



**Muinde & 2 others v Arts 680 & another; Muriithi & 2 others (Interested Parties)  
(Environment & Land Case 3 of 2021) [2022] KEELC 15673 (KLR) (4 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 15673 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 3 OF 2021**

**AE DENA, J**

**APRIL 4, 2022**

**BETWEEN**

**ROBERT MUINDE ..... 1<sup>ST</sup> PLAINTIFF**

**MARK MUINDE ..... 2<sup>ND</sup> PLAINTIFF**

**VYONNE MUINDE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ARTS 680 ..... 1<sup>ST</sup> DEFENDANT**

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

**AND**

**ANNE WANGECI MURIITHI ..... INTERESTED PARTY**

**GRACE NYAGURA MURIITHI ..... INTERESTED PARTY**

**MARTHA WANGUI MURIITHI ..... INTERESTED PARTY**

**RULING**

**The Applications**

1. The subject of this ruling is the two applications dated 11/3/2021 and 24/3/2022. The application dated 11/3/2021 is by the Interested Party's and seeks that the suit be struck. The same is premised upon grounds listed thereon and supported by affidavits sworn by Joseph Karanja Kanyi sworn on 14/3/22 and 22/4/21. It is averred that the suit was filed in the year 2017 against the defendants who were proprietors of land parcel Nos Kwale/Galu Kinondo/1605,1606,1607 and 1608 seeking for injunctive orders and further compelling the 1<sup>st</sup> defendant to pull down a perimeter wall that had been erected on the plaintiff's property.



2. The Interested Parties were then granted leave to be enjoined in this suit as proprietors of Kwale/Galu Kinondo/52 and 51. Plots 1607 and 1608 were subdivisions of Kwale/Galu Kinondo/51. Plots 1605 and 1606 were subdivisions of Kwale/Galu Kinondo/52.
3. It is averred that by the time the present suit was filed, a determination had already been made on Plots 1607 and 1608 by an order of mandamus dated 25/2/2009 in Misc.No.887 of 2005 directing cancellation of all entries in Kwale/Galu Kinondo/52 and restoring the names of Martha Wangui Muriithi and Elijah Muriithi the interested party.
4. It is stated that Kwale/Galu Kinondo/51 was also subject of the proceedings in ELC No 218 of 2004 where judgement was delivered on 19/12/2019. That a decree was issued on 4/5/2021 where the names of the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs then registered as owners of Kwale/Galu Kinondo/1605 and 1606 were cancelled and the property ordered to be reverted to Kwale/Galu Kinondo/51.
5. According to the applicants the plaintiffs cannot litigate as proprietors over a matter that has clearly been adjudged as not belonging to them. It is contended that the plaintiff lacks proprietary interest in the suit properties. The suit is also termed an abuse of the court process and a waste of courts time. The court is urged to allow the application.
6. The second application is dated 24/3/2022 and seeks orders similar to those in the application dated 11/3/2021. The grounds in the application reiterate the averments raised in the affidavit sworn by Joseph Karanja Kanyi. The affidavit in support of the application dated 24/3/2022 is sworn by one Himashu Chunilal. It is averred that issues surrounding ownership of the suit property were already determined in ELC No. 218 of 2004 and in Misc. Civil Application No. 887 of 2005. In his supplementary affidavit sworn on 11/4/22 reiterating the outcomes of the suits cited herein it is additionally averred that the 1<sup>st</sup> defendant is the registered owner of Kwale/Galu Kinondo/53 which borders Kwale/Galu Kinondo/52 registered under Martha Wangui Muriithi and Elijah Muriithi. That the court in Republic Vs Msambweni Land Dispute Tribunal & 3 Others Exparte ARTS 680 Ltd Judicial Review Application No. 493 of 2009 reaffirmed the 1<sup>st</sup> defendant ownership of Kwale/Galu Kinondo/53 and prohibited the 2<sup>nd</sup> defendant from making any transfer in respect of the property. Therefore, there is no dispute on its ownership. That the court in ELC 218 of 2004 held that the names of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs be cancelled from the register of owners of parcel Kwale/Galu Kinondo/52. That the legal implications of the determinations herein were that the plaintiffs do not share any boundary with the 1<sup>st</sup> defendant.
7. It is further stated that the Notice of Appeal was filed on 25/02/2009 and no evidence had been provided to show that the plaintiff has instituted the formal appeal. That the Notice of Appeal cannot be an indicator that the case has not been fully decided which is unreasonable and unjustified. That the appeal cannot be injected with life 4,784 days after it was filed.
8. In response to the applications, the Plaintiffs filed a replying affidavit sworn by their advocate Mwangi Munyuga. He avers that res judicata cannot arise as there has been no previous suit wherein the 1<sup>st</sup> defendant was a party or any other party under whom the 1<sup>st</sup> defendant claims or was litigating under. That the matters directly and substantially in issue in the present suit are different from those in Mombasa ELC case No. 218 of 2004 and Mombasa HCCC No Misc. App No 887 of 2005. The pleadings were attached. It is also stated that the judgements in Mombasa ELC Case No 218 of 2004 and the ruling in Mombasa HCCC No Misc App No 887 of 2005 do not constitute the final determination of ownership rights and /or existence of Titles No. Kwale/Galu Kinondo/1605,1606,1607 and 1608 appeals having been preferred against the said decisions.



