



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KWALE**

**ELC NO 57 OF 2021**

**(FORMERLY ELC 3 OF 2016)**

**JOSEPH MWANIKI GITAU.....1<sup>ST</sup> PLAINTIFF**

**MILKA NJERI GITAU [Both suing as administrator of the Estate of the late**

**SAMSON MWAURA GITAU.....2<sup>ND</sup> PLAINTIFF**

**BRIDGETTE KARL GITAU.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KWALE.....2<sup>ND</sup> DEFENDANT**

**SAID H. BEDZENGA sued as THE KADHI OF KWALE.....3<sup>RD</sup> DEFENDANT**

**The estate of the late JUMA A KIMETSE MWACHIMAKO.....4<sup>TH</sup> DEFENDANT**

**HAMISI T CHIMETSE.....5<sup>TH</sup> DEFENDANT**

**FATUMA SAID KIMETSE.....6<sup>TH</sup> DEFENDANT**

**MWALIMA SAID KIMETSE.....7<sup>TH</sup> DEFENDANT**

**ASHAH SAID KIMETSE.....8<sup>TH</sup> DEFENDANT**

**REHEMA JUMA KIMETSE.....9<sup>TH</sup> DEFENDANT**

**JOHN ERICK MUSYOKA ANNAN.....10<sup>TH</sup> DEFENDANT**

**GERARDINE MUMBUA MUSYOKA.....11<sup>TH</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1 The present suit against the defendants was filed on 14<sup>th</sup> January 2016. On 11<sup>th</sup> November 2020 this court set down the suit for hearing for 17<sup>th</sup> June 2021 in the presence of Counsel for the Plaintiff and 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The rest of the parties did not attend court. On 16<sup>th</sup> June 2021 only, Mr. Omollo Counsel for the 5<sup>th</sup> Defendant attended court. On the application of Mr. Omollo the court ( Sila Munyao J) noted that the Plaintiff and his Counsel were absent and dismissed the suit for nonattendance with costs to the defendants.

2 The Plaintiff then filed the Notice of Motion dated 17/6/2021 seeking for the following orders; -

- 1) SPENT
- 2) That the order for the dismissal of the suit made on 16/6/21 be set aside or varied upon such terms as are just.
- 3) That the Plaintiffs be allowed to prosecute the suit to conclusion.
- 4) That the costs of the application be provided for.

3 The 10<sup>th</sup> and 11<sup>th</sup> Defendant/Respondents filed a preliminary objection dated 5/11/21 to the said application. This ruling is in respect of the said preliminary objection. The grounds for the objection were that the application dated 17/6/2021 and the cause of action were time barred by dint of Section 7 of the Limitation of Actions Act 2) The suit having been dismissed on 16/6/21 for want of prosecution and an earlier case Originating Summons No. 58 of 2009 (OS) which dealt with the same cause of action was similarly dismissed on 30/3/2017, would be Res Judicata by dint of Section 7 of the Civil Procedure Act if heard by the court and 3) The application was therefore incompetent and an abuse of the court process.

4 On 15/11/2021 this court gave directions for the preliminary objection to be canvassed by way written submissions.

#### **10<sup>th</sup> and 11<sup>th</sup> Defendants Submissions**

5 The 10<sup>th</sup> and 11<sup>th</sup> Defendants filed their submissions on 23/11/21 through learned Counsel Mr. Kithi and identified three issues for determination 1) Whether the application and the suit were res judicata 2) Whether the suit is time or statute barred by dint of Section 7 of the Limitation of Actions Act and 3) whether the suit should be reinstated.

#### **Whether the application and the suit were res judicata**

6 Counsel submitted that the suit had been dismissed twice. First by Hon Justice E Cheron on 30/3/2017 where the Plaintiff has never sought reinstatement and subsequently by Justice S. Munyao on 23/6/2021. That the reinstatement motion was a waste of the courts precious time as the issues had been raised and dealt with by the court twice. The provisions of section 7 of the Civil Procedure Act were enumerated to buttress this point. Further reliance was placed on the case of **Independent Electoral Boundaries Commission Vs Maina Kiai & 5 Others [2017]** where the Supreme Court outlined the elements to be satisfied conjunctively for the res judicata doctrine to be invoked. Counsel emphasized that for a matter to be res judicata the matter in issue had to be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. Accordingly, Counsel urged that the suit with the same parties was already in court, heard and finally dismissed on 30/3/2017 and therefore the Plaintiffs suit was res judicata.

