



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 30 OF 2019**

**MICHAEL MBITHI MUKOLYA** (*Suing as the legal representative of the Estate of MUKOLYA KITHU – deceased*)

**RAPHAEL KALOKI** (*Suing as the legal representative of the Estate of DISHON ITUTE KITHU – deceased*)

**MAURICE MUTHAMA KITHU**

**PAUL MWANGANGI MUIITHYA** (*Suing as the legal representative of the Estate of MUIITHYA KITHU MICHAEL alias*

**MUIITHYA KITHU – deceased**)

**SIMON MULEI NZWILI** (*Suing as the legal representative of the Estate of*  
*of*

**NZWILI NTHENGE KITHU – deceased**) **.PLAINTIFFS**

**VERSUS**

**BONFACE MULWA**.....**1<sup>ST</sup> DEFENDANT**

**HENRY MULWA**.....**2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION**.....**3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR**.....**4<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Notice of Motion application dated the 6<sup>th</sup> May, 2021 where they seek the following orders:

- 1. Spent**
- 2. That the Honourable Court do stay a Permanent Order issued on 30<sup>th</sup> July, 2019 and its consequential orders pending inter-partes hearing of this application.**
- 3. That the Honourable Court do please vacate or set aside an Order issued on 30<sup>th</sup> July, 2019 and its Consequential Orders.**
- 4. That the Complaint dated herein be struck out for being res judicata and time barred as Decree was issued on 4<sup>th</sup> November, 1997.**
- 5. Costs do abide the application.**

The application is premised on the grounds on the face of it and the supporting affidavit of BONFACE MULWA where he deposes that this matter was concluded on 4<sup>th</sup> November, 1997 and attempts to challenge the Decree has been unsuccessful. He claims an Order of implementation was obtained before both parties in the Trial Court and implementation is scheduled on 7<sup>th</sup> May, 2021 when the suit land is set to be subdivided. He contends that through misrepresentation, the Respondents obtained an Order against a valid Court Order issued on 4<sup>th</sup> November, 1997 and this is a total abuse of the court process. He insists the Order should be set aside and implementation proceed. He explains that since 1997 the Applicants have been unable to implement the Order of this Court as the Respondents have engaged in

unorthodox methods which include but not limited to missing court files. Further, litigation must come to an end. He reiterates that this matter is res judicata by virtue of Misc. Application No. 48 of 1997. He avers that the Appeal was dismissed by Justice Dulu vide Judicial Review Application No. 72 of 2009. Further, that subsequent applications by the Plaintiffs have been dismissed vide Machakos Misc. App. No. 22 of 1998 and Machakos Misc No. 19 of 1999 respectively.

The Plaintiffs opposed the application by filing a replying affidavit sworn by RAPHAEL KALOKI where he deposes that the Honourable Court issued the impugned Orders procedurally and lawfully. Further, all material information was presented to court. He provided highlights of the dispute herein dating back to 1970. He insisted the Defendants are seeking to enforce orders obtained in flawed proceedings. Further, that the Court of Appeal had already rendered itself in the matter vide Nairobi HCCA 105 of 1971 which Appeal was decided in favour of the Plaintiffs on 28<sup>th</sup> July, 1977 where the Judge held that Mulili was a mere invitee and could not claim ownership of the land. He insists the said Judgement upheld the Judgement as rendered vide DMCL 74/1970 delivered on 30<sup>th</sup> March, 1971. Further, the Appeal filed by the Mulili family in the Court of Appeal being Civil Appeal No. 16 of 1978 was dismissed on 7<sup>th</sup> November, 1979. He reiterates that the operative order in this instance is the one issued in Tawa DMCL 74 of 1970 in which the Mulili family were ordered to vacate the suit land in six months. Further, the Mulili family was then forcefully evicted from the suit land in 1981. He explains that during adjudication process the Adjudication Officer erroneously registered the suit land in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's family in total disregard of the orders issued at Tawa Court vide DMCL 74 of 1970 on 30<sup>th</sup> March, 1971. He contends that in 1996, the Defendants filed a case at the Land Dispute Tribunal being Tribunal Case No. 150 of 1996 which Tribunal acted ultra vires its powers by decreeing that the land parcels Nos. 207 and 209 be subdivided into two portions between the Mulili and Kithu families. Further, the orders were issued in utter disregard of the Court of Appeal decision. Further, it did not have jurisdiction to deal with the matter. He states that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceeded to adopt the Tribunal Award vide PMCC Misc. Appl No. 48 of 1997 but this did not sanitize an otherwise flawed and illegal process. Further, that the highlights herein were presented to court before the orders dated 30<sup>th</sup> July, 2019 were issued in the presence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' advocates then on record.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' filed a further affidavit reiterating their averments and insisted there is a valid Decree to date vide Misc PMCC No. 48 of 1997. Further, that attempts to challenge the said Order failed terribly vide Judicial Review Misc No. 72 of 2009, which unfortunately the Respondent is avoiding to quote. He avers that the decisions referred to in DMCL No. 70 of 1970; No. 39 of 1991; No. 105 of 1971 and No. 16 of 1978 are irrelevant and not related to this matter. Further, the issues are different and subject matter not disclosed. He avers that no single decision resolved the dispute between the parties herein as parties are different. Further, in the premises, the matters are res judicata due to a valid court order issued on 4<sup>th</sup> November, 1997 in the presence of both parties. He states that the orders obtained on 30<sup>th</sup> July, 2019 were based on misrepresentation and mischievously couched.

