAINTIFF**

AND

**MWINYIHAJI KHAMIS ALI 1ST DEFENDANT
ALI KHAMIS ALI 2ND DEFENDANT
REGISTRAR OF LANDS MOMBASA 3RD DEFENDANT**

JUDGMENT

1. The case is that at all material time to this suit the Plaintiffs and the Defendants are relatives grandchildren and the great grandchildren of the Late Ali Bin Hamadi who was the registered owner of the parcel of land No 132/111/ MN (hereafter referred as the suit plot). That the late Ali Bin Hamadi who was the registered owner of the parcel of land No 132/111/ MN (hereafter referred as the suit plot) had three wives when he died and he was survived with nine children five sons and four daughters sired by his three wives.
2. That at all material times the grandfather of the Defendants (Hamisi Ali) who was one of the sons of the late Ali Bin Hamadi was unanimously chosen and or appointed as the representative of the estate of late Ali Bin Hamadi and a land title was issued to the family bearing the name of Hamisi Ali as representative of Ali Bin Hamadi (deceased). The Plaintiffs' avers that sometimes in January 2013



one of the beneficiaries Haji Ali Haji (now deceased) on behalf of the other beneficiaries filed a suit at the Mombasa Kadhi's court via KCC Succession No 14 of 2013 to restrain the Defendants from interfering with the estate the late Ali Bin Hamadi and the same to be distributed among the heirs according to the Islamic Sharia.

3. That on 5th August 2014 unanimously all the parties agreed to do away with the estate and the same was agreed to be divided according to Islamic Sharia and all the aggrieved parties were converged to the offices of the former Chief Kadhi of Kenya Sheikh Hamadi Kassim who is a professional on matters of inheritance. That the same was distributed and what was remaining was subdivision but the Defendants shortchanged the Plaintiffs along the way. The same is yet to be implemented.
4. That at that time the title was still in the name of the original owner Late Ali Bin Hamadi. As the Plaintiffs awaited the Defendants to do as promised they were shocked and surprised to note that the Defendants went and filed another petition at the Kadhi's court being Succession Cause No KCC No 37 of 2014 and misled the Kadhi's court and purported that they are the only heirs to the estate of the Hamisi Ali whom they purported that he was the only heir to the estate of the Late Ali Bin Hamadi and the same was divided 50 : 50 among themselves leaving out a huge number of legal beneficiaries.
5. The Defendants without any colour of rights illegally and frequently started subdividing and selling the plots to unsuspecting buyers regardless of the other beneficiaries shares while the matter was being handled by the Assistant County Commissioner. The Defendants in collusion with some officers from the Land office Mombasa did transfer the title from original owner Late Ali Bin Hamadi passing all other beneficiaries and fraudulently changed it to the names of the Defendants' despite no court order or consent from other beneficiaries authorizing the same. The Plaintiff further avers that on or around September 2017, he discovered that Plot Number No 132/111/ MN was registered in the names of the 1st and 2nd Defendant purporting to be the only beneficiaries of the estate of the Late Ali Bin Hamadi. The Plaintiff prays for;
 1. Permanent injunction restrained the Defendants from charging, leasing, selling, transferring or in any other way or manner whatsoever and howsoever interfering with the parcels of land known as Plot Number 132/111/ MN 132/111 ft.nq
 2. Declaration that the registration of Plot Number 132/111/ MN in the names of the 1st and 2nd Defendant obtained by fraud and / or misrepresentation at Kadhi' s court and at the Registrar of lands offices.
 3. An order directing the 3rd Defendant to cancel the registration of Plot Number 132/III/MN from the names of the 1st and 2nd Defendants and return the same to its owner Late Ali Bin Hamadi.
 4. Quashing the orders issued by the Honourable Kadhi' s court on KCC Succ No 37 of 2014 given on 14th July 2014 as the same were obtained through false evidence alluded by the Defendants
 5. And upon cancellation of the title issued to the Defendants a proper names of joint Administrators both parties be appointed to administer the estate.
 6. Cost of the suit.
6. The 1st and the 2nd Defendants admits that Ali Bin Hamad was the duly registered proprietor of the property known as Plot No 132/III/MN. The initial 1st Defendant- Mwinyi Khamis (now Deceased and substituted by his Daughter Shufaa Mwinyi) and the 2nd Defendants are direct grandchildren of the original owner being children of Khamis Ali the son to the original owner and his 1st wife. That upon



the demise of the original owner and in rightful accordance with Islamic Sharia Laws the two Khamisi Ali and Hamadi Ali were to inherit the suit parcel as the surviving male children of the Original owner.

