



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 284 OF 2010

1. NGUMBAO KAZUNGU

2. KITSAO KAZUNGU..... PLAINTIFFS

-VERSUS-

1. KAHINDI KALUME FONDO

2. JOHN CHARO KALUME

3. JOSEPH KARISA

4. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. The 1st,2nd and 3rd defendants by their notice of motion dated 3rd May 2012 and brought under Section 1A, 1B,3,3A and 7 of the Civil Procedure Act and Order 2 rule 15 of the Rules sought for "***an order to strike out the plaintiff's plaint dated 18th August 2010 on the ground that the same is bad in law, an abuse of the court process or otherwise res judicata***". The defendants also prayed for the costs of the application and the suit. The application is supported by the grounds on the face of it and a lengthy affidavit sworn by Kahindi Kalume Fondo the 1st defendant/applicant.

2. The motion is opposed and the 1st plaintiff/respondent swore a replying affidavit filed in Court on 2nd March 2015. The respondents vehemently denied the allegations put forth by the applicants. The advocates then submitted orally for and against the motion on 2nd March 2015 to that effect.

3. Mr. Wafula for the defendants applicants submitted that the plaintiffs are the sons of Kazungu Muzhoga and the plot in dispute is Kilifi/Kinani/231. He submits that this property has been in dispute since 1971 with the plaintiff's father filing the first case in land case no. 11 of 1971 but the suit was dismissed. The plaintiff's father filed another case in 1986 in no16 of 1986 against the 1st defendant and Kahindi Mure which was also dismissed. The applicants annexed the proceedings in the two cases. The applicants aver the issue of ownership was the subject matter in the two suits and there were no appeals filed against the decisions in the former suits, therefore the plaintiffs are not entitled to bring the current suit as it goes against the principle of res judicata. He referred the court to case law of;

- (i) *Kamunye & others vs Pioneers Gen. Assurance (1971) EA 263.*
- (ii) *Judith Gathimu vs George Kihara & 2 others HCC. 163 of 2004*
- (iii) *Pop-in (K) Ltd vs Habib Bank, A.G. Zurich (1990) KLR 609*
- (iv) *Section 7 Civil Procedure Act*
- (v) *Peter Njogu vs Joyce Wambui Njogu (2005) eKLR*

4. Mr. Mwawasi for the respondents in opposing the application submitted that the name of the plaintiff in suit no. 11 of 1971 is different from the name of the plaintiff's father and there was no evidence that the two people were related. Secondly the plot number is not mentioned in this case. On the civil case no 16 of 1986, counsel submitted that the case dealt with the issue of jurisdiction not ownership while the present suit is about proprietorship of the suit land. He concluded that the doctrine of res judicata does not apply to this case and urged the court to dismiss this application with costs to the respondents.

5. Under Section 7, res judicata provides in mandatory terms that no court shall try a 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. (*underline mine for emphasis*). The plaintiffs admits the existence of suit no. 16 of 1986 except to them the subject matter was different from their case hence they are not in breach of Section 7 of Civil Procedure Act.

6. The plaintiff in their plaint dated 18th August, 2010 and filed in court on 19th August 2010 at para 4 states thus; ***"The plaintiffs state that in or about the year 1982, their father filed a case in Kaloleni court vide land case no. 9 of 1982 parties being Kazungu Muzhoga father to plaintiffs and Kahindi Mure and Kalume Fondo the fathers to the 3rd and 1st and 2nd defendants."***

According to the plaintiff, judgment was given in favour of their father. The plaintiff have not annexed the proceedings in this case to their affidavit but reading the plaint, it can be safely concluded that it was a dispute over ownership. This averment by the plaintiffs themselves in their pleadings constitute is a breach of the principle of res judicata since they have a suit over a subject matter that was already litigated.

7. The defendant annexed the proceedings both no. 11 of 1971 and no. 16 of 1986. It is true that in No. 11 of 1971 the plaintiff is Kahindi Mushonga not Kazungu Muzhoga which difference cannot be decided in favour of the defendants. As regards proceedings in no. 16. It is admitted the plaintiff in this suit was the father to the present plaintiffs. The plaintiff's father had sought orders to set aside the judgment /award of the panel of elders and for the dispute to be retried by a different District Officer and panel of elders. The parcel of land in question is the same as in the present case. In page 3 of the ruling 2nd paragraph reads as follows;

"It is not disputed that the parcels of land now claimed by the plaintiff/applicant had already been registered in favour of the defendants/respondent among others. What he was trying to do was to challenge the registration of these parcels of land in the name of the respondents. He had done so during the process of land adjudication before the arbitration board but his claims were overruled."

8. From reading this ruling in the whole context, it is clear that even before no 16 of 1986 the plaintiffs father had sued fathers to the defendants to claim this land before a panel of elders and lost. He filed case no 16 of 1986 for another panel to be constituted but this claim was also dismissed. The plaintiffs have not submitted that the panels and or bodies or courts who heard these cases filed by their father were not competent to try them. The claim by their father was both challenging the registration and ownership of the defendant's fathers to the suit property. The plaintiff's in my view are considered as persons "*under whom*" they could claim under their father. The present suit is not a different cause of action from the

ones litigated between the fathers' of the parties herein. The cases cited by the applicants re-emphasized the provisions of Section 7.

9. In conclusion, this suit is found to be res judicata as the matters in issue were directly and substantially in issue in the suits commenced and prosecuted by their father before the arbitration board, panel of elders, suit no 9 of 1982 and suit no 16 of 1986. Consequently, the notice of motion dated 3rd May 2012 is merited and I allow it with costs. This suit be and is hereby struck out with costs of the suit to the 1-3rd defendants.

Dated and delivered in open court at Mombasa this 24th day of April 2015.

A. OMOLLO

JUDGE

24.4.2015