



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL SUIT NO.22 OF 2012

IN THE MATTER OF THE ESTATE OF ZAKARIA LUPAO KALABA

AND

IN THE MATTER OF ESTATE THE SUCCESSION ACT CAP 169 LAWS OF KENYA

AND

IN THE MATTER CIVIL PROCEDURE RULES 2010 AND

REGISTERED LAND ACT CHAPTER 300 LAWS OF KENYA

AND

IN THE MATTER OF APPLICATION OF HEIRS AND ADMINISTRATION OF

THEIR RIGHTS AND/OR INTEREST IN THE ESTATE OF THE DECEASED

BETWEEN

1. RASOA NABIFWO WATAKA

2. TEBULA MUKOYA BURANDA.....PLAINTIFFS/RESPONDENT

VERSUS

PETER WAMALWA KIBERENGE.....DEFENDANT/APPLICANT

RULING

By way of originating summons filed on 5.3.2012 the appellant sought the following relief orders against the Respondent as follows;

- a) A declaration that the deceased at his demise left behind an estate capable of being distributed to his heirs and/or beneficiaries.
- b) A declaration that the closer of title number Bokoli/Chwele/281 and combination to Bokoli/Chwele/1070 was unlawful
- c) A declaration that there is an estate of deceased remaining capable of being distributed after determination and scrutiny of the process of closer of title number Bokoli/Chwele/281 and combination of the same into Bokoli/Chwele/1070
- d) A declaration in view of the illegality and fraud that attendant to the closer of title number Bokoli/Chwele/281 and combination of the same into Bokoli/Chwele/1070 by the respondent and third party.

By way of an application dated 28th April 2018 filed by the Applicant. The application is brought pursuant to the provisions of Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 2 Rule 15 (i) (d) of the Civil Procedure Rules, 2010, and Section 7 of the Limitation of Actions Act and seeks orders to have this suit struck out for being res judicata. The application is premised on affidavit of Alex Walukhu Wamalwa and categorically states that issues raised herein were the same issues raised, canvassed and determined on merit in

BUNGOMA CMCC NO.145 OF 1985 and BUNGOMA CMCC NO.5 OF 2006 and parties in the above suit are same parties herein.

THAT the plaintiffs/Respondents have filed the following cases all which were decided in favour of deponent late father;

- a) Bungoma CMCC NO.145 OF 1985
- b) KAKAMEGA HCC APPEAL NO.45 OF 1988
- c) BUNGOMA HCC P & A NO.23 OF 2003
- d) BUNGOMA HCC NO.26 OF 2004(O.S)
- e) BUNGOMA LDT NO.5 OF 2006
- f) BUNGOMA HCC NO.51 OF 2007
- g) BUNGOMA HCC APPEAL NO.58 OF 2007
- h) BUNGOMA CMCC CRIMINAL CASE NO.2127 OF 2007
- i) BUNGOMA CMCC NO.591 OF 2009
- j) BUNGOMA HCC APPEAL NO.108 OF 2010

In her reply, the respondent has deposed inter alia that the issues/reliefs sought in our case herein are not similar as those sought in all the stated cases and that it is not true that this matter is Res-Judicata vexatious and abuse of court process.

By way of consent parties canvassed the application by way of written submission. Counsel for the Applicant/Defendant submitted that the issues dealt with and the prayers sought by the plaintiffs in Bungoma CMCC NO.145 OF 1985 are the same as those raised in this suit therefore this suit is Res Judicata and holds same position in Bungoma CMCC LTD 5 OF 2005 and Bungoma CMCC NO.591 OF 2009. Counsel submits that it doesn't matter whether the plaintiff has changed her narrative added or removed some facts the bottom line is whether the subject matter the issues and the parties are same. The Defendant also sought the suit to be struck out on grounds of the claim is time barred by virtue of Limitation of Action Act and it is abuse of court process.

The Respondents/Applicants Counsel submitted that the relief sought in O.S is distinct from those in the other previous suits allegedly mentioned by the Defendant.

