



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC APPEAL CASE NO. E013 OF 2021

JULIUS MUISYO MWANIA (Sued as legal representative of the

Estate of **MWANIA KITONG'O LOKI** Alias **ERASTO MWANIA**

KITONG'o (Deceased)**APPELLANT**

VERSUS

ISAACK LOKI NDUNDA & SAMSON KITAVI NDUNDA

(Suing as the legal representative of the estate of **NDUNDA MUTUA**

(Deceased) **RESPONDENT**

(Being an appeal from the Ruling delivered in the Senior Principal Magistrate's Court at Kangundo by Hon. Martha Opanga Senior Resident Magistrate on 23rd March 2021)

JUDGMENT

1. Vide a memorandum of appeal dated 30th March 2021 and filed on 14th April 2021, the Appellant in this matter appealed against the entire ruling of the Magistrate's court in Kangundo ELC Case No. 58 of 2020, delivered on 23rd March 2021, dismissing the Appellant's preliminary objection which had sought to have the Respondent's suit struck out for being *res judicata*.
2. The Appellant being dissatisfied with the said decision of the Senior Resident Magistrate, filed this appeal citing the following grounds;
 1. **The learned trial magistrate erred in law and fact hence arriving at a wrong conclusion that the suit therein was not Res Judicata.**
 2. **The learned trial magistrate erred in law and fact by ignoring and failing to appreciate the judgment of the High Court in Miscellaneous Application No. 589 of 2002 which judgment held that the action for enforcement or execution of judgment of 7th September 1987 was hopelessly out of time, time barred and *Res judicata*.**
 3. **The learned magistrate erred in law and fact in holding that the cause of Action had changed despite Miscellaneous Application No. 589 of 2002 and High Court Civil Appeal 11 of 1980 having touched on property known as Matungulu/Katheka/562.**
 4. **The learned trial magistrate erred in law and fact by failing to appreciate the instant suit is coached as an application for execution of the Judgment in Civil Appeal Number 11 of 1980 dated 17th September 1987 which attempt the court found to be hopelessly out of time in Miscellaneous Application No. 589 of 2002.**
 5. **The learned trial magistrate in paragraph 2 of her determination misdirected herself by holding that the High Court in Civil Appeal No. 11 of 1980 found that the suit property Matungulu/Katheka/562 belonged to Ndunda Mutua despite absence of such finding in the judgment.**
 6. **The learned trial magistrate erred in law and fact in relying on conjuncture, supposition and on extraneous matters.**

3. The Appellant prays for the following orders;

1. Setting aside the lower court ruling delivered on 23rd March 2021 and uphold the preliminary objection that the matter is *Res judicata* and time barred.
2. A declaration that the suit is time barred.
3. An order directed to the registrar to remove caution in property Matungulu/Katheka/562.
4. Costs of the appeal.

4. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 1st November 2021 while the Respondents filed their submissions on 24th November 2021.

APPELLANT'S SUBMISSIONS

5. Counsel for the Appellant submitted that the matter substantially in issue is Land Parcel Number Matungulu/Katheka/562. Counsel argued that among the Defendant's list of documents are judgments in High Court Judicial Review Miscellaneous Application Number 589 of 2002 (*Republic vs. Chairman Machakos Land Disputes Tribunal*) as well as judgment in *High Court Civil Appeal Number 11 of 1980*. Counsel argued that the former suit was between the same parties save that the Appellant in the lower court appears in his capacity as the personal representative, hence parties are litigating under the same title.

6. It was submitted for the Appellant that parties in this case had had a protracted battle from the District Magistrate's Court to the High Court. Counsel referred to page 69 of the record, where the High Court stated in its decision in Appeal No. 11 of 1980 as follows;

“Having established his ownership of land on the evidence, I do not see any reason why he cannot have the boundary marked. The elders tried to do so but were threatened by the Respondent. In my view, looking at the evidence, the trial magistrate was correct in his finding that the Appellant was entitled to a portion of land he claimed and that a boundary should be fixed between the parties.”

7. Counsel submitted that the Respondent filed the Land Disputes Case Number 6 of 2002 in a bid to enforce the judgment in Appeal Case Number 11 of 1980. That this prompted the Appellant to file Judicial Review Application Number 589 of 2002, in which the court held that the Respondent's claim before the Land Disputes Tribunal failed due to a delay of 15 years to file suit to enforce the judgment of the High Court and that the claim was *Res Judicata* besides being time barred.

8. Counsel argued therefore that since the decision of the court in Judicial Review No. 589 of 2002 had not been appealed against, or set aside, the Respondents could not file a fresh suit claiming land parcel number Matungulu/Katheka/562.