#### **Whether the suit is time or statute barred by dint of Section 7 of the Limitation of Actions Act**

7 Counsel stated that the 3<sup>rd</sup> to 9<sup>th</sup> Defendants have been in possession of the suit property as ancestral land and that the Plaintiffs have never been in possession of the same. That the 10<sup>th</sup> and 11<sup>th</sup> Defendants have been in possession since 2015 and have been unable to develop the same as a result of the orders obtained irregularly by the plaintiffs. Counsel reiterated that the Plaintiffs filed suit in 2009 which was dismissed in 2017 and filed it again in 2016 as [Mombasa ELC No 3 of 2016] and dismissed in 2017. According to Counsel this meant, two separate suits running at the same time and hence rendering the matter subjudice. It was contended that the Plaintiffs suit having been dismissed twice there was nothing for the court to go back to. That the suit was time barred since an action to recover land may not be brought after the end of 12 years.

#### **Whether the suit should be reinstated.**

8 In view of paragraph 7 above Counsel pointed that the suit being time barred and res judicata could not be reinstated as held in **Sitelu Konchella V Daima Bank Limited** which quoted **Mobil Kitale Service Limited V Mobil Oil Kenya Limited**. Further reliance was placed in **Utalii Transport Co Ltd & 3 Others V NIC Bank & Another [2014]** where it was held that it was the primary duty of the Plaintiffs to take steps in prosecuting suits as they had dragged the defendants to court.

9 It was prayed that the preliminary objection be allowed and the plaintiffs motion be dismissed with costs.

#### **1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants Submissions**

10 The 1<sup>st</sup> and 2<sup>nd</sup> Defendants are represented by State Counsel from the office of the Attorney General. Mr. Waga informed this court on 6/12/21 that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would not be participating in the PO.

#### **4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants Submissions.**

11 The 4<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants were represented by Ms Sigei and identified the same issues as the 10<sup>th</sup> and 11<sup>th</sup> Defendants. The submissions have largely adopted the 10<sup>th</sup> and 11<sup>th</sup> Defendants and I will not belabor them.

## 5<sup>th</sup> Defendants submissions

12 The 5<sup>th</sup> Defendant was represented by the Mr. Omollo who filed a replying affidavit sworn on 6<sup>th</sup> October 2021 in respect of the application dated 17<sup>th</sup> June 2021. His main contention is that there must be an end to litigation, the dispute herein having started way back in 2009. From the record there are no submissions with regard to the preliminary objection on behalf of the 5<sup>th</sup> Defendants. I however note that on 15/11/21 Mr. Omollo informed this court that he had not seen the preliminary objection but if it had the effect of determining the whole suit, the same should be heard before the application dated 17<sup>th</sup> June 2021. On 6/12/21 Mr. Omollo indicated that the 5<sup>th</sup> Defendants were supporting the preliminary objection.

## Plaintiffs submissions

13 The Plaintiffs submissions dated 30/11/21 were filed on 3/12/2021, Mr. Tindi Counsel for the Plaintiffs submitted that the preliminary objection was not purely on points of law as some of the facts were contested and disputed and needed to be ascertained. These were the dismissal order of 30/3/2017, withdrawal of the 1<sup>st</sup> suit and whether or not the Plaintiffs have been indolent. Counsel relied on the definition of a preliminary objection as outlined in the cases of **Mukisa Biscuits Manufacturing Co Ltd V West End Distributors Limited 1969 EA 696** and **Mombasa High Court Civil Case No.190 of 1995 Gunter Joseph Gebaur Vs. Said Edward Nzaro** to buttress their arguments and further urged that the objections raised could be argued together in the substantive application as they did not merit being referred to as preliminary points of law

14 As to whether the suit was time barred it was submitted that the defendants had failed to demonstrate how the suit was time barred. That it was not certain on when time started running against the 10<sup>th</sup> and 11<sup>th</sup> defendants as the contents of their Amended Defence dated 26/6/2019 stated that they had been in occupation of the suit land since 2015 and from the pleadings they were sued in 2016. Consequently, they were precluded from pleading limitation of actions under section 7 of the Limitation of Actions Act. Further that while the 4<sup>th</sup> to 9<sup>th</sup> defendants claimed that the suit land was ancestral land, they had failed to disclose to the court when they obtained title to the property which would have guided on computation of time for purposes of limitation.

