



REPUBLIC OF KENYA



KENYA LAW
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Kioko & 3 others v Musya & 3 others (Being sued jointly In their capacity as trustees of Ukai Self-Help Group) (Environment and Land Appeal 10 of 2021) [2023] KEELC 20772 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20772 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 10 OF 2021
MAO ODENY, J
OCTOBER 19, 2023

BETWEEN

JOSPHAT MUIA KIOKO 1ST APPELLANT
JOSEPH KYALO WAMBUA 2ND APPELLANT
LUCAS MUTHUI MASYA 3RD APPELLANT
JOSEPH KYUVI KILONZO 4TH APPELLANT

AND

ANTONY MAUNDU MUSYA 1ST RESPONDENT
ALFONSE KITULYA MUOKI 2ND RESPONDENT
TITUS MUTULU MWANIKI 3RD RESPONDENT
JAMES MACKENZIE NDAMBUKI 4TH RESPONDENT
BEING SUED JOINTLY IN THEIR CAPACITY AS TRUSTEES OF UKAI SELF-HELP GROUP

(Being an appeal against the ruling and/or Order of Honourable R. G. Mundia (PM) issued on 6th July, 2021 in Mpeketoni in Principal Magistrates Court Case No. E03 of 2020)

JUDGMENT

1. This appeal arises from the ruling dated 6th July 2021 by Hon. R. G. Mundia Principal Magistrate Kilifi delivered in Mpeketoni PMCC No E03 of 2020. The appellant herein being aggrieved by the ruling and lodged a Memorandum of Appeal dated 26th July 2021 on the following grounds:



1. That the Learned Magistrate erred in law and fact by calling for evidence on Preliminary Objection based on a pure point of law.
 2. That the Learned Magistrate erred in law and fact by disregarding the fact that there has been no conclusive decision determining the Rights of the parties with respect to all that property known as LAMU/ LAKE KENYATTA1/ 753.
 3. That the Learned Magistrate erred in law and fact by being blind to the fact that the suit had been brought by the Appellants in their capacity as former members of Ukai Self Help Group.
 4. That the Learned Magistrate erred in law by dismissing the Appellants' suit prematurely notwithstanding the existence of a valid cause of action.
2. The appeal was heard via written submissions whereby counsel for both parties filed submissions.

Appellants' Submissions.

3. Counsel gave a brief background to the suit and stated that both the Appellants and the Respondents together with other members joined forces to purchase a piece of land known as Land parcel Lamu/ Lake Kenyatta 1/753 and formed a Self-help group to manage the said land through the Management Committee.
4. Counsel submitted that the land was subsequently registered in the name of the Respondents herein as the Management Committee of Ukai Self Help Group.
5. Mr. Otara submitted that the 1st Appellant herein Josphat Mi-jia Kioko once sued the said Management Committee who are the Respondents herein in Malindi ELC Case No. 142 of 2013 seeking for the following reliefs; -
 - a. That the Respondents do hand over the entire project documents to him in supervision of the District Social Service Officer and the DCIO/OCS Mpeketoni and all the project accounts be audited.
 - b. That an order do issue directing the Mpeketoni Land Settlement Scheme to cancel the certificate of ownership and subsequently delete the Respondents names and substitute the same with the plaintiffs (1st Appellant) name and other new office bears duly recognized by the committee members or this project.
 - c. Costs of the suit.
6. It was counsel's submission that the court considered clause 9 of the group's Trust Deed which provides as follows; -
 9. that the power to appoint and discharge the trustees shall be vested in the general members of the group converging in an AGM for the purpose of electing the group's management committee or in a special general meeting convened to discuss any recommendation (s) from the management committee about mismanagement of the trust property by the trustees or vacate position in the trustee office arising by whatever means and may reappoint or replace all the sitting trustees or just part of it... "
7. That the court found the suit to be frivolous, vexatious, and proceeded to strike it out. Counsel stated that since the issue of change of Management Committee became almost impossible, the Appellants opted to have the self-help group dissolved and opted to file a suit in Mpeketoni SPM'S Court being Mpeketoni SPMCC No. E3 OF 2022 seeking for the following reliefs ;-



- A. A declaration that the plaintiffs are entitled to their fair shares of the property in Lamu/Lake Kenyatta 1/753.
 - B. An order directing the immediate distribution of the suit property in equitable shares among all the initial shareholders who contributed towards its purchase.
 - C. An order directing the office of the Lamu County Surveyor to oversee the distribution of the suit property.
 - D. Costs to the suit.
8. Mr. Otara stated that Hon R.G. Mundia (P.M) in his ruling made a finding that the suit was *Res-Judicata* Malindi ELC Case No. 142 of 2013 and was in violation of Section 7 of the [Civil Procedure Act](#) hence an abuse of the Court process.
 9. Counsel identified one issue for determination as to whether or not Mpeketoni SPMCC No. E3 is *Res-judicata* Malindi ELC Case No. 142 of 2013 and relied on Section 7 of the [Civil Procedure Act](#) submitting that the ingredients of Section 7 of the Act demands that the issues raised in this current suit must have been raised in Malindi ELC Case No. 142 of 2013 and heard and finally determined.
 10. Mr. Otara also submitted that the issues that were before Malindi ELC case Number 142 of 2013 were all about the management of the Self-Help Group and change of the Management Committee and that the issue of dissolution of the group and distribution of the suit property was not an issue and the same has not been heard and finally determined by any court.
 11. Finally, counsel submitted that in the SPM's case in Mpeketoni, the Plaintiffs were seeking to have the group dissolved and each to go his own way. That the Plaintiffs in Mpeketoni SPMCC No. E3 of 2020 did not intend to continue having their land held in trust by the self-help group that was formed many years back. Counsel urged the court to allow the appeal as prayed.

