Koya v Abdalla & another (Environment & Land Case 13 of 2020) [2023] KEELC 20759 (KLR) (16 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20759 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 13 OF 2020

EK MAKORI, J

OCTOBER 16, 2023

BETWEEN

JOHNSON KOYA .... PLAINTIFF

AND

SWAFIA ABDALLA .... 1ST DEFENDANT

FATMA SWALEH MAHDI [AS ADMINISTRATRIX OF THE ESTATE OF SWALEH MAHDI] .... 2ND DEFENDANT

RULING

1. The application before the court is dated 21st September 2020. The applicants seek an order to strike out the plaint and dismiss the suit, because this cause of action is res judicata and the cause of action is otherwise contra-statutes, as the Malindi Land Control Board did not sanction the purchase of the Agricultural Land sought to be alienated. It is also averred that the action is an abuse of the court process as an attempt by the plaintiff to have a second bite at the cerise.

2. The applicants also seek to set off their costs of this suit and the application, once allowed and taxed, against the compensation due to the plaintiff in Mombasa HCC No. 155 of 1993 (OS), under the 2002 judgment.

3. The application is opposed a replying affidavit in opposition is deposed by one Johnston Koya dated 5th of June 2023.

4. The applicants aver that the contract relied upon in paragraphs 4, 5, 6, 7, 8, 9, and 10 of the plaint dated 14th February 2020 was reportedly made on 14th Match1989. The plaintiff also admits that his name, willingly or against his wish, was included in the suit filed in Mombasa HCC No. 155 of 1993 (OS), by the person who allegedly filed the suit in a representative capacity. The judgment of the court, which is filed in the defendants' list of documents, does not show that any of the plaintiffs were suing in a representative capacity.

5. The applicants contend that in Mombasa HCC No. 155 of 1993 (OS), this suit is res judicata the judgment of Waki J., as he then was, delivered on 12th November 2002. The present plaintiff was in the judgment shown as the 4th plaintiff. On page 8 of the judgment of the Court, the evidential account of the 4th plaintiff and his brother, Stephen, is noted by the learned judge.

6. The applicants submit that the issue of the attempted purchase of 2 1/2 acres of the suit land by the plaintiff from the deceased owner collapsed and was repudiated. Moreover, the land owner sued the plaintiff and his brother Stephen, before the subordinate court at Malindi, and judgment to give vacant possession was obtained against them, long before they filed, or joined in the filing of the Mombasa HCC No. 155 of 1993 (OS). The matter of purchase of the land has been the subject of three cases. That is Malindi SRMCC No. 168 of 1991, which was filed on 15th May 1991; Mombasa HCC No. 155 of 1993 (OS) and Malindi ELC No. 13 of 2020; not to mention several Court of Appeal appeals and applications, like Malindi Court of Appeal Civil Appeal Number 105 of 2018 which was struck out in May 2019 and Malindi CA Civil Appeal No. 85 of 2019, which is pending hearing before the Court of Appeal. It is therefore not correct on the part of the plaintiff to say that res judicata does not apply.

7. The Applicants aver that it is clear from the foregoing that the plaintiff's suit is for dismissal, as the issue of his purchase of 2 ½ acres of the suit land has been discussed and determined on merit by several courts. If the plaintiff was in doubt about the determination of the subordinate court at Malindi, the judgment of the High Court at Mombasa of 2nd November 2002 made it clear that the agreement dated March 1989 was repudiated. It cannot be revived by a fresh action filed 18 years post-judgment.

8. The applicants assert that the respondent was a party to the Mombasa case until October 2017 when he unsuccessfully attempted to withdraw the suit. In his ruling of 11th April 2018, Yano J. held that the plaintiff herein could not withdraw from a suit that had been determined. In the said ruling in *Bahati Temo and 5 Others v Swafya Abdalla and Another [2018]*eKLR, the defendants in paragraph 9 include the current plaintiff. The notice of withdrawal exhibited to the replying affidavit shows it was filed by the 5th plaintiff on 6th October 2017. The applicants assert that the finding by Yano J. is conclusive on the issue of attempted withdrawal of the Mombasa case.

