



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC NO. 12 OF 2018

NAOMI WAYUA MUTUKU.....PLAINTIFF

-VERSUS-

MUTUA S. WAEMA & 5 OTHERS.....DEFENDANTS

KOMAROCK AND FARMING

CO-OPERATIVE SOCIETY.....INTERESTED PARTY

R U L I N G

By a Notice of Motion Application dated, 16th March, 2020 brought under Section 3A of the Civil Procedure Act and Articles 50 and 59 of the Constitution, the Applicant is seeking for Orders:

a) That the plaint dated 19/1/2018 and amended on 29/4/2021 be struck out for being res judicata and abuse of the court process.

The application is premised on the grounds on the face of it and supported by the Affidavit of Mutua S. Waema indicated as the 1st Defendant who deposed that he is the registered owner of the suit property since 1999, has been in possession of the same for 22 years and the issue of ownership was determined in HCCC No. 1098 of 1993. He contended that the decision has never been challenged and the orders prayed for should be allowed.

The Plaintiff opposed the application by filing a replying affidavit where she averred that she challenged the fraudulent sale and transfer of the suit property to the 3rd Defendant and later to the 1st Defendant before the village elders, area chief, district officer and the Land Dispute Tribunal Kangundo, Matungulu Division. She confirmed that she has been in possession of suit property until 2017. She insisted that, as for ELC No. 1098 of 1993 which was filed by the 3rd Defendant, she was not properly served and was only compelled to sign the transfer documents. She reiterated that the parties therein were different from the ones herein and the Applicant has failed to supply the court with any pleadings or judgment relating to HCCC No. 1098 of 1993.

The 1st Defendant filed a further affidavit and averred that a court cannot sit and reopen issues that had been heard and determined with finality by a court of competent jurisdiction.

The application was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the Notice of Motion application dated the 16th March, 2020 including the respective affidavits and rivalling submissions, the only issue for determination is whether the Plaint dated 19th January, 2018 and amended on 29th April, 2021 should be struck out for being res judicata.

The 1st Defendant in his submissions reiterated his averments, insisted this suit is res judicata and provided the background of the dispute herein. He insisted the Plaintiff is estopped from filing a fresh claim over the suit land. To support his arguments, he relied on the following decisions: **Omondi Vs National Bank of Kenya Ltd & others (2001) EA 177; Henry Wanyama Khaemba Vs Chartered Bank Ltd Civil Case No. 560 of 2006; Trade Bank Ltd v L.Z Engineering Construction Ltd [2000] IRA 266; Zurich insurance Co. PLC v Colin Richard (2011) EWCA Civil 641; The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR);Ngomeni Swimmers Ltd V Lalana Chera Suleiman (2014) eKLR and Myers V Elman (1) (1939) 4 All ER pg 509.**

The Plaintiff insisted this suit is not res judicata as none of the parties herein and in HCCC No. 1098 of 1993 were litigating under the same title. Further, the Plaintiff has alleged fraud against the Defendants which was not an issue in the previous suit. She relied on the following

decisions: **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR**; **Tom Chebungwen Ndiwa V County Government of Bungoma & 3 Others (2018) eKLR**; **In re Estate of David Wanganga Gichuhi (Deceased) (2020) eKLR**; **James Maina Kinya V Gerald Kwendaka (2018) eKLR**; **Joseph Kaguthi & 11 Others V Permanent Secretary, Ministry of Interior & Coordination of Government & Another (2021) eKLR** and **Cosmas Mrombo Moka V Cooperative Bank of Kenya Limited & Another (2018) eKLR**;

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 **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** 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 case of **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR**, it was held that:

‘or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms; 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.’

See also the case of **Joseph Kaguthi & 11 Others V Permanent Secretary, Ministry of Interior & Coordination of Government & Another (2021) eKLR**.

In this instance, the 1st Defendant claims this suit is res judicata as the ownership of suit land was determined in Nairobi HCCC No. 1098 of 1993 which decision was implemented vide gazette Notice No. 1713, dated 31st March, 1995. He insists the 1st Defendant obtained a clean title in 1999. He avers that the Plaintiff has abused the court process by commencing tribunal proceedings in 2002 vide LDC 55 of 2002 after the suit land had been transferred to him. Further, he was not a party to the suit.

First and foremost, I wish to state that, this court has not had the benefit of perusing the pleadings including judgement in Nairobi HCCC No. 1098 of 1993 to confirm which parties and what issues were in dispute, as the same were not availed by the Applicant. Be that as it may, I will proceed to deal with the evidence presented herein. I note the 1st Defendant has admitted that not all parties herein were parties in the Nairobi HCCC No. 1098 of 1993. However, the dispute therein involved the suit land herein. Except for the gazette notice furnished in court to prove the suit land was transferred to a third party, there is no judgement furnished to enable this court confirm what issues were dealt with in the aforementioned Nairobi HCCC No. 1098 of 1993. Insofar as it has emerged that the suit land was dealt with in the former suit, I find that the Applicant has failed to demonstrate in his affidavit that the claim and issues herein were directly and substantially in issue in Nairobi HCCC No. 1098 of 1993; the parties were the same and litigating under the same title; and the issue was heard and finally determined in the former suit. I opine that since the Applicant failed to furnish court with the Pleadings, proceedings and judgement from the said suit, he has not proved the claim that this suit is res judicata. It is my considered view that the burden of proof was upon the Applicant as envisaged in section 107 of the Evidence Act to prove that Nairobi HCCC No. 1098 of 1993 and the instant suit dealt with similar parties, issues and title which he has failed to do.

Based on the facts as presented while applying the legal provisions cited above on res judicata as well as associating myself with the decisions cited, I find that this suit is not *res judicata* as claimed by the Applicant and in the interest of justice, noting that the Plaintiff has made serious allegations against the Defendants in the Amended Plaintiff, I hold that this matter should proceed for full hearing on its merits.

In the circumstances, I find the Notice of Motion application dated the 16th March, 2020 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE