



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC NO. 82 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 34 of 2020}

OYUNGE BARNABUS RATEMO.....1ST PLAINTIFF

MALACH RATEMO MATHAYO.....2ND PLAINTIFF

KENNEDY MBAKA RATEMO.....3RD DEFENDANT

DANIEL RATEMO (Suing as the administrators of the estate of

MATHAYO RATEMO MAYAKA (Deceased).....4TH PLAINTIFF

=VRS=

CHARLES OTEKI RIOBA.....1ST DEFENDANT

HELLEN BWARI MOKONO.....2ND DEFENDANT

RULING

Before me is an Application dated 18/1/22 by the Defendants/Applicants asking that the matter be referred to arbitration before the Assistant County Commissioner, Borabu for determination and that the matter be deemed to be *Res judicata*. During the Hearing of the Application the Prayer for arbitration was withdrawn. The grounds advanced on the issue of *Res judicata* are that by selective litigation the Plaintiffs filed a matter against the Defendants as the only persons occupying the Estate of Mathayo Ratemo Mayaka over the suit property and in the course of the said proceedings it occurred there are several persons occupying the estate that were not sued in the said proceedings since they allegedly bought the properties from the Respondents and that the orders sought in Succession Cause No. 1117 of 1992 High Court, Nairobi and granted on the 25/1/1995 are similar to the ones sought in this case. The 1st Plaintiff on behalf of the 3 others who have sued the Defendants in their capacity as the Administrators of the Estate of Mathayo Ratemo Mayaka, swore a Replying Affidavit on 20/1/22 and filed it the same day. In the said Replying Affidavit, she deposes that the Assistant County Commissioner would eventually refer the matter to court for determination since the said Administrator does not have the legal capacity to address issues touching on land and/or intermeddling with the Estate of the Deceased and would be manipulated by the Defendants. She also proceeds to say that on the issue of *Res judicata*, the Succession Court's mandate was only dealing with the preservation of the Estate and that the issue of eviction was not determined by the Succession Cause. She further explains that the Succession Cause i.e. Nairobi High Court Succession Cause No. 1117 of 1992 was later withdrawn and another one was filed in Kisii High Court being Succession Cause No. 5 of 2019 which was heard and finally determined. Restraining orders of eviction were given by the High Court. Mrs. Oyunge Barnabus Ratemo further deposed that the allegation that they are seeking a determination in this matter which would be issued against only some selected few and not all the parties in the Succession Cause is not true as the suit herein is directed against the trespassers only. She points out that the Defendants fear that if Judgment is given in the Plaintiffs' favour, the same may be issued against the rest of the intermeddlers" without giving them a chance to be heard.

Finally, the 1st Plaintiff argues that this is a delaying tactic to ensure that this matter is not finalized expeditiously and that the Defence is a sham and unsustainable. The same should therefore be dismissed. The matter before Nairobi High Court in Succession Cause No. 1117 of 1992 that is said by the Defendant to make the current suit *Res judicata* had Teresa Nyanchama Ratemo, Daniel Ratemo, David L.O. Ratemo and Zacharia M. Ratemo as the Respondents. The orders sought therein were eviction orders against:

1. MR. ONSINYO MEROKA.

2. WILKISTA NYAKERARIO.

3. JOSIAH MOKONO OMBAYE.

4. KERUBO MOGAKA.

5. OSORO NYAKWEBA.

6. CHARLES GICHANA ANGWENYI.

7. NYAMICHABA NYARIBO.

8. HEZRON NYAMORI MOTIRI &

9. MOSES CHOTI.

from the Deceased's Matayo Ratemo Mayaka's Land and that Teresa Nyanchama Ratemo and other beneficiaries had purported to sell and/or lease part of the Deceased's Estate to other persons who are not beneficiaries of the Deceased's Estate and who had moved into the Deceased's Estate, built structures and cultivated thereon.

The Defendants argued that the subject matter is the same i.e. LR. NO. 9346/2 in the vicinity of Keroka Town. The parties in the Succession Cause were Teresa Nyanchama Ratemo –vs- Methusela Mayaka Ratemo, Daniel Ratemo, David O. Ratemo and Zachary M. Ratemo. The orders sought therein were the eviction of Onsinyo Meroka, Josiah Mokono Ombaya, Osoro Nyakweba, Nyamichaba Nyaribo, Moses Choti, Wilkister Nyakerario, Kerubo Mogaka, Charles Gichana Anywenyi and Hezron Nyamori Motiri. Josiah Mokona Mokono Ombaye is the husband to the 2nd Defendant herein and the one who sold a portion of land to the 1st Defendant herein is the same Josiah Mokono Ombaye. In the Succession cause an order was sought by Teresa Nyanchama Ratemo to evict the persons listed herein and the court by an order dated 25/1/95 declined to issue the eviction orders.

After the Application was heard, the following Orders were given:

THAT, pending the hearing and determination of the application for the revocation of the grant of letters of administration herein obtained by the Respondent on 1/11/92 for the administration of the estate of the late Mathayo Ratemo Mayaka , the beneficiaries do remain in their respective parcel of land namely L.R 9346/2 as at 6/1/95 and all persons be and are hereby restrained from entering, subdividing at the, demarcating, alienating, dealing, interfering or destroying the boundaries existing on the said property.

