



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 5 OF 2018

AGNES NTHENYA MASILA.....PLAINTIFF

VERSUS

MUTISO KIMAU.....1ST DEFENDANT

PETER MULI.....2ND DEFENDANT

RULING

What is before Court for determination is the Defendants' Preliminary Objection dated the 20th September, 2019 premised on the following grounds:

- 1. That the suit herein is res judicata by virtue of having decided in HCCC No. 206/1998 at Machakos vide a Consent Judgement.***
- 2. That the issue of ownership of LR No. 8914 was settled awaiting implementation.***

The Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the instant Preliminary Objection and the rivaling submissions, the only issue for determination is whether this suit is res judicata by virtue of having been decided in HCCC No. 206/1998 at Machakos vide a Consent Judgement.

The Defendants in their submissions provided a history of the suit land and insisted that the issue of ownership was determined vide Machakos HCCC No. 206 of 1998, hence this suit is res judicata, which fact the Plaintiff denies. They have made reference to the witness statement of Esther Kalasu Makau dated 31st July, 2018 and contend that one Makau Mulinge who was her husband was a shareholder of Ngelani Ranching. Further, that she became a shareholder in place of her husband, after his demise. They insist that the question of who was entitled to the suit land was settled in the aforementioned case vide a consent judgement dated the 1st November, 2007. Further, that the court cannot review its orders and set aside the consent. They insist they are beneficiaries of the estate of Mulinge Makau in LR No. 8914 pursuant to consent order dated 1st November, 2007 and it matters not if the said parcel had been subdivided to change the cause of action.

The Plaintiff in her submissions insists the consent order which the Defendants availed in court from Machakos HCCC No. 206 of 1998 is incomplete and refers to parcel number LR. 8914. Further, that the Certificate of Title she filed indicates parcel number IR 160406 Land Reference No. 8914/14 was registered in her name as the proprietor on 31st December, 2014. She insists the title to the land which is the subject of the present suit was neither in place at the time of filing Machakos HCCC No. 206 of 1998 nor at the time of signing the consent order dated 1st November, 2007. She reiterates that the Defendant's Preliminary Objection is hinged on a document which is neither a court order nor judgement. Further, the parties herein are not captured as parties in the purported consent.

Section 7 of the Civil Procedure Act, stipulates as follows in relation to 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.'

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** which referred to the case of **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that:- **'in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must**

have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.' Further in the case *Nancy Mwangi T/A Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR*, J Gikonyo states thus:

'The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and others 92001) EA 177*, the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted *Kuloba J.* in the case of *Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported)* where he stated, 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.

On perusal of the pleadings herein including the consent order from the Machakos HCCC No. 206 of 1998, the parties therein were *Kyalo Munyao, Peter Muli & Bernard Masai Kavoi Vs Julius Ngila Mosa, Mulei Matu, Mutiso Kathuma & Muasa Katiku*. Further, the suit property indicated therein was *LR No. 8914*. In the instant suit the parties are *Agnes Nthenya Masila Vs Mutiso Kimau & Peter Muli*. It is only **Peter Muli** who was in the previous suit. Further, the dispute in the instant suit revolves around land title No. I.R 160412 Land Reference 8914/79 owned by the Plaintiff which is different from the suit land in the previous suit which was owned by Ngelani Ranch. I note the Plaintiff actually acquired her title after the impugned consent order. I wish to further point out that for a party to rely on the defence of res judicata, it should be first raised in the Defence which is not the case herein. Based on this analysis while relying on the legal provisions cited above as well as associating myself with the case I have cited, I find that this suit is not res judicata as the prayers sought in the Plaintiff were not in issue in the Machakos HCCC No. 206 of 1998 and parties herein were not litigating under the same title. Further, the issue of the validity of the Plaintiff's title was not determined in the said suit. It is my considered view that even if this file had a relationship with Machakos HCCC No. 242 of 2009, as alleged by the Defendants, the issues raised herein are different from the issues that had been raised therein.

It is against the foregoing that I find the Defendants' Preliminary Objection dated the 20th September, 2019 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF JANUARY, 2022

CHRISTINE OCHIENG

JUDGE