



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 176 OF 2018

KAZUNGU KARISA HAZIZI

KASICHANA KARISA HAZIZI (Suing as the Legal Representative of the Estate of

KARISA HAZIZI NGUNGI.....**PLAINTIFFS**

VERSUS

JOSEPHINE WANJIKU MWAGHOTI.....**DEFENDANT**

RULING

The ruling is in respect of a Preliminary Objection dated 26th October 2021 by the Plaintiffs against the Defendant's Counter-Claim dated 25th September 2018 on the following grounds; -

1. That the defendant's Counter-claim is Res Judicata and offends the provisions of Section 7 of the Civil Procedure Act (Cap) 21, Laws of Kenya

2. That the defendant's counter-claim is offensive to provisions of Order 24 Rule 7 (1) of the Civil Procedure Act (Cap 21) Laws of Kenya

Counsel agreed to canvas the Preliminary Objection vide written submissions which were duly filed.

PLAINTIFFS' SUBMISSIONS.

Counsel gave a brief background to the suit and stated that the Plaintiffs filed this suit on 11th September, 2018 vide their joint Plaint dated 10th September, 2018 seeking for permanent injunctive orders against the Defendant in respect of Plot No. Kilifi/Mtondia/195 settlement scheme.

That the Defendant filed a defence and Counter Claim dated 25th September 2018 and before the matter could be heard, the Plaintiffs filed a Notice of withdrawal of their suit vide a Notice dated 26th October 2021.

Counsel submitted that the Defendant's Counter- Claim is res judicata as the Defendant's late husband filed a suit against the 1st Plaintiff in the year 2006 seeking permanent injunctive orders in respect of parcel of land known as Plot No. Kilifi/Mtondia/384 which is a subdivision of Plot No. Kilifi/Mtondia/195. Further that from the Counterclaim, Plot No. Kilifi/Mtondia is a subdivision of Plot No. Kilifi/Mtondia/195.

It was Counsel's further submission that the suit between the Defendant's late husband and the Plaintiffs was dismissed for want of prosecution and that the Defendant's Counter Claim is res judicata as the subject matter and parties are the same as in the previous suit. That the Defendant derives her authority vide the letters of administration.

Counsel relied on the case of *Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR* on res judicata and *Thomas K. Sambu v Paul K. Chepkwony [2018] eKLR* on the issue that a dismissal for want of prosecution or non-attendance amounts to a final judgment of the court unless it is set aside or an appeal is filed.

Counsel therefore submitted that the Counterclaim is res judicata hence the Preliminary Objection should be upheld and the suit struck out.

DEFENDANT'S SUBMISSIONS

Counsel opposed the Preliminary Objection and submitted that there is no relation between the current suit and the previous suit as the subject matter of the counter-claim is Plot. No. KILIFI/MTONDIA/2916, measuring 1.21 hectares (3) acres) whereas the subject matter of the Plaintiffs suit against the Defendant was title number KILIFI/MTONDIA/195 measuring 18 acres.

It was Counsel's submission that the in the alleged previous suit *ELC No. 20 OF 2006* the subject of the suit was title No. KILIFI/MTONDIA/384, measuring 4.96 hectares and that a perusal of the pleadings in *ELC No. 176 of 2016* and *ELC No. 20 of 2006* does not show any connection between the two suits, hence evidence of the parties will be required to determine whether there is a similarity.

Counsel further submitted that a Preliminary Objection can be raised only where a pure point of law stands out from the pleadings of the parties, and where the court is called upon to look at the evidence before determining the alleged point of law, then the same does not qualify as a Preliminary Objection.

Counsel relied on the Supreme Court case of *Aviation & Allied Workers Union Kenya –vs- Kenya Airways Ltd & 3 Others (2015) eKLR* and the Court of Appeal in *Suleiman said Shabhal –vs IEBC & 3 Others (2014) eKLR* where the court held that to constitute res judicata there must be adjudication which conclusively determines the rights of the parties with regard to all the matters in controversy and urged the court to dismiss the Preliminary Objection.

ANALYSIS AND DETERMINATION.

This is a Preliminary Objection raised on a point of law on the grounds that this matter is res judicata. The issue for determination is whether this suit falls on all fours of Section 7 of the Civil Procedure Act which stipulates as follows: -

“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.”

Is the Preliminary Objection as raised by the Plaintiffs purely on a point of law or the court would need to look for evidence to decide on the issue whether the matter is res judicata or not.

The Applicant referred to a previous suit involving the husband of the Defendant and suit land which was subdivided and resultant titles issued. No such pleadings were availed to the court to peruse to ascertain whether the suit is res judicata or not.

Counsel submitted that the suit was dismissed for want of prosecution but did not tell the court whether any action was taken to either reinstate it or not. The court is cognizant of precedents that a dismissed matter for want of prosecution or non-attendance amounts to a final judgment unless the same is reinstated or appealed against as held in the case of *Njue Ngai v Ephantus Njiru Ngai & another (supra)*.

I also wish to rely on the case of *George Kamau Kimani & 4 Others Vs County Government of Trans Nzoia & Another (2014), eKLR*, where the Court held that: -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

I am of the view that the Applicant should have filed a Notice of Motion annexing the previous pleadings to enable the court determine whether the matter is res judicata or not. As I have stated above that such pleadings were not availed to the court for perusal. Was the court to look for the pleadings to enable it determine the issue. When a court is called upon to look outside the pleadings, then it does fit to be termed as a Preliminary Objection.

Similarly, in the case of *Michael Bett Siror Vs Jackson Koech [2019] eKLR* where the Court of Appeal held that: -

“The appellant was contending that there were previous suits between the same parties’ arising from the same cause of action. The doctrine of res judicata bars the bringing of another suit where there has been a previous suit between the same parties that has been heard and finally determined by a competent court. The rationale is that it would be pointless and a waste of judicial time, to re-litigate issues that have already been addressed and determined by the court. It was not disputed that there were previous proceedings between the parties and/or parties claiming under them. The question that the learned judge ought to have addressed is whether these previous suits involved the same issues as the respondent’s current suit and if so, whether, the issues in the previous suits were finally determined.

Both the appellant and the respondent in their affidavit sworn in support and in response to the appellant’s motion, were in agreement that two of the previous suits filed by the respondent were dismissed for want of prosecution, while another was abandoned and withdrawn by the respondent. This means that none of the suits was fully argued nor were the issues finally determined.

We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment 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 judgment is the result of what may be described as a technical knockout.

Thus, we reject the appellant's contention and find that the application of the doctrine of res judicata was very contentious and required full investigation at the trial, more so in a longstanding land dispute involving a big parcel of land and several other people."

As much as a dismissal of a suit for want of prosecution or non-attendance amount to a judgment, such a judgment does not fit well or satisfy the requirements of Section 7 of the Civil Procedure Act as the matter has not been adjudicated and determined on merit but on a technicality.

I have considered the submissions by Counsel and find that the Preliminary Objection lacks merit and is therefore dismissed with costs to the Defendant. The matter to be fixed for hearing of the Counterclaim.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.