7. That however, before succession could take place Hamadi Ali sold the suit parcel of land to a third party one Bwana Swalehe Mwalomba for Kshs. 40 without Ali's withdrawal of the suit the initial 1st Defendant and 2nd Defendant filed a Petition in Kadhi's Court being Kcc Succession Cause No 37 of 2014 which petition was for purposes of vesting the suit property in themselves as the rightful heirs. The 1st and 2nd Defendants aver that the Orders were granted by the Honorable Kadhi on 07th August 2014 and the same duly registered against the Title of the suit property sometime in September 2014. The 1st and 2nd Defendant aver that there was no unanimous decision reached leading to the distribution suggested by one Sheikh Hamadi Kassim and even more important, is the fact that the 1st and 2nd Defendants aver that no opinion of an individual- expert or not- can supersede, overturn and or quash the Orders of a Court. Should the Plaintiffs have been aggrieved by the Orders of the Court, they were within their rights to file the proper objections and seek the revocation or any other directions from the same Court. That the Plaintiffs are deliberately misleading this Honourable Court and aver that by the time of institution of these proceedings, the suit property had already undergone subdivision and a subdivision certificate dated 2nd October 2012 already issued by the County Government, then County Council of Kilifi. The suit property was sub divided into two plots being Subdivision number 7756 (CR 63604) and Subdivision 7757 (CR 66305) rendering the suit property document of Title closed on sub-division. The latter subdivision was further once again subdivided and new resultant Titles issued being CR Numbers 75153, 75154 and 75155. To sum, the 1st and 2nd Defendants aver that the suit property in its original state has ceased to exist, this entire suit was overtaken by events and the prayers sought therein by the Plaintiffs cannot be granted. The 1st and 2nd Defendants prays for Judgment against the Plaintiffs as follows:
 1. A declaration that the Plot No 132/111/MN was sold to Khamisi Ali (deceased) by the late Bwana Swalehe Mwalomba and does not form part of the estate of Hamadi Ali.
 2. A declaration that the 1st and 2nd Defendants are the legal heirs of the Estate of the Late Khamisi Ali and solely entitled to Plot No 132/111 in its entirety and the subsequent subdivisions therefrom.
 3. A declaration Plot No 132/111/ MN was lawfully registered in the names of the (initial) 1st and 2nd Defendants pursuant to the Orders of the Court in Kcc Succession No 37 of 2014.
 4. An order directing the 3rd Defendant not to interfere with the registration of the 1st and 2nd Defendants as the legal beneficiaries of Plot No 132/111/ MN and all other subsequent entries made in the Title to Plot No 132/111/ MN and resultant Titles.
 5. That the Plaintiffs' suit be dismissed with costs to the 1st and 2nd Defendants.
 6. Any other or further relief that this Honourable Court may deem fit to grant.
8. This court has carefully considered the evidence and submissions therein. It is not disputed that Ali Bin Hamad was the duly registered proprietor of the property known as Plot No 132/III/MN. The Plaintiffs aver that Plot Number No 132/111/ MN was later registered in the names of the 1st and 2nd Defendant purporting to be the only beneficiaries of the estate of the Late Ali Bin Hamadi. The Defendants have raised a preliminary issue that this court does not have jurisdiction and is court had been heard and determined before the Kadhi's Court in Mombasa KCC Succession Cause No 37 of 2014.



9. Section 6 and 7 of the *Civil Procedure Act* Cap 21 provides as follows:

Section 6.

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

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.”

10. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“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.”

11. Therefore, for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. In the case of *Henderson v Henderson* (1843-60) ALL E.R.378, the court held that;

...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

12. It follows then that a Court will apply the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.



13. In that respect, the Court of Appeal held in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, (2017) eKLR, that:

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 disjunctive 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.”

14. The Court went on to state on the role of the doctrine:

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.”

15. On perusal of the court record I find that one of the prayers by the Plaintiffs is for quashing the orders issued by the Honourable Kadhi' s Court on KCC Succ No 37 of 2014 given on 14th July 2014 as the same were obtained through false evidence alluded by the Defendants. The Plaintiffs stated that on the 5th August 2014 all the parties agreed on the subdivision of the estate before the former Chief Khadhi and the same was distributed according to the Islamic Sharia. This case was filed in 2020. The court wonders why the Plaintiffs never objected or raised an objection before the Kadhi. I find that this matter is res judicata Mombasa KCC Succ No 37 of 2014 and I strike out this suit with no orders as to costs as the parties are relatives.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH JULY 2023.

N.A. MATHEKA

JUDGE