9. Applicants further submit that the respondent's action is for the same reasons an abuse of the court process and he should be made to pay costs, both for this application and for the struck-out suit, on a higher scale as there is a statement of defence on record. The defendants will inter alia seek to recover these costs, once taxed, from the amount due to the plaintiff as compensation for his hut and crops under the decree in Mombasa HCC No. 155 of 1993 (OS).

10. On the other hand, the respondent submits that this suit is not res judicata as the applicant withdrew from the cases cited and was never a party to the same. Any orders in those suits do not bind him at all. That Mombasa ELC NO 155 of 1993 was about adverse possession claimed by the parties who were propagating the suit on the other hand, his claim rests with a sale agreement he entered with the deceased defendants' father on 14th March 1989. The said agreement for the sale of 2 ½ acres which transaction has never been discharged.

11. The deceased father died in the year 1994, the plaintiff has been keen to have the transfer of his portion effected by the heirs of the deceased estate being the defendants therefore the issue of transfer has been a continuing event, and hence the issue of limitation of actions does not arise. The defendants have all along been ready to transfer that portion but seem to have reneged necessitating the institution of the current court action to compel them to perform their part under the doctrine of specific performance.

12. The issue that falls for the determination of this suit is whether this suit should be struck out for offending the doctrine of res judicata and the *Limitation of Actions Act* sections 4 and 7 and section 3 of the *Contract Act.*

13. The doctrine of res judicata comes into action to aid our courts from the rigmaroles of having to hear and rehear suits and actions that have already been heard fully and finally by courts of competent jurisdiction. In other words, litigation has to come to an end in one way or another. See for example the decision in *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022]* eKLR:

> "The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which 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"

The Black's Law Dictionary 10th Edition defines "res judicata" as

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits, and (3) the involvement of same parties, or parties in privity with the original parties..."

A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

i. what issues were really determined in the previous Application;

ii. whether they are the same in the subsequent Application and were covered by the Decision.

iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

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In the Court of Appeal case of Siri Ram Kaura – Vs – M.J.E. Morgan, CA 71/1960 (1961) EA 462 the then EACA stated that: -

"The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata…

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before …

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

Hon. Justice G.V. Odunga in Republic – Vs – Attorney General and Another Exparte James Alfred Koroso, expressed himself thus on the issue of access to justice: -

"Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others."

14. In Mombasa HCC No. 155 of 1993 (OS) reported as *Bahati Temo & 6 others v Swaleh Mohamed Swaleh* [2002] eKLR, Waki J. (as he then was) decided the matter before him said to be similar to this one as follows:

> " The 1st and 3rd questions may be considered together as they raise the core issue, assuming there was occupation by the Plaintiffs when time began to run in their favour. Was there occupation in the first place? On the material before me, I am prepared to accept that there was. The Plaintiffs however did considerable harm to their case when they did not offer themselves for cross-examination on the statements made on oath. Three of them did not even bother to swear any Affidavits although Kesi says he had authority to swear on their behalf. They talk generally about occupation of the disputed land which measured 112.82 Acres. As far as they were concerned no one else owned it until 1990 when the Defendant sued some of them. They never saw the Defendant or anyone else before then. That of course cannot be true and the reason I think is because they never occupied the entire area of 112.82 Acres. In the absence of clear evidence which is tested in cross-examination, I find that the date of commencement of occupation of the land by the Plaintiffs is vague and indeterminate. For similar reasons, I find that the Plaintiffs did not occupy the whole area

of 112.82 Acres. Sofia (DW 1) who was cross-examined on her evidence, went there in 1978 and largely found bush. But there were some twenty families according to her who were in occupation of portions of the land and most of them left at the instance of the Defendant leaving behind the Plaintiffs. As regards at least four of the Plaintiffs whose cases ended up in court in 1990/91, they did not occupy more than 5 Acres which they were ready to purchase but did not. An offer to give them another 21/2 Acres gratis was withdrawn when it was not accepted. The existence of those cases and the orders made thereunder are not challenged. The factual and legal position is therefore that there are warrants of eviction obtained against Johnson Koya, Steven Koya (not a party to this suit), Kesi Mjape, Bahati Temo, and Charo Mwanzavi. It is I think an abuse of the court process to seek to circumvent those orders without complying therewith by filing another suit. I would dismiss the suits of those four Plaintiffs for that reason.