According to the Amended Complaint filed herein on 2/6/21, the Plaintiffs seek eviction orders against the Defendant herein in the following terms: -

- (a) An order of eviction against the Defendants from the deceased's land parcel LR. NO. 9346/2.
- (b) An order of permanent injunction restraining the Defendants, jointly and severally their respective agents, privies servants and others whosoever claiming through them from entering, trespassing, tilling, construction, wasting, harvesting trees thereon, and/or in any other manner howsoever dealing with the deceased's land parcel LR. NO. 9346/2.
- (c) General damages for trespass.
- (d) Costs of this suit and interest.

The Defendant's counsel concluded by submitting that based on that, Section 7 of the Civil Procedure Act provides that matters that have already been determined by a competent court of law are concluded. The subject matter in the 2 matters is the same and the parties litigating in the Succession Cause are the same parties in the current case while others were represented in the former suit. The point of convergence is Josiah Mokono Ombaye who they have sued the wife and the person who bought land from him. The orders issued in the Succession Cause were never appealed against.

The Plaintiff's Counsel Mr. Mutai stated that prayer No. 3 fails because the elements of Res judicata are not met. The Applicant has annexed to his motion a chamber summons Application dated 21/11/95 which does not relate to the orders of 25/1/1995. The orders were interim to preserve the subject matter pending the determination of the Succession Cause. The Respondents in the order of 25/1/95 are beneficiaries of the Deceased's Estate and are related to the Plaintiffs in this case. Even the Applicant is also a beneficiary. The subject matter is also the same – i.e. LR. NO. 9346/2 belonging to the Deceased. The subsequent Succession Cause is still on. The earlier cause was withdrawn to enable Kisii High Court to deal with the matter since it has geographical jurisdiction. There is a certificate of confirmation of Grant relating to the subject matter herein Kisii High Court Succession Cause No. 5 of 2019. Under Section 82 & 83 of the Law of Succession Act (Cap 160 Laws of Kenya) the Plaintiffs are seeking to exercise powers pursuant to Section 82 and are also discharging a duty under Section 83 paragraphs (f) and (g) to vest the shares of the beneficiaries upon them. The current Defendants in this case are impeding that process.

The Defendants' Counsel Mr. Nyambati also argues that Sec. 7 Subsection (b) applies in this case because the Defendants were persons litigating under Josiah Mokono Ombaye who was among the persons evicted. The claim is therefore the same.

The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“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”

The **Black’s law Dictionary 10th Edition** defines “*res judicata*” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

In the case of **Christopher Kenyariri vs Salama Beach (2017) eKLR**, the court clearly stated the ingredients to be satisfied when determining *res judicata* thus;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit**
- b) Former suit between same parties or parties under whom they or any of them claim.**
- c) Those parties are litigating under the same title**
- d) The issue was heard and finally determined.**
- e) The court was competent to try the subsequent suit in which the suit is raised.”**

In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- (i) what issues were really determined in the previous case;
- (ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- (iii) whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

Has the Applicant shown the Court that he deserves the Orders of having this Suit struck out as falling within the doctrine of Res Judicata?

The Application appears to have been crafted to confuse this court. First, there can be no Parcel of land described as L.R. NO. 9346/2. The description of the parcel of land must therefore be confusing. At least the Applicant should have annexed a copy of the Title Documents for ease of reference. Of even much more significance is that the orders allegedly granted in Nairobi High Court Succession Cause No. 1117 of 1992 relating to the Estate of Matayo Ratemo Mayaka on the 25/1/1995 are said to have been a successful Decision of the Application preceding the Application that Order is attached to. The Order commences as follows: -

“UPON READING the application presented to this court on (illegible)....th January 1995.....”

The Application preceding the order and to which the said order is a product of is dated 21/11/1995 and the Affidavit supporting the Application thereof was sworn on 24/11/1995. From the face of the chamber summons Application the same was scheduled to be heard on 30/11/1995. It is curious to note that the rubber stamps of the court receiving both the Application as well as the Supporting Affidavit are illegible just as the actual date indicated in the order that was granted by the court. But it is obvious that if the 3 documents (the Application, the Supporting Affidavit and the resultant Order) are anything to go by, the order had already been granted 10 months before the same was presented to court.

Upon discovery of these discrepancies, the properly choreographed scheme to confuse the court has miserably failed.

The upshot of the above is that there is nothing on record to show that the threshold anticipated under Section 7 of the Civil Procedure Act has been met. We are not able to tell from the Application in court and the annexures to the Affidavits in support thereof what issues were ever determined in Nairobi High Court Succession Cause No. 1117 of 1992 nor what was determined in Kisii High Court Succession Cause No. 5 of 2019. Nothing would have been easier than to extract genuine Orders of the 2 aforesaid Courts to enable the court compare the same with the pleadings in the current suit.

The Application is accordingly dismissed with costs. The case to proceed to full Hearing.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 16TH DAY OF FEBRUARY, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Mutai for the Plaintiff

Defendant: N/A