



**Kisindayi v Sirengo (Environment and Land Appeal E033 of 2021)
[2023] KEELC 21583 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E033 OF 2021
DO OHUNGO, J
NOVEMBER 15, 2023**

BETWEEN

EDSON WANYAMA KISINDAYI APPELLANT

AND

FRANCIS WAFULA SIRENGO RESPONDENT

*(eing an appeal from the judgment and decree of the Senior Principal
Magistrate's Court at Butali (Hon. Z J Nyakundi, Senior Principal
Magistrate) delivered on 21st June 2021 in Butali MCELC No. 173 of 2018)*

JUDGMENT

1. Litigation leading to this appeal traces its roots to plaint dated 28th August 2006 which was filed in the High Court at Kakamega as HCCC Number 81 of 2006 by Mourice Wafula Sirengo against Edson Wanyama Kisindayi sued as the personal representative of the estate of Kisindayi Laboni alias Ramadhan Kisindayi Laboni (deceased). The matter was later transferred to this court and ultimately to the Subordinate Court where it became Butali MCELC No. 173 of 2018.
2. Mourice Wafula Sirengo averred in the plaint that Kisindayi Laboni alias Ramadhan Kisindayi Laboni unlawfully and fraudulently caused himself to be registered as the proprietor of the parcel of land known as N/Kabras/Lwandeti/864 (the suit property). He therefore prayed for cancellation of the said proprietorship. He further sought for costs of the suit and interest thereon. The appellant filed amended defence and counterclaim dated 29th September 2007 in which he averred that the suit was barred by *Limitation of Actions Act* and was *res judicata*. He denied the respondent's allegations and prayed for a declaration that the suit property belonged to him.
3. Mourice Wafula Sirengo passed away on 16th November 2007 and was substituted by Francis Wafula Sirengo the respondent herein pursuant to an order made on 4th December 2012.



4. Upon hearing the matter, the Subordinate Court (Hon. Z J Nyakundi, Senior Principal Magistrate) delivered judgment on 21st June 2021 ordering cancellation of the appellant's title and further ordering that the suit property be registered in the name of Mourice Wafula Sirengo. He further granted the respondent costs of the suit.
5. Aggrieved by the judgment, the appellant filed this appeal on 13th July 2021 through Memorandum of Appeal dated 9th July 2021. The following grounds of appeal are listed on the face of the Memorandum of Appeal:
 1. That the learned trial magistrate erred in law and in fact in failing to appreciate the reasonable and sufficient evidence tendered in court hence erroneously ordering cancellation of the title deed in respect of land parcel number N/Kabras/L Wandeti/864.
 2. That the learned trial magistrate erred in law and in fact in failing to appreciate the reasonable and sufficient evidence tendered in Court by the appellant hence arriving at a wrong conclusion and finding.
 3. That the learned trial magistrate erred in law and in fact in failing to consider the Appellant's statement of defence, list of documents and the appellant's evidence against the weight of evidence tendered by the plaintiff/Respondent.
 4. That the learned trial magistrate erred in law and in fact in failing to appreciate that the PEXH 3 was not the proceedings of appeal case No.120 of 1960 and the plaintiff did not have such a document hence erroneously importing evidence which did not exist.
 5. The learned trial magistrate erred in law and in fact in misapprehending the evidence contained in the decision by the land adjudicator, the appeal case no 120 of 1960, the evidence contained in the green card and the appellants documents generally.
 6. The learned trial magistrate erred in law and in fact in failing to appreciate that the decision of the land adjudicator was not to have the plaintiff's grandfather registered on the suit land but instead was to have him given a portion out of which a new number was to be issued which is now N/Kabras/Lwandeti/1508 on which the plaintiff resides.
 7. Generally the learned trial magistrate misdirected himself and applied extraneous evidence to the suit hence arriving at a conclusion not sustainable in law.
6. Based on those grounds, the appellant prayed that the judgment and decree of the Subordinate Court be set aside and substituted with a proper finding and that this court declares that the suit property belongs to the estate of Kisindayi Laboni alias Ramadhan Kisindayi Laboni.
7. The appeal was canvassed through written submissions. The appellant argued that the respondent's suit was res judicata in view of previous proceedings in Lurambi African Court L.C No.199 of 1959 and the African Court Appeal at Kakamega L.A. No. 54 of 1960. He annexed to his submission what he termed as proceedings and decisions of the said court and further argued that the learned magistrate erred in failing to consider that he was the registered owner of the suit property.



8. He went on to argue that the learned magistrate based the judgment on proceedings of case number 120 of 1960 yet the said proceedings had not been produced into evidence. As regards the decision of the Land Adjudicator in Objection Number 29 of 1972, the appellant contended that the learned magistrate misapprehended the said proceedings since if the objection was successful then the objector would have been the registered proprietor of the suit property. The appellant therefore urged the court to allow his appeal.
9. In response, the respondent argued that the appellant attached documents to his submissions which did not form part of the record of the Subordinate Court. He urged this court to strike out the said documents from the record. As regards the claim that the suit was res judicata, the respondent argued that the appellant did not address res judicata in his submissions before the Subordinate Court and further failed to adduce any evidence before the Subordinate Court on the question of res judicata.
10. Regarding grounds 2 and 3 of the appeal, the respondent argued that the appellant did not point out particular aspects of his statement that he claims the trial court did not consider. On whether the trial court misdirected itself on relying on the proceedings of Appeal Case Number 120 of 1960, the respondent submitted that the learned magistrate was referring to the objection proceedings and that Appeal Case Number 120 of 1960 could have been mentioned in error. The respondent contended in conclusion that the appeal is not merited and urged this court to dismiss it with costs.
11. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* \[2013\] eKLR](#).
12. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the suit was res judicata, whether illegality and fraud were established and whether the reliefs sought by the parties ought to have issued.
13. I will now consider the first issue for determination: whether the suit was res judicata. Res judicata is jurisdictional issue which can be raised at any stage of proceedings. The doctrine has found statutory expression at Section 7 of the [*Civil Procedure Act*](#). In this case, the appellant raised it in his amended defence and counterclaim.
14. For a plea of res judicata to succeed, there must have been a previous suit in which the matter was in issue; the parties in both matters are the same or litigating under the same title; the previous matter was heard and determined by a competent court and the issue is raised once again in the new suit. See [*John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* \[2015\] eKLR](#). Res judicata operates as a complete estoppel against any suit that runs afoul of it. See also [*Maitihene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* \[2018\] eKLR](#).
15. As the Supreme Court stated in [*Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* \[2016\] eKLR](#), res judicata prevents a multiplicity of suits which clog the courts and occasion unnecessary costs to the parties. It also ensures that litigation comes to an end.
16. The appellant has attempted to introduce new evidence through his submissions in this appeal with a view to supporting his claims of res judicata. Needless to state, no leave was granted to adduce additional evidence in this appeal. The annexed proceedings are thus totally disregarded and are of no