9. On the question of time limitation, counsel placed reliance on the cases of *IGA vs. Makerere University [1972] E.A 65*, the case of *Gathoni vs Kenya Cooperative Creameries Ltd [1982] KLR 104* and *Melita vs Shah [1965] EA 321*. Counsel further relied on the case of *Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR* on his submissions on the conditions that meet the plea of *Res judicata*. Counsel concluded that the plea in the Magistrate's Court in Kangundo ELC Case No. 58 of 2020 was filed 30 years after the judgment at the High Court was entered, without leave of court and therefore the suit is hopelessly out of time. Counsel sought that the Respondent's suit in the lower court be struck out.

RESPONDENT'S SUBMISSIONS

10. Counsel for the Respondent relied on Section 7 of the Civil Procedure Act and submitted that the Appellants failed to prove the elements of *Res Judicata*. Counsel relied on the cases of *Clement Wekesa Muuyi & Another vs Patrick Wekesa Okumu (Sued as representative of the estate of Okumu Masai (deceased) [2019] eKLR* and *Lemita Ole Lemein vs Attorney General & 2 Others [2020] eKLR*, which decisions have been considered by the court. Counsel further argued that the Appellant's assertion that the suit before the lower court in Kangundo was *res judicata* was premised on allegations that Ndunda Mutua (Deceased father to the Respondent) had a case with Erasto Mwanja Kitong'o (deceased, father of the Appellant herein) which case was based on ownership of Land Parcel Number Matungulu/Katheka/562. Counsel stated that for the claim at the District Magistrate's Court in Civil Suit No. 16 of 1976, the issue in contention was fixing of boundaries, which decision was affirmed in the judgement of the High Court in Appeal Case No. 11 of 1980. Counsel also pointed out that at the time judgment was pronounced by the High court, the late Erasto Mwanja Kitong'o had not registered the suit property in his name, and therefore the cause of action in Kangundo ELC Case No. 58 of 2020 had not crystallized.

11. It was contended for the Respondent that it is only after Erasto Mwanja Kitong'o registered himself as proprietor of the suit land that the late Ndunda Mutua began the process of protecting his interests in the suit land by registering a caution thereto on 20th September 1999. Counsel pointed out that the cause of action in the current suit is for cancellation and revocation of title wrongfully issued to the late Erasto Mwanja Kitong'o and rectification of the register at Machakos Land's Registry to reflect the true owner of the suit land. Counsel argued that as the causes of action between the current suit and the former suit were different, the plea of *res judicata* could not stand.

12. On whether the Respondent's suit was time barred, counsel submitted that that issue was not raised in the preliminary objection dated 13th October 2020 and neither was it addressed in the court ruling. Counsel argued that the Memorandum of Appeal contravened Order 42 Rule 1(2) of the Civil Procedure Rules.

13. Counsel argued further that the preliminary objection by the Appellant was defective as the question of whether or not the suit in the lower court was res judicata, ought to have been raised in a Notice of Motion and not by way of preliminary objection. Counsel relied on the case of *Josephat Njuguna Karugu vs. Margaret Nduta Ngugi & 2 Others [2021] eKLR*, for the proposition that a plea of res judicata cannot be raised by way of preliminary objection and the proper procedure is to file a notice of motion. Counsel argued that in filing Land Disputes Tribunal Case Number 46 of 2002, the Respondent showed that he was not sleeping on his rights. According to counsel, time stopped running and only started running on conclusion of Miscellaneous Application No. 589 of 2002 on 23rd November 2006, and that time also stopped running in the course of the trial of Kangundo Succession Cause No. 7 of 2015 whose judgment was delivered on 28th November 2019. For that proposition, counsel relied on the cases of *Josephat Njuguna Karuga vs. Margaret Nduta Ngugi & 2 Others (Supra)* and *William Gatuhi Murathe vs Gakuru Gathumbi [1998] eKLR*.

14. On whether the Appellant is entitled to the orders sought in the Memorandum of Appeal, counsel argued that the Appellant had failed to prove elements in the preliminary objection and therefore his appeal must fail. Counsel argued that the Appellant has not given any justification why the decision of the lower court should be interfered with.

ANALYSIS AND DETERMINATION

15. I have considered the Memorandum of Appeal, the parties submissions, the record of appeal and all other material placed before court and it is my considered view that the issues that arise for consideration are;

- a. Whether the preliminary objection raised by the Appellant was merited.
- b. Whether the trial court was justified in dismissing the preliminary objection.

16. The question as to what constitutes a preliminary objection is now well settled by a long line of authorities on the subject. In the locus classicus case of *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors [1969] EA 696*, the Court of Appeal described a preliminary objection in the following terms;

“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 the 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.”