15 Counsel also pointed that the provisions of section 7 of the Limitation of Actions Act were not cast on stone and provided for exceptions under Section 26 (c) thereof. This related to fraud where the period of limitation does not start running until the plaintiff has discovered the fraud or mistake. The Plaintiffs had pleaded that 3<sup>rd</sup> and 4<sup>th</sup> Defendants had committed fraud while obtaining their titles. It is also confirmed in the statement of the 1<sup>st</sup> Plaintiff that fraud was discovered after 2014. That this suit having been filed in 2016, that is two years later was not time barred. Reliance was placed on **Justus Tureti Obara Vs. Peter Koipetai Nengisoi (2014) eKLR**.

16 On issues surrounding HCCC NO 58 of 2009[OS] and referring to the Notice of Withdrawal dated 4/12/2017, it was submitted that the suit was withdrawn on 4/12/2012 pursuant to the provisions of Order 25[1] of the Civil Procedure Rules. Counsel urged that the suit had already been withdrawn by the time the same was being allegedly dismissed on 30/3/2017 and hence the issue of subjudice does not rise. On the issue of res judicata it was submitted that the suit dismissed on 30/3/2017 had been withdrawn previously and a fresh suit filed which included 8 more Defendants. That it was not necessary to obtain leave to file the suit out of time as the suit that was being filed was a fresh one. In any event having been withdrawn there was nothing to withdraw. Counsel distinguished the elements outlined in the authorities cited by the defendants urging that the same were not fully met in the present suit as it has not been demonstrated what was heard in the previous suits. In addition, it was contended based on the case of **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (supra)** that the issues herein are completely different since in the current suit fraud was committed by all the 11 defendants, the parties herein are different by dint of the additional defendants and also completely different and the former suit was never heard having been withdrawn.

17 It was prayed by the Plaintiffs that the PO before court for ruling was not merited and the same ought to be dismissed.

## ANALYSIS AND DETERMINATION.

18 I have considered the application and Counsels submissions. This is a preliminary objection raised on a point of law on the grounds that this matter is res judicata. I agree with the issues as identified earlier in the submissions. However, I'm inclined to first consider whether the preliminary objection has been properly raised as required and guided by Court of Appeal in **Mukisa Biscuits Manufacturing Co. Ltd – v- West End Distributors Limited (1969) EA. 696** where Law J.A. stated thus: -

*“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A preliminary objection raises a pure point to 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”.*

19 In reaffirming the above the Supreme Court in **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]**: expressed itself as follows on preliminary objections;

*“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696:*

*‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of*

limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection 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'."

20 From the courts rendition the questions I would pose from the pleadings herein are can the facts be deemed agreed, Is there any fact that will require to be ascertained through the main hearing. From the pleadings filed before court it is clear that several facts are contested by the parties herein. The defendants allege that the suit herein has been dismissed on two separate occasions. The contested dismissal is the one by Justice Cheronu on 30/3/2017 which the Plaintiffs on their part state cannot amount to a dismissal as the matter had already been withdrawn by them on 5/4/2019. I have seen the Notice of Withdrawal/Discontinuance of suit dated 4/12/12. The suit is Mombasa HCCC No. 58 of 2009 (OS). It relies on the provisions of Order 25 of the Civil Procedure Rules and states that '.... the Plaintiffs withdraw and or discontinue wholly the suit entirely as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.' There are only three Respondents sued in the suit. I'm inclined towards confirming that indeed the suit had earlier on been withdrawn. It is clear that the facts pertaining to the withdrawal of the suit or whether the same was dismissed need to be ascertained by the court and the same can only be through substantive proceeding of the suit where both parties can avail their evidence over the allegations raised. For that reason, the preliminary objection does not raise a pure point of law.