The application was canvassed by way of written submissions.

#### **Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 6<sup>th</sup> May, 2021 including the respective affidavits, annexures and rivalling submissions, the following are the issues for determination:

- ***Whether this court should vary and set aside the orders issued on 30<sup>th</sup> July, 2019.***
- ***Whether the Plaintiffs' Plaint should be struck out with costs, for being res judicata.***

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Applicants in their submissions reiterated their averments above and insisted this suit is res judicata. To support their arguments, they relied on the following decisions: ***Omondi Versus National Bank of Kenya Ltd & Others (2001) EA 177; Henry Wanyama Khaemba Vs Chartered Bank Ltd, Civil Case 560 of 2006; Trade Bank Ltd V L. Z. Engineering Construction Ltd (2000) IRA 266; and Zurich Insurance Co. PLC Vs Colin Richard (2011) EWCA Civil 641.***

The Plaintiffs in their submissions relied on their averments in the replying affidavit and insisted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not established a basis to be granted the orders sought herein. Further, that orders issued on 30<sup>th</sup> July, 2019 were rightfully issued in the presence of both parties. They contend that the orders sought by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be determined on merit. They reiterate that the instant application is omnibus which cannot be adjudicated upon without prejudicing them. Further, that the Plaint raises novel issues which the court should afford them an opportunity to ventilate. They deny the instant suit is res judicata since the issues raised in the current suit have not been directly in issue before a court. Further, they have not been conclusively determined by a court of competent jurisdiction. To support their arguments, they relied on the following decisions: ***Mary Kerubo Ogoti V Chief Magistrate Court, Kisii Law Courts & 5 Others (2017) eKLR; Challenger Trade Finance Segregated Portfolio of South Africa SPC Vs Danish Brewing Company E. A Limited & 2 others (2020) eKLR and In re estate of David Wang'ang'a Gichuhi (Deceased) (2020) eKLR.***

Before I proceed to make a determination of the issues raised herein, I wish to provide a highlight of the Order issued on 30<sup>th</sup> July, 2019 which reads as follows:

***"1. That an Order of permanent injunction is hereby granted restraining the Chief Land Registrar from implementing the order issued on 4<sup>th</sup> November, 1997 in Machakos PMCC Misc. Application No. 48 of 1997 for being null and void pending hearing and determination of this application.***

***2. That the Respondent to file a replying affidavit within 14 days and the Applicant to file a further affidavit and submissions within 14 days of service.***