Further Sir Charles Newbold JA stated in the same matter as follows;

“A preliminary objection is in the nature of what used to be a demurer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.”

19. In the case of *Hassan Ali Joho & Another vs. Suleiman Said Shabal & 2 Others [2014] eKLR*, the Supreme Court stated as follows;

“...a preliminary objection consists of a pure point of law which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit.”

18. The Supreme Court has considered the purpose of parties resorting to preliminary objections in the case of *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others [2015] eKLR*;

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit, firstly, it serves as a shield for the origination of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for running the case otherwise destined to be resolved judicially, and on the merits.”

19. It is therefore clear that a preliminary objection ought to be raised only where facts are not in dispute and should be based solely on pure points of law. Additionally, the same should not be used for purposes of obtaining a summary determination of a suit which ought to be heard on merit.

20. The question that this court must address therefore is whether the preliminary objection raised by the Appellant was premised on pure points of law or on contested facts as argued by the Respondents. To answer this question the court must evaluate the nature of the preliminary objection raised and the basis of the objection.

21. Turning to the Appellant’s Preliminary Objection before the lower court the same was couched in the following terms;-

“Take Notice the defendant shall raise a preliminary Objection that the entire suit be struck off on a point of law that the suit herein is res judicata and the case has been heard and determined and the court cannot hear the suit herein”.

22. The rationale for the doctrine of res judicata was stated in the case of **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR**, by the Court of Appeal as follows;

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, true and certain justice.”

23. To prove the doctrine of res judicata the following elements must be proved;

- a. That suit or issue was directly and substantially in issue in the former suit.
- b. That the 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 of the suit in which the issue is raised.

See **Independent Electoral & boundaries Commission vs Maina Kiai & 5 others** [supra].

24. It therefore follows that for one to prove the elements of res judicata, they must among other things sift through the facts to determine the issues, so as to ascertain whether the issues in the former suit are the same as those in the current suit. They must also consider whether the decision in the former suit was final and whether the parties were the same or were parties under whom any of them could claim; or if they were litigating under the same title, as well as whether the Court that heard the former suit had jurisdiction. This cannot be done without considering the evidence which may include pleadings and decisions of the former suit as against the current suit.

25. It is for the above reason that a plea of res judicata is best raised in a Notice of Motion; where the applicant can present evidence to satisfy the elements of res judicata as against raising a Preliminary Objection, which ought to be purely on points of law. Therefore it is my considered view that the Preliminary Objection raised in this matter did not constitute a proper preliminary objection as the same touched on highly contested facts, which could not be determined on a preliminary point without hearing the suit on merit.

26. Courts have frowned upon the practice of raising a plea of res judicata by way of a preliminary objection, where the same is based on contested facts. I associate myself with the holding in the case of **George Kamau Kimani & 4 Others vs County Government of Trans-Nzoia and Another [2014] eKLR** where the court stated that one cannot raise a plea of res judicata by way of Preliminary Objection and the best way to raise a ground of res judicata is by way of Notice of Motion, where pleadings and other forms of evidence are annexed to the application to enable the court ascertain whether the suit is res judicata.

27. In this matter, the Preliminary Objection did not have sufficient material to show the evidence that proved res judicata. From the record, what the appellant relied on as the basis of his preliminary objection was his submissions which disclosed the reasons why the Appellant pleaded res judicata.

28. The contentions and arguments by the Appellant were fervently contested by the Respondent in his submissions. It is upon these rival submissions that the trial court held as follows:-

“in simple terms the cause of action in suit leading to Civil appeal member 11 of 1980 was that the plaintiff’s father sought declaration that he was entitled to a portion of the suit land. The Court of Appeal ruled in favour of the plaintiff’s father to mean that the plaintiff’s father ought to have been registered as the owner of the portion awarded to him. Years later, the defendant’s father caused the entire suit land to be registered in his name. The cause of action now although concerning the same land has changed in the sense that it is now for cancellation and revocation of title wrongfully issued to the defendant’s father and rectification of the register at Machakos Lands Registry to reflect true owner”.

“... In this case the cause of action is different from the previous suit therefore the preliminary objection is unfounded. I proceed to dismiss same with costs to the Plaintiff/Respondents”.

29. It is my considered view that the appellants Preliminary Objection was not a proper Preliminary Objection as the contentions raised by the appellants in regard to what constituted the facts, were vehemently disputed by the respondents and therefore those matters can only be determined upon full trial.

30. In the premises, the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

31. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 14TH DAY OF FEBRUARY 2022

THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Kimathi holding brief for Mr. Muli for the Respondent

No appearance for the Appellant

Josephine Misigo – Court Assistant