9. Additionally, that the suit in Mombasa HCCC No Misc. App No 887 of 2005 were in the nature of judicial review and did not constitute determination of ownership rights to the suit property Kwale/Galu Kinondo/52 and the sub divisions resultant of the said parcel.
10. According to the plaintiffs, the suit by the interested parties had been filed against the 1<sup>st</sup> plaintiff for determination of proprietary rights in ELC 161 of 2014 which was actively prosecuted for 9 years, withdrawn on 21/6/2017 and the parties were not similar. That another suit Mombasa HCCC No 125 of 2009 was pending before court. It was urged that the present suit was properly before court and cannot be conceived as being an abuse of the court process. That the applications herein were misconceived and aimed at misleading the court by divulging part truths and withholding the rest in order to give the court a skewed perspective of the suit.
11. Mrs Waswa state counsel appearing for the Chief Land Registrar supported the applications but did not file any papers thereto.

### **Submissions**

12. The applications were canvassed by way of written submissions which parties filed and exchanged.

### **Interested Party's/Applicants Submissions**

13. Highlighting several factors deemed as the gist of the application it is submitted that the court has already made a determination as to ownership of the suit properties. The plaintiffs lack the requisite locus to sustain the suit. It is submitted that the interested parties are not estopped from raising res judicata as the issues raised in the previous suits are similar to the ones raised in this suit. Several authorities were relied upon to buttress their arguments. The court is urged to allow the interested party's application and dismiss the plaintiffs suit.

### **Plaintiffs/Respondents Submissions.**

14. The plaintiff identified three issues for determination on both applications. Whether the suit should be struck out for being an abuse of the court process; Whether the previous cases over Kwale/Galu Kinondo/51 and Kwale/Galu Kinondo/52 render this suit fit for dismissal and Whether the costs should be awarded to the Applicants.
15. Based on the decisions in *C K Bett Traders Limited & 2 Others Versus Kennedy Mwangi & Another* [2021] and *The Independent Electoral and Boundaries Commission Versus Maina Kiai & 5 Others* [2017] eKLR it was submitted that there was only one suit ELC No 161 of 2014 [Formerly Civil Suit No 152 of 2008] filed between the parties instituted by the interested parties against the plaintiffs and the 1<sup>st</sup> defendant. That the parties were not being sued in the same capacity as they were in the previous suit. That the issues in the present suit were not directly and substantially in issue in the former suits. On whether the previous cases over the suit properties render this suit fit for dismissal, it was submitted that the disputes over the suit properties have not been conclusively dealt with by the court. That the suits are pending determination at an appeal stage and were awaiting determination. It was lastly submitted that the applicants were not deserving of costs.

### **Analysis and Determination**

16. I have considered the applications filed before court, their respective responses, the submissions and authorities cited by both parties. The main issue for determination is whether the present suit is res judicata and therefore an abuse of the court process warranting its dismissal by this court.



17. The doctrine of res judicata is provided for under Section 7 of the Civil Procedure Act which sets the following elements that must be established in order to terminate a suit on the basis of res judicata
- a. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits.
  - b. The former suit must have been between the same parties or parties under whom they claim
  - c. The parties must have litigated under the same title
  - d. The court which decided the former suit must have been competent
  - e. The former suit must have been heard and finally decided by the court in the former suit.
18. The rationale for res judicata was articulated by the Court of Appeal in John Florence Maritime Services Limited & Ano. vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR as follows: -
- .“the rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”
19. It is the contention of the 1<sup>st</sup> defendants and the Interested Parties that the issues in this suit have already been determined in previous suits that involved the suit properties. I have perused the pleadings herein and the attachments thereto which prove the existence of the following suits by the parties;
- a. Mombasa Judicial Review Republic Versus Msambweni Land Disputes Tribunal & 3 Others Exparte ARTS 680 Ltd
  - b. ELC 218 of 2004 Athman Juma Mwakuandika Versus Martha Wangui Muriithi & Elijah Waichagaru Muriithi
  - c. Republic Versus Land Disputes Tribunal Msambweni & Senior Resident Magistrates Court Kwale & Sampuli Salim Mwanyonje & Swalehe Salim Mwanyonje [Interested Parties] Misc. Appl No 887 of 2005
  - d. ELC No. 161 of 2014 which is not in issue for purposes of res judicata for it was withdrawn.
20. Is the subject matter herein directly and substantially the same matter which was directly and substantially in issue in the above mentioned suits? The subject matter in the present suit is Kwale/Galu Kinondo 1605, 1606, 1607 and 1608. These suits were all subdivisions of Kwale/Galu Kinondo/52 and 51. The court in Misc. Civil App 887 of 2005 ordered cancellation of the subdivisions of the suit parcel Kwale/Galu Kinondo/52 while the court in ELC Misc. 218 of 2004 held that the names of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs therein be cancelled from the register of parcel number Kwale/Galu Kinondo/51. Firstly in the present suit the plaintiffs claim to be the registered proprietors of all the subdivisions herein and wants to have the 1<sup>st</sup> defendant restrained from inter alia trespassing, wasting or interfering with the suit property. The claim for trespass cannot be separated from the issue of ownership however much one tries to disguise it. One must prove they are the owners of the land which the plaintiff are not. There is therefore no doubt the subject matter in the present suit and the



other suits revolve around the ownership of same properties being Kwale/Galu Kinondo/52 and 51 wherefrom the subdivisions being claimed arose from.