From the above, the pleadings, the application, the affidavits and the submissions of the parties filed herein, I am in a position to decipher the major issues for determination is whether the suit is Res judicata? When *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings-of the previous case and the instant case- to ascertain;

- I. What issues were really determined in the previous case; and
- II. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- III. The court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

To determine the issue at hand I will give a brief analysis of the previous cases according to evidence on record as follows;

I. **Bungoma CMCC NO.145 OF 1985**- the parties in this suit were Lupao Kalarai versus Peter Wamalwa and plaintiff filed the suit but upon his demise Raso Nabifwo Wataka was granted leave to substitute him and the Plaintiff claim was that the Defendant entered the suit land at night and that she was claiming the land as an heir of her late father. The court heard the matter and made the following determination;

“The plaintiff has not convinced the court that the land forming the subject matter of the case belongs to her deceased father. There is no way one can enter another person’s land at night and stay on it. The statement by the Plaintiff that the Defendant entered the land at night made the court to form opinion that she is untruthful witness who exaggerates thing. Her application is therefore dismissed with costs.”

II. **KAKAMEGA HCC APPEAL NO.45 OF 1988** this was an appeal for Bungoma CMCC NO.145 OF 1985 the parties in this suit were were the same but suit was dismissed for want of prosecution.

III. **BUNGOMA HCC NO.26 OF 2004(O.S)** the parties in this sui were Raso Nabifwo Wataka and Tabula Mukoya Buranda as plaintiffs and Peter Wamalwa Kiberenge and the Land Registrar Bungoma District as the Defendants and issue raise was that 1st defendant fraudulently got his name registered as proprietor of the whole parcel of land No.BOKOLI/CHWELE/1070 and the

plaintiffs sought the same to be cancelled. The matter was referred to Land Dispute Tribunal and orders made accordingly and ordered award of 71/2 Acres to the Plaintiff. The Defendant appealed against the decision in **BUNGOMA LDT NO.5 OF 2006** to set aside the decision of lower tribunal and the plaintiffs appealed against the appellate tribunal decision in **BUNGOMA HCC APPEAL NO.58 OF 2007** but their appeal was dismissed.

k) **BUNGOMA CMCC NO.591 OF 2009** the plaintiffs filed this suit against Defendant Peter Wamalwa Kiberenge for eviction from suit property but the defendant made a counterclaim for eviction and judgment was entered for defendant. The Plaintiff appealed in **BUNGOMA HCC APPEAL NO.108 OF 2010**

l) **BUNGOMA CMCC CRIMINAL CASE NO.2127 OF 2007** the Plaintiff filed this criminal case against defendant and the same was heard and determined and the defendant was acquitted under section 210 of the CPC. In all the above cases the contest has been between the Plaintiffs **Raso Nabifwo Wataka** and **Tabula Mukoya Buranda** and the Defendant **Peter Wamalwa Kiberenge** and subject matter has been dispute over Plot No. **BOKOLI/CHWELE/1070**.

Upon making the above analysis I will embark on the determination of the application before me which is premised upon Section 7 of the Civil Procedure Act.

Which provides as follows: -

7. Res judicata

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.

The doctrine of *res judicata* as stated in the said Section has been explained in a number of decided cases. In the case of **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 that:

“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 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.”** The Court explained the role of the doctrine thus:

“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.”

The above provision of the law embodies the common law doctrine of *res judicata*, which bars a court from hearing a matter that has already been decided before by a competent court. There is no contest that where one has presented a case before a competent court and such court has pronounced itself on the dispute, the litigants ought not to present the same dispute for fresh litigation. That, as I have mentioned is not in controversy.

Under Order 2 Rule 15, a court is empowered to dismiss a suit if the same is scandalous, vexatious and an abuse of the court process. The said provision of the law is drawn as follows: -

15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

In my view, a pleading which introduces a matter which has been litigated before is a vexatious pleading and/or is a pleading which is an abuse of the process of court and is liable to being struck out summarily.

It is also clear that courts cannot allow parties to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case different garments and complexion, from the one that was given to the former suit, so as to appear different, when the real issues for determination remain the same and courts of competent jurisdiction have pronounced itself on the same.

Applying the stated law to the facts before me, it is my view that to prolong this litigation when its determination will not bring the substantial matter to an end is abuse of court process and on analysis the suit raises issues that are substantially similar in all cases mentioned above and also the matter is between the same parties.

In the premises I allow the application dated 28th April 2018, with costs.

Dated and Delivered at Bungoma this 21st day of February, 2019.

S.N. RIECHI

JUDGE