



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC NO. E023 OF 2021**

**BENSON ONYANGO NYAPETE.....APPLICANT/PLAINTIFF**

**VERSUS**

**PHILLIP AMOLO OKENGO.....RESPONDENT/ DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. The Respondent/Defendant herein filed a Notice of Preliminary Objection dated 27<sup>th</sup> September, 2021 in response to the Plaintiff's Originating Summons dated 5<sup>th</sup> May, 2021, on the following grounds: -

a) That the case is **Res Judicata**.

2. On 04/10/2021, this Court issued directions on the disposal of the Preliminary Objection dated 27.09.2021 by way of written submissions. The Respondent filed his submissions dated 22.10.2021 while the Plaintiff despite being given time to file his submission on the said P.O. I do note that none was filed. Be that as it may, I will proceed to give my ruling on the same.

3. It is the Respondent's submission that the cause of action in the instant suit is the same cause of action in Migori CMC ELC No. 125/2019 involving the same parties; which was already heard and finally concluded in his favor.

4. He further submits that the Plaintiff having been aggrieved by the decision in CMC ELC No. 125/2019 lodged an Appeal No. ELC Appeal No. 03/2021 which is yet to be heard by the court.

5. Despite being given an opportunity to respond to the allegations made by the Respondent; the Plaintiff failed to file his submissions.

6. The sole issue for determination before me is whether the Notice of Preliminary Objection dated 27/09/2021 is merited and I will proceed to discuss it as hereunder;

7. The law on what constitutes a preliminary objection is now well settled. In the celebrated case of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; the Court defined Preliminary Objection as follows;

***"...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".***

8. The Supreme Court addressed its mind on the issue of a preliminary objection in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** and stated as follows:

***"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts."***

9. The Respondent has sought the dismissal of the Plaintiff's suit vide the Originating Summons dated 05/05/2021 on the basis that the same is *Res Judicata*. Section 7 of the Civil Procedure Act on res judicata defines what amounts to res judicata as follows: -

***"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.”*

10. From a reading of the above mentioned section, the salient features that must be demonstrated for doctrine of res judicata to hold are that; the issues raised in the present suit must be directly and substantially in issue as the issues raised in the former suit that has been heard and finally determined by a competent court. The same must be between the same parties.

11. The Court of Appeal in expounding the essence of the doctrine of res judicata in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR* pronounced itself as follows:

*“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”*

See also the Supreme Court’s decision in *Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR*.

12. Applying the foregoing to the present case, it is the Respondent’s assertion that the cause of action in the present suit is the same cause of action between the same parties in Migori CMC ELC No. 125/2019 which was heard and determined and further there is a pending appeal being ELC Appeal No. 03/2021.

13. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under **section 7** of the **Civil Procedure Act**. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR*, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

*"(a) The suit or issue was directly and substantially in issue in the former suit.*

*(b) That former suit was between the same parties or parties under whom they or any of them claim.*

*(c) Those parties were litigating under the same title.*

*(d) The issue was heard and finally determined in the former suit.*

*(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”*

14. This court has taken the liberty to call for the Lower Court file in CMC ELC No. 125/2019 and the ELC Appeal No. 03/2021 to ascertain the allegations made by the Respondent. I do note that what is at the center of the suit CMC ELC No. 125/2019 is a claim of a portion of **L.R NO. MUHURU/MACALDER/43** measuring approx. **2acres**. A brief background to bring the matter into perspective; the plaintiff therein (now the Respondent) claims against the defendant for a declaration order that part of land plot no. MUHURU/KADEM/MACALDER/43 comprising of about 2 acres belongs to him. It is his claim that the Defendants jointly encroached into the land and are illegally utilizing the said portion of 2acres without his consent.

15. The Defendant (now the Plaintiff) filed a statement of Defence and Counter-claim wherein they stated that they have been occupying and residing on plot no. MUHURU/KADEM/MACALDER/42; since 1953 to date and claimed that the plaintiff’s suit was time barred. They purported that the portion measuring 2 acres claimed by the plaintiff forms part of the defendant’s parcel and the plaintiff’s claims are false creation to get the portion for purposes of the senate.

16. There was a surveyor’s report dated 29.09.2020 whose finding was that the bone of contention was a portion of land that according to the map was part of parcel no. 43 while the actual occupants/ users were the proprietors of parcel no. 42. It confirmed that the dispute was not a boundary dispute between plot no. 42 and 43 since the boundaries were well demarcated & defined on the ground and thereafter referred the matter to court for determination.

17. Further, from the lower court judgment dated 15.12.2020; the trial magistrate relied on the surveyor’s report which was adopted by consent and made a determination that the portion in dispute between the parties measuring 2acres which lied between parcel no. MUHURU/KADEM/MACALDER/43 and 48 and bordering river Migori is part of parcel number 43 registered in the name of the plaintiff and thus belongs to the Plaintiff.

18. I have equally noted that the Plaintiff herein being aggrieved by the lower court Judgment dated 15.12.2020 lodged Appeal No. 03/2021 and filed a Memorandum of Appeal dated 17.12.2020 which is still pending before this court and is yet to be prosecuted.

19. I do note that the cause of action in both suits is similar being; a portion of **L.R NO. MUHURU/MACALDER/43** measuring approx. 2acres/ 0.8 Hectares. The Plaintiff in the previous lower court suit sought a declaration that a portion measuring 2 acres forms part of **L.R NO. MUHURU/MACALDER/43** and therefore belongs to him as the rightful legal owner/proprietor while the Plaintiff in the present suit is seeking a declaration that he is the registered proprietor of the 0.8Ha of **L.R NO. MUHURU/MACALDER/43** by virtue of adverse

possession, having been in possession and occupation of the said portion for a period of over 40years.

20. Upon perusal of the lower court record and the Appeal preferred being Appeal No. 03 of 2021 vide a Memorandum of Appeal dated 17.12.2020, I cannot help but note that the suit and the subsequent Judgment delivered on the 15.12.2020 dealt with the portion of land parcel no. **L.R NO. MUHURU/MACALDER/43** measuring approx. **2acres** which is dispute between the same parties herein. I am also alive to the pending Appeal No. 3 of 2021 and the grounds thereon which seeks to have the judgment of the lower court set aside.

21. Applying the foregoing to the present case, I note that the gist in the Originating Summons dated 5<sup>th</sup> May, 2021 revolves around the question of the portion of land parcel no. **L.R NO. MUHURU/MACALDER/43** measuring approx. **2acres**. It is therefore clear that the said matter having been heard and determined by a court of competent jurisdiction cannot again be brought before this court, the same amounts to res judicata. Besides the Plaintiff herein (Appellant in Appeal No. 3 of 2021) lodged an Appeal which is still pending before the court.

22. In view of the foregoing, I find that the Notice of Preliminary Objection dated 07.09.2021 raises pure points of law on the issue of res judicata arises and is thus merited.

23. The upshot of the foregoing analysis is that the Respondent's **Preliminary Objection** dated **27<sup>th</sup> September, 2021** is merited and the Plaintiff's Originating Summons dated 05/05/2021 is hereby struck out with costs to the Respondent/ Defendant. Further, any Interim Orders herein before granted be and are hereby vacated. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 18TH DAY OF JANUARY, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**RULING DELIVERED IN THE PRESENCE OF: -**

**NON APPEARANCE FOR THE APPLICANT/PLAINTIFF**

**MR. MBOYA FOR THE RESPONDENT/ DEFENDANT**

**TOM MAURICE - COURT ASSISTANT**