21. The plaintiffs urge that the parties herein were not being sued in the same capacity as they were in the previous suit. My understanding from the plaintiffs pleadings is that the 1<sup>st</sup> defendant is being sued as a substantive party in the present suit as opposed to an interested party in 161 of 2014. But with profound respect to counsel I do not see how this argument helps the plaintiffs in the instance case as long as the property they state belong to them had been adjudged in favor of another person. Even if I were to look at it from a perspective of a boundary issue the subject properties being claimed by the plaintiffs are still Kwale/Galu Kinondo/52 and 51 and not different parcels. For me I agree with the contention herein that the plaintiffs could be referring to Kwale/Galu Kinondo/53 registered in the 1<sup>st</sup> defendant's name and which in my view is not in issue herein as it has not been referred in the plaint. Even assuming I'm wrong on this one the parties in the entire spectrum of the suits don't change they have basically been the same ab initio.
22. I then asked myself whether the said suits were heard on merit and finally decided. In posing this question I did not have in mind a determination by technical knockout such as a dismissal of a suit for non-attendance or for want of prosecution. It is noteworthy that while such would amount to a judgment, it could not satisfy the requirements of Section 7 of the *Civil Procedure Act*, as long as the issues therein had not been addressed and finally determined by the court see *Michael Bett Siror vs. Jackson Koech* (2019) eKLR. Firstly, discounting case 616 of 2014 which was withdrawn my opinion is that the issues raised in the present suit have already been substantively dealt with in the suits listed earlier and I need not belabor the point. None of the suits were determined summarily but the courts competent to try them heard and decided the matters. This brings me to the plaintiff's contention that proceedings in Mombasa HCCC No Misc. App No 887 of 2005 did not constitute determination of ownership rights to the suit property Kwale/Galu Kinondo/52 and the sub divisions resultant of the said parcel being judicial review proceedings. And I agree but I don't see the point being raised here since there was no determination of ownership. Title was just reverted to the Muriithi's as the tribunal had acted ultavires. However, it is evident that ownership for property Kwale/Galu Kinondo/52 has been decided before another court with competent jurisdiction.
23. The plaintiffs claim that appeals to the said decisions have been lodged at the Court of Appeal and hence the suits have not been conclusively been dealt with by the court. Respectfully this cannot be a ground to defeat res judicata. At the superior court level, the suit has been determined and the fact that an appeal has been preferred cannot oust the principle of res judicata. Counsel did not cite to this court any authorities in support of his contention that a suit is not res judicata when an appeal has been preferred against the decision of the court. If this were the intention of the drafters it would have been easier to state so by providing a proviso or exceptions in section 7 herein. I have also noted that the Notice of Appeal on record was filed on 25/2/2009 and the appeal has not been prosecuted over 10 years later. No memorandum of appeal was annexed or even displayed. In any event, a Notice of Appeal is not an appeal, but just a formal notification of an intended appeal as was stated in *Machakos Misc. Civil No E218 of 2021 Emmanuel Ndithya Versus Total Kenya Limited*.
24. The 1<sup>st</sup> defendant wants this suit struck out for being an abuse of the court process. While discussing the issue of abuse of the court process the Court of Appeal in *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR 229, stated as follows; -

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective



administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive’.

From my analysis herein this suit is clearly an abuse of the court process and I need not say more.

25. It is this court’s finding that the instant suit raises issues that have already been substantially and conclusively dealt with by the previous courts and there must be an end to litigation between the parties herein on the subject suit properties. The upshot is that the applications dated 11/3/2021 and 24/3/2022 are merited. The suit is dismissed for being resjudicata and an abuse of the court process.
26. As provided by Section 27 of the *Civil Procedure Act*, cost is granted at the discretion of the Court. However, costs normally follow the event. The interested parties and defendants herein are the successful litigant and are entitled to costs to be borne by the plaintiffs herein.

It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 4<sup>TH</sup> DAY OF APRIL, 2022**

**A.E. DENA**

**JUDGE**

**A.E. DENA**

**JUDGE**

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Kurgat for 1<sup>st</sup> Defendant

Ms Mango for the Interested Party and also H/B for Mrs Waswa for the 2<sup>nd</sup> defendant

N/A for the plaintiffs

Mr. Mazerah - Court Assistant.