Respondents' Submissions.

12. Counsel submitted that the Respondent filed a Preliminary Objection that the suit in the lower court was *res judicata* and that they were under a duty to explain to the court that indeed this matter was *res judicata* and this could only be done through providing the court with all relevant case details and pleadings in the previous matters stated to have been concluded to enable it determine the question at hand in the interest of justice.
13. Counsel relied on the case of [Omondi v National Bank of Kenya Ltd](#) (2001) KLR 579 (2001) 1 EA 177, where the court held that in determining a Preliminary Objection the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters.
14. Counsel further submitted that the Appellants in all previous matters filed sought the same orders and the said matters were filed by the same parties and that it was therefore not in issue for determination in what capacity the Appellants had filed the matter before the trial court.
15. According to counsel, the grounds were already addressed in a similar matter between the same parties being Malindi ELC No. 142 of 2013 [Josphat Muia Kioko v Antony Musya Maundu & 4 others](#). That the suit before the trial court which sought to address the issues dealt with in several previous matters including the above case was therefore *Res-judicata* and the trial court rightfully held do.
16. Ms Mwanja elide on the doctrine of *res judicata* which forbids a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same



parties or parties litigating under the same title. According to her, the Appellants have filed several suits being Malindi ELC Case No. 142 of 2013, Malindi High Court Miscellaneous Civil Application No. 44 of 2009, Malindi Senior Principal Magistrate's Civil Suit No. 212 of 2009, Lamu Senior Resident Magistrate's Court Civil Suit 25 of 2011 which were all filed by the same parties and raising the same issues and which were determined in the Respondents' favor and to which no appeal was preferred.

17. Counsel cited the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of (2017) eKLR and urged the court to dismiss the Appeal with costs.

Analysis And Determination.

18. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, reevaluate and analyze it and come to its own conclusion. Further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record as was held in the case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 where the court held as follows:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

19. Similarly the Court of Appeal for East Africa in the case of *Peters v Sunday Post Limited* [1958] EA 424 Sir Kenneth O'Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

20. This appeal raises three major grounds namely whether the Trial Learned Magistrate erred in law and fact by calling for evidence on Preliminary Objection based on a pure point of law, whether the Magistrate erred in law and fact by disregarding the fact that there has been no conclusive decision determining the Rights of the parties with respect to all that property known as Lamu/ Lake Kenyatta1/ 753 and whether the Magistrate was blind to the fact that the suit had been brought by the Appellants in their capacity as former members of Ukai Self Help Group.
21. This raises the issue whether the Magistrate was right in allowing the Preliminary Objection on the ground that the matter was res judicata Malindi ECL NO. 142 of 2013.



22. The Appellants contend that that the issues that were before Malindi ELC case No. 142 of 2013 were all about the management of the Self-Help Group and change of the Management Committee and that the issue of dissolution of the group and distribution of the suit property was not an issue and the same has not been heard and finally determined by any court.
23. Further, that in the SPM's case in Mpeketoni, the Plaintiffs were seeking to have the group dissolved and each to go his own way. That the Plaintiffs in Mpeketoni SPMCC No. E3 of 2020 did not intend to continue having their land held in trust by the self-help group that was formed many years back
24. The Respondents on the other hand asserted that the Appellants in all previous matters filed sought the same orders and the matters were filed by the same parties and that it was therefore not in issue for determination in what capacity the Appellants had filed the matter before the trial court.
25. On the issue of res judicata, section 7 of the Civil Procedure Act provides that:

“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.”

26. In the cases of Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another and Kinyanjui Njuguna & Company Advocates & another (Interested Parties) (2020) eKLR the court held that:

“...for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

27. In Malindi ELC No. 142 Of 2013 Josphat Muia Kioko V Anthony Musya Maundu, & 4 Others Justice Olola held that;

“Thus while the Plaintiff contends that the Defendants herein fraudulently registered themselves as trustees long after they were voted out of office, their own documents paint a different picture. As it were, it is only the title deed for the suit property that was issued on the date cited by the Plaintiff. That title was applied for at a time when the Defendants were not only officials of Ukai Self Help Group but were also its registered trustees for the said property. In my mind, it would not make much sense that every time there was an election of new officials of the Group, the documents of title would be changed to reflect that position. That must be the reason the members of the said Ukai Self Help Group entrusted the management of some of their assets to the trustees. A perusal of Clause 9



of the Group's Trust Deed aforesaid provides as follows:-“That the power to appoint and discharge the Trustees shall be vested in the general members of the Group converging in an AGM for the purpose of electing the Group's Management Committee or in a special general meeting convened to discuss any recommendation(s) from the Management Committee about mismanagement of the Trust property by the Trustees or vacant position in the Trustee office arising by whatever means and may reappoint or replace all the sitting Trustees or just part of it.”

28. I come to the conclusion having perused the proceedings in both matters that the Appellants in all previous matters filed, sought the same orders, the said matters were filed by the same parties, the grounds were already addressed in a similar matter between the same parties being Malindi ELC No. 142 of 2013 *Josphat Muia Kioko v Antony Musya Maundu & 4 others* making the matter res judicata having been heard and determined by this court.

29. The upshot is that the Appeal is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF OCTOBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

