REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 95 OF 2009

PATRICK MUTHENGI MALUKI...........PLAINTIFF/APPLICANT

VERSUS

PETER KISOVI WATUTA.................DEFENDANT/RESPONDENT

RULING

1. This suit has been in the courts since 2009, when the plaintiff filed the suit seeking that the court declare him as the owner of the suit land located at Kyaimu village Kavutei Sub-location and Mutitu Division, Kitui District. The suit was dismissed for want of prosecution vide ruling delivered on 16th November, 2012 that also directed that the plaintiff's advocate Lawrence Mwangi will personally pay the costs of the defendant. This resulted in a notice to show cause and a warrant of arrest being issued in respect of costs and an application by JK Mwangi dated 18th July, 2016 seeking to stay the orders issued vide ruling delivered on 16th November, 2012 which culminated to a consent being entered in respect of the said application. Thereafter the application dated 14th February, 2017 that sought to set aside the consent and the said application was dismissed vide ruling delivered on 29th September, 2017 hence the instant application.

2. The Applicant in his application dated 30th May, 2018 is seeking the following substantive orders:

> a. That upon hearing the application interpartes the honorable court be pleased to set aside and/ or vary the ruling issued on 29th September, 2017 and the ruling made by the Honorable court on **16th November, 2016** be maintained in terms of the payment of costs by the plaintiffs advocate then.

3. The main grounds for this application as stated in a supporting affidavit sworn by the applicant on 30th May, 2018, were that the advocate on record entered into a consent without his consent, approval, knowledge and authority.

4. Lawrence Mwangi & Mwangi Advocates in response filed the preliminary objection on 3rd July, 2018 where the learned Advocates stated that the instant application is res judicata and may only be challenged on appeal for it raises the same issues that was determined vide ruling dated 29.9.2017. He added that the firm of Mwenda Njagi & Co Advocates is not properly on record for he has not complied with Order 9 Rule 9 of the Civil Procedure Rules. There is on record a replying affidavit by Lawrence Mwangi dated 2nd July, 2018 who reiterated the preliminary objection.

5. J.K. Mwalimu and Co Advocates in response filed the preliminary objection on 5th July, 2018 where the learned Advocates stated that the instant application is res judicata and that the plaintiff's Advocate is not properly on record and the application is an abuse of court process. There is a replying affidavit deponed by Grace Nyaata from the firm of J.K. Mwalimu and Co Advocates wherein it is deponed that the applicant has not made out a case for review of the orders dated 29.9.2017.

6. The application was canvassed vide written submissions. Learned counsel for the plaintiff submitted that the mistake of counsel should not be visited on the client and cited the case of **Belinda Muras & 6 Others v Amos Wainaina (1978) KLR.** Learned counsel added that consent was acquired fraudulently and there is no proof on record of the involvement of the applicant. He cited the case of **Kenya Commercial Bank Ltd v Specialized Engineering CO. Ltd (1982) KLR 485.** According to counsel, the instant application raises triable issues and the same ought to be determined via trial. He cited the case of **Olympic Escort International Co. Ltd & 2 Others v Parminder Singh Sandhu & Another (2009) eKLR.**

7. The defendant's learned counsel submitted that there are three issues for determination; whether or not the plaintiff's counsel is properly on record; whether or not the application is bad for being res judicata and whether or not the ruling delivered on 29.9.2017 can be reviewed, varied and/ or set aside. On the 1st issue, counsel submitted that no notice of change has been filed in terms of Order 9 rule 5 of the Civil Procedure Rules. Learned counsel posited further that the issue of whether the consent orders dated 21.7.2016 had been fraudulently obtained were conclusively dealt with vide ruling delivered on 29.9.2017 hence the instant application offends Section 7 of the Civil Procedure Act. Learned counsel submitted that the applicant had not met the threshold for grant of review orders under Order 45 of the Civil Procedure Rules because the applicant has not demonstrated mistake or error and has not alluded to any discovery of a new and important matter and

that the application was filed over 10 months after delivery of the subject ruling hence the delay is unreasonable and unexplained.