**3. That the Respondent to file submissions within 14 days of service.**

**4. That hearing of Notice of Motion be heard on 16<sup>th</sup> October, 2019.”**

From the Court records, I note this order was issued in respect to the application dated the 20<sup>th</sup> March, 2019, in the presence of both the Plaintiffs and 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ Counsels, hence was not ex parte. Further, on the 16<sup>th</sup> October, 2019, since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had not filed a replying affidavit to the application dated 20<sup>th</sup> March, 2019 in 14 days as had been directed, the Court proceeded to allow the said application as it was unopposed. I note the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have brought the instant application under sections 1A, 1B and 7 of the Civil Procedure Act. They seek to rely on the oxygen principles yet they failed to oppose the application which led to the issuance of the impugned order. Since the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were represented by Counsel, I opine that they should have furnished court with an affidavit from the said Counsel on why they failed to file a response to oppose the application dated 20<sup>th</sup> March, 2019, which was allowed but they now seek to set aside the orders issued on 30<sup>th</sup> July, 2019. To my mind I find that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not provided any plausible reasons and are not being candid. I find that no proper reason has been canvassed on why the impugned orders which were confirmed on 16<sup>th</sup> October, 2019 should be set aside and I will decline to do so.

As to whether the Plaintiffs’ Plaint should be struck out with costs.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants seek for the Plaint to be struck out with costs for being *res judicata*.

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*.

While in the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, the Court held that: -

**“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

In this instance, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim this suit is *res judicata* as the matter had been dealt with vide PMCC Misc Cause No.48 of 1997. On perusal of the said miscellaneous cause, I note it was adopting the Award of the Land Disputes Tribunal which directed that the suit lands were to be subdivided equally between the Plaintiffs’ as well as 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ families. While in the instant suit the Plaintiffs seek the following orders:

- a. **An order that registration of the Defendants in the titles to Muthetheni/Kyethivo/207 and 209 was illegal, null and void in view of the orders issued in the previous proceedings culminating in the Court of Appeal order issued on 7<sup>th</sup> November, 1979.**

**b. A permanent order of injunction be issued restraining the Chief Land Registrar from implementing the order issued in Machakos PMCC Misc. App No. 48 of 1997 for being null and void.**

**c. An order directed to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to ensure the removal of the names Mukutha Mulili and Mulwa Mukutha from the register of titles No. 207.**

**d. An order directed to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to register the titles to Muthetheni/Kyethivo/207 and 209 in favour of the Plaintiffs.**

**e. Any other order as this Honourable Court may deem fit and just to grant.**

**f. Costs of this suit.**

First and foremost, I wish to state that, this is a matter that has been long standing from 1970 with different courts dealing with different angles of the dispute. I note in Nairobi HCCA 105 of 1971 the High Court upheld that the Mulili family which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' are representing could not have a claim over the suit land as it was an invitee. The Mulili family then filed an Appeal which was dismissed and this in essence meant the judgement of TAWA DMC No. 74 of 1970 was upheld. Further, in this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have not filed any Defence to controvert the Plaintiffs averments as per the Complaint and only seek to have the Complaint struck out. It is trite that for a party to rely on Defence of res judicata, the same has to be pleaded in the Defence but at this juncture, this has not been done. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim the suit is res judicata, yet I note from the proceedings herein, they actually proceeded to lodge a complaint at the Land Disputes Tribunal in 1996 much later after the Court of Appeal had made a decision over the disputed land in favour of the Plaintiffs. Be that as it may, on perusal of the Complaint and the impugned Order in PMCC Misc. 48 of 1997, I note some of the issues raised in the two suits are different. Insofar as it has emerged that the suit land was dealt with in the former suit, I find that the Applicants have failed to demonstrate in their affidavit that the issues herein were directly and substantially in issue in the aforementioned misc cause and the issue was heard and finally determined in the former suit. It is my considered view that the burden of proof was upon the Applicants as envisaged in section 107 of the Evidence Act to confirm this suit is *res judicata* which I find they have failed to discharge.

Based on the facts as presented while applying the legal provisions cited above as well as associating myself with the quoted decisions, I find that this suit is not res judicata as claimed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and in the interest of justice, noting the Plaintiffs have provided a history of the dispute herein and made serious allegations against the Defendants in the Complaint, 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 6<sup>th</sup> May, 2021 unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10<sup>TH</sup> DAY OF MARCH, 2022**

**CHRISTINE OCHIENG**

**JUDGE**