Assuming without deciding however that the four could still urge their case for adverse possession of the portions they occupied, is their case and that of the other three Plaintiffs who were unaffected by earlier court orders well founded? Is the failure to prove exclusive occupation of a specific well defined area of land fatal to their case?

There is a dicta in some decided cases that the land claimed to have been held in adverse possession should be well defined. However, I prefer the dicta of Madan, J. (as he then was) in Gatimu Kinguru v Muya Gathengi, [1976] KLR 253 at Page 260.

"The portion occupied by the defendant is not a separately surveyed piece of land with a plot number and title number to it. There is no deed plan in respect of it, at least none has been produced to the court. It is, however, a definitely identified and identifiable portion with a clear boundary. That which can be ascertained is certain; that which is definitive is positive. It is so plotted that if not certain it can be made certain. I think the absence of a plot and title number should present no difficulty or be a bar to the defendant in establishing his claim on the ground of adverse possession. The defendant has established a title to his portion by adverse possession."

All other things being equal therefore the Plaintiffs could lay the claim on the portions that they occupied individually. But their claim is based on S 38 of the *Limitation of Actions Act*. They say they have been on those portions for 12 years or more before 23.7.1993 when they filed suit. That would be just before 23.07.1981. As a matter of arithmetic, they would have been, since there is evidence conceded by Sofia that they were sighted on the disputed land in 1978. The issue that arises therefore is whether they were in continuous uninterrupted occupation and whether they were in adverse possession.

Section 7 of the Limitation of Action Act provides-

7. An action may not be brought by any person to recover the land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

It has to be read with S.13 which spells out when adverse possession becomes operative. It states-

"13. (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), ..."

The effect of Registration under the Land Titles Act S.21 is reproduced above. Platt, J.A. in Kisee Maweu v Kiu Ranching, [1982 – 88] 1 KAR 746 referred to another Court of Appeal decision which dealt with the same section and its effect thus:-

"In the Alibhai case, it was decided that certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interests than those mentioned therein. Secondly, it was held that no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate. So it follows that from the time a person acquires registered land the period of limitation runs from that time and not before."

The evidence on record in this matter shows that the Defendant was registered as the owner of the disputed land at 3.46 p.m. on 23.02.1987. If that be the operative date then of course 12 years had not expired by 23.7.1993 when the suit was filed and the Plaintiffs could not therefore claim title by adverse possession. Was it the operative date? The law does not seem to be clear at this point.

The case of Alibhai Tayebali v Abdulhussein Alibhai, (1938) EACA 1 which Platt, J A. referred to above supports the view that the period before registration shall be excluded. Hancox, J.A. (as he then was) made similar observations in the Kisee Maweu Case at Pg.748:-

"The judge referred to s 21 of the Land Titles Act, Cap 282, which provides every certificate of title issued under the Act is conclusive evidence of the matters therein contained. Accordingly, the judge held, following Tayebali Alibhai v Abdulhussein Alibhai (1938) 5 EACA 1, that any period of adverse possession prior to the acquisition of title to the land by the respondent was irrelevant for the purpose of the appellants' case. Section 21 of the Land Titles Ordinance, Cap.143 of the 1926 edition of the Laws of Kenya under which Alibhai's case was decided was identical to the present section, and the Court of Appeal for Eastern Africa, in that case, held that the registration under that Ordinance was the foundation of the title and that certificates issued thereunder conferred an absolute and indefeasible title to the property in question. Consequently, there could be no entitlement or easement in favour of the respondent in that case, by virtue of the Limitation Ordinance, to the staircase, wooden landing, and balustrade which overlapped on to the appellants' plot, unless the possession or use of it had existed for the prescribed period after the date of the grant of the certificate of title. Unfortunately, however, the Land Titles Act has no application to the present case. ...."