21 Is the present suit res judicata? The ingredients that make a suit res judicata are stated in **Section 7 of the Civil Procedure Act** Chapter 21 of the Laws of Kenya. which stipulates 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.'*

22 The above provisions were further elaborated by the Supreme Court in **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (supra)**. Counsel for the 10<sup>th</sup> and 11<sup>th</sup> Defendants alluded to them in support of his objection that the suit is res judicata. **These are;** -

*"(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."*

23 Guided by the above criteria it is clear that the suit property is the same. In HCCC NO 58 of 2009 (OS) the Plaintiffs are the same as in the present suit, these are Joseph M. Gitau, Milkah Njeri Gitau except that in the present suit Joseph Gitau and Milcah Gitau are both suing as administrators of the Estate of the late Samson Mwaura Gitau. The Respondents in the OS are named as Hamisi T Chimetse, Juma A. Kimetse Mwachumako and the Attorney General. It is clear that the parties are not the same as the ones in the present suit. The present suit has an additional 8 defendants who subsequently came into the suit property changing the facts further. As indicated by Counsel for the Plaintiffs the OS was withdrawn to allow additional defendants who had come into occupation of the land. I also find that the previous suits were never heard and determined on merit. They were withdrawn in the first instance and dismissed for want of prosecution in the second instance. It is therefore clear that no hearing took place where parties were allowed to ventilate their case and for the court to be allowed to make a just finding ultimately. To arrive at this finding this court relies on the Court of Appeal decision in **Michael Bett Siror Vs. Jackson Koech (2019) eKLR** at Paragraph 30 where the court held as follows; -

*'We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgement, however such a judgement does not satisfy the requirements of Section 7 of the Civil Procedure Act, as the issues raised in the suit has not been addressed and finally determined by the court, but the judgement is the result of what may be described as a technical knockout.'*

Accordingly, I find that the elements raised in the present case as compared to the Maina Kiai (supra) case do not give rise to the doctrine of res judicata.

24 This court chooses substantive justice as guided by the holding in **D.T Dobie & Co. (Kenya) Ltd V. Joseph Mbaria Muchina & Anor (1980) eKLR** where Madan JA stated that; -

*"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere resemblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

25 My choice to go with substantive justice herein also impacts the application dated 16<sup>th</sup> June 2021 which is for the reinstatement of

*the suit. Invoking my inherent jurisdiction I will allow the said application to enable this matter progress to hearing. Indeed it is an old matter which needs closure. As a court I'm alive to the overriding objectives in Sections 1A and 3A of the Civil Procedure Act.*

26 The upshot of the foregoing is that I find the preliminary objection dated 5<sup>th</sup> November 2021 lacking merit. The following orders shall and hereby issue to dispose of the preliminary objection dated 5<sup>th</sup> November 2021 as well as the Plaintiffs application dated 16<sup>th</sup> June 2021.

- 1) The preliminary objection dated 5<sup>th</sup> November 2021 be and is hereby dismissed with no orders as to costs.
- 2) The Application dated 17<sup>th</sup> June 2021 be and is hereby allowed.
- 3) The Plaintiff shall pay thrown away costs to the 5<sup>th</sup> 4<sup>th</sup> 6<sup>th</sup> 7<sup>th</sup> 8<sup>th</sup> 9<sup>th</sup> 10<sup>th</sup> and 11<sup>th</sup> Defendants of Kshs.3,000 each before the next hearing date.
- 4) The Plaintiff shall set down the suit for hearing within 45 days of this order.

**DELIVERED AND DATED AT KWALE THIS 15TH DAY OF FEBRUARY 2022.**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Tindi ..... for the Plaintiffs

N/A .....for 1<sup>st</sup> ,2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Mr.Sigei.....for the 4<sup>th</sup> ,6<sup>th</sup> ,7<sup>th</sup> ,8<sup>th</sup> and 9<sup>th</sup> Defendants

Mr. Tindi holding brief for Mr Kithi .....for the 10<sup>th</sup> and 11<sup>th</sup> Defendants

Mr. Denis Mwakina ..... Court Assistant.