- use. The appellant has failed to demonstrate that there was a previous suit or that such a suit was heard and determined by a competent court. Simply put, *res judicata* has not been established.
17. The second issue for determination is whether illegality and fraud were established as concerns the appellant's title. There is no dispute that the appellant was the registered proprietor of the suit property as of the date of trial. His proprietorship is confirmed both by the respondent's case and the copy of the certificate of official search which was tendered in evidence by the respondent. He became the registered proprietor on 5th December 2006. Prior to that date, Ramadhan Kisindayi Laboni was the registered proprietor from 17th September 1973.
 18. By virtue of his registration, the appellant was entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Additionally, Section 26 of the *Act* obligated the trial court to accept the certificate of title as conclusive evidence of proprietorship, unless the provisos under Section 26 (1) (a) or (b) were established. In other words, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 19. The respondent attacked the appellant's title on allegations of illegality and fraud. Having chosen that mode of attack, the respondent was bound to not only prove fraud but to additionally show that the appellant was party to such fraud. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
 20. The particulars of fraud that the respondent pleaded at paragraph 5 of his plaint were: "(a) Misrepresentation to the panel of elders during the Land Adjudication process within Lwandeti area. (b) Causing and/or caused to be registered as proprietor of the plaintiff's parcel of land. (c) Failing to appreciate that the plaintiff was the bonafide beneficiary of the land from his late father. (d) Acquiring the plaintiff's land which he knew and/or ought to have known to be unlawful and illegal."
 21. In his witness statement, which was adopted as his testimony, the respondent stated:

The late KISINDAYI LABONI a.k.a RAMADHAN KISINDAYI LABONI - Deceased also got registered on my late father's parcel of land designated as L.R. NO. NORTH/KABRAS/LUANDETI/864 measuring approximately 10 Acres and/or thereabouts by fraud.

I was born in 1962, on a portion of land occupied by my late father. I have lived on this portion of land with my 19 siblings, who have their families on the same. When I was born I found my father and the Defendant's late father having a dispute over ownership of the parcel of land better known N.KABRAS/LUANDETI/864. In Land Appeal case NO. 120/1964 the Defendant's father appeal was dismissed. In the Appeal my father was the 3rd Respondent. This meant that the Defendant's late father's claim over the land was disallowed. In the appeal the 1st and 2nd Respondents were ordered to vacate the parcel of land.
 22. It will be noted that the respondent built his case on illegality and fraud around the adjudication dispute. His own evidence was that he was born in 1962 and that he found the dispute ongoing. As of 17th September 1973, when Ramadhan Kisindayi Laboni was registered as proprietor, the respondent was a child of only 11 years. By then, the adjudication process had long been completed and registration



done. The respondent was neither a witness to the alleged misrepresentation to the panel of elders during the land adjudication process nor did he offer any admissible evidence of misrepresentation on the part of the appellant. His account of the events was hearsay.

23. The respondent relied on what he said was the decision of the adjudication officer in Objection Number 29 of 1972. I have perused the said decision which is dated 28th July 1972. I have also perused the copy of the register in respect of the suit property. It shows that a restriction which was registered by the Chief Land Registrar on 21st September 1977 pending determination of an appeal from the adjudication process was lifted by the Chief Land Registrar on 18th May 2001. The restriction was registered pursuant to Section 28 of the *Land Adjudication Act* and was removed after conclusion of the appeal process, in terms of Section 29 of the same statute. I also note that following removal of the restriction, Ramadhan Kisindayi Laboni was registered as proprietor on 18th May 2001. Consequently, the decision of the adjudication officer in Objection Number 29 of 1972 which was made on 28th July 1972 cannot be a basis for nullifying the appellant's title.
24. I am not persuaded that the respondent proved his allegations of fraud, illegality and misrepresentation to the required standard which is higher than the usual one in civil cases of proof on a balance of probabilities. Consequently, the learned magistrate erred in cancelling the appellant's title.
25. The appellant prayed in his amended defence and counterclaim for a declaration that the suit property belonged to him. I do not think that I need to make such a declaration since proprietorship of the suit property is a matter that is to be established from the register of the parcel. It is not for the court to declare it.
26. In the result, I find merit in this appeal, and I therefore make the following orders:
 - a. The judgment of the Subordinate Court is set aside.
 - b. The respondent's suit in the Subordinate Court is dismissed.
 - c. The appellant shall have costs of both the suit in the Subordinate Court and of this appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER, 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Kurgat for the Appellant

Mr K Mukavale holding brief for Ms Rauto for the Respondent

Court Assistant: E. Juma