8. Lawrence Mwangi Advocate submitted that the application is res judicata, the application for review was made and dismissed vide ruling dated 29.9.2017 and that the applicant may appeal to the court of appeal and cited the case of **National Bank Limited v Ndungu Njau (1996) KLR (CAK).** He urged the court to dismiss the instant application.

9. Having considered the pleadings and submissions by the parties my issues for determination are Firstly, whether the application dated 30.5.2018 is *res judicata*; Secondly, whether the issues raised in the application filed on 30.5.2018 is wholly or substantially similar to issues raised in the application dated 14.2.2017 where a ruling was delivered on 29.9.2017 and Thirdly, whether the applicant has satisfied the conditions for setting aside the consent order recorded on 21.7.2016.

10. To ascertain the second issue for my determination, it is necessary to closely examine the issues raised in the dismissed application and the issues presented in this application. Paragraph 8 of the ruling reads in part:-

> *"Again the court record for the 2.2.2017 reveals that the plaintiff himself agreed to pay the amounts sought … by way of instalments"*

11. Paragraph 9 reads in part

> "*it is therefore quite clear that the plaintiff had been aware of the genesis and progress of his case all along and therefore I am unable to find that his erstwhile advocate did not have authority to enter into the consent now complained of… the plaintiff is estopped from trying to avoid the 2 consents and deny their existence… therefore there is no reason to disturb them*"

12. From the foregoing, the bone of contention in the application dated 14.2.2017 was the setting aside of what was a consent. The court then went ahead to make a final determination on the said issue *as* reproduced in paragraph 7 above.

13. From the foregoing, I find that what was framed in prayer 3 of the application were conclusively handled by the court in the ruling delivered on 29.9.2017 and the application seeks a review of the consent order through the backdoor. I find that all of the issues for determination in the application dated 14th February, 2017 are the same for determination in the instant application.

14. I shall now address what I framed as the first issue for determination. On what constitutes *res judicata*, I adopt the following passage in the dictum of Wigram V-C, in ***Henderson vs Henderson*(1843) 67 ER 313** as it summarizes *res judicata*:-

> *" … where a given matter becomes the subject of litigation in, and 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 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 cases, 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."*

15. 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. One more thing; 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.

16. The test of determining whether a matter is *res judicata* was also summarized in **Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others (2010) eKLR** as follows: - (**a)** The matter in issue is identical in both suits; **(b)** the parties in the suit are the same; **(c)** sameness of the title/claim; **(d)** concurrence of jurisdiction; and **(e)** finality of the previous decision. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

17. The doctrine relates not only to points upon which the first court was actually required to adjudicate 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. (See **Kamunye & others v The Pioneer General Assurance society Limited (1971) EA 263**). Prayer 3 captures the issues raised in this case and having found that prayer 3 was finally determined, it means that the instant application is res judicata.

18. With regard to the 3rd issue, in light of my above finding it is needless to address the same.

19. For arguments sake, the applicant in his affidavit has not placed before the court any evidence to demonstrate mistake or error or any discovery of a new and important matter, and the court finds that prayer 3 of the application lacks merit. This court having delivered its decision on the issue of review became functus officio and the only avenue for the plaintiff was to lodge an appeal against the ruling dated 29.9.2017. It is an abuse of the court process for the plaintiff to attempt to regurgitate the same issue again through the back door. This court is careful not to agree to be drawn into sitting in appeal on its own ruling and or judgement which is obviously not permissible in law. It is clear that the matters now being raised ought to be reserved for an appellate court.

20. Upon analysing the facts and pleadings on record, I find and hold that the preliminary objection dated 2nd July, 2018 and grounds of opposition dated 29.6.2018 have merit and are allowed with the result that the plaintiff’s application dated 30.5.2018 is found to lack merit

and is ordered dismissed with costs to the defendant/respondent.

It is so ordered.

Dated and delivered at Machakos this 25th day of September, 2019.

D. K. Kemei

Judge