In our case the Land Titles Act applies and so the Alibhai Case is applicable. In another case Kairu v. Gacheru, (1988) 2 KAR 111, however, it was held that:-

"The law relating to prescription affects not only present holders of the Title but their predecessors (S.7 *Limitation of Actions Act*).

Apaloo, J A (as he then was) reasoned:-

"If the period the respondent was in adverse possession against Mwangi were to be excluded and the period of limitation reckoned only when the appellant became registered proprietor, an owner of land whose title was in danger of being lost by prescription can better his lot by the simple device of alienating the land just a day before the 12-year period ran out. But it is elementary that a grantor of land cannot grant better title than he has. The appellant took Mwangi's title subject to the rights of a prior purchaser in adverse possession. That the law

relating to prescription affects not only present holders of title but their predecessors – in title is shown by s.7 of the Limitation of Action Act."

The case however related to Registered *Land Act* Titles. Assuming the principle is of general application, however, there is evidence that the Defendant purchased the disputed land in 1978 and took possession of it. There is evidence that he took action soon after to have the Plaintiffs and others evicted and he succeeded in respect of those others. There is evidence that he went to court in respect of 4 of the Plaintiffs. In short, there was not continuous uninterrupted possession. Kneller, J. (as he then was) in Kimani Ruchine v Swift, Rutherford & Co. Ltd., [1980] KLR 10 said:-

"The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec plecario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by any recurrent consideration;"

On all accounts, I answer the first question posed in the Originating Summons in the negative. Whether the time began running in 1978 or 1987 no interest had been acquired by the Plaintiffs in adverse possession and so the 3rd question is also answered. In view of those findings question Number (2) does not arise. So does question Number (4).

It is plain however from the proceedings and the exhibits on previous cases that the Plaintiffs have residential structures of whatever nature and have commercial plants on the small portions they occupy. These ordinarily would by definition go with the land. But as the Land Titles Act under which the land is registered recognizes and the peculiar phenomenon of "houses without land" which I take judicial notice of, dictates those properties belong to the Plaintiffs. Accordingly, reasonable compensation therefor shall be paid to the Plaintiffs.

Finally, it is not lost to me that there is a larger underlying problem in this litigation - the problem of "squatters" in the Coastal region. It is however a problem of the policy decision-makers in the Government and Parliament who must take active steps to rectify the warped land policies that now exist. All the courts can regrettably do is to interpret the law as it exists and in accordance with the current Constitution."

15. The issue of whether the plaintiff was a party in that matter other than what Waki J. stated was decided by Yano J. when dealing with reasonable compensation of the parties arising from the pronouncement of Waki J. (supra) in the case of *Bahati Temo and 5 Others v Swafya Abdalla and Another* [2018]eKLR Yano J. decided this way:

" I note that the 5th plaintiff filed a notice of withdrawal of suit on 06.10.2017. The suit was determined by the court on 12th November 2002 and therefore the withdrawal, in my view, is of no effect".

16. The disputes that are the subject of this decision have long been resolved. Payment has already been made in restitution. Informed and involved is the plaintiff (in *Bahati Temo and 5 Others v Swafya Abdalla and Another* [2018]eKLR). Res judicata applies to the issues brought up here. I cannot make a difference for the plaintiff on that particular point, and I will not try to resurrect the case by myself based on the facts and the law as placed before me.

17. On the issue of limitation of actions, Waki J. already ruled that the agreement under review was long repudiated. I cannot revisit it. It is a stale demand, to say the least.

18. On costs to be recovered from the pending compensation claim – that is for the Deputy Registrar as the taxing master to deal in the relevant court file dealing with the issue.

19. The upshot is that the existing suit is hereby stuck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 16TH DAY OF OCTOBER 2023.

....

E. K. MAKORI

JUDGE

In the Absence of

Mr. Otara for the Plaintifs

Mr. Kimani for the Defendants

NB: Since the parties are absent, the Judgment be transmitted to them electronically.