



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwamule Company Limited v Chief Land Registrar & 2 others (Environment & Land Case 105 of 2019) [2022] KEELC 3670 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3670 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 105 OF 2019**

**JO OLOLA, J  
MAY 12, 2022**

**BETWEEN**

**MWAMULE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> DEFENDANT**

**FABIA CAMPANELLA ..... 2<sup>ND</sup> DEFENDANT**

**CAMPANELLA PAOLA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling relates to two applications. The first application dated November 26, 2019 was instituted by the plaintiffs herein – Mwamule Company Limited, while the second application dated October 15, 2020 was instituted jointly by Fabia Campanella and Campanella Paola the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein respectively.
2. By the first application, the plaintiff company prays for orders that:
3. Pending the hearing and determination of this suit the 2<sup>nd</sup> and 3<sup>rd</sup> defendants whether by themselves individually or jointly, their servants and/or agents or otherwise be prevented and/or restricted from doing the following acts or any of them, that is to say from;
  - (a) Entering into any sale agreement, selling, transferring and disposing of, pledging, leasing, charging or in any other manner howsoever alienating or dealing with LR No 1883 (original No 424/31 (one half 1/2 undivided share);
  - (b) Effecting any change whatsoever in the state, condition, ownership and occupation of the suit properties or any part thereof; and



- (c) Interfering in any manner whatsoever in the plaintiff's interest in the suit property including the Plaintiff's right to occupation and enjoyment (of) the suit property;
4. Spent.
  5. An order under section 68 of the Land Registration Act No 2 of 2015 (Amendment) Act 1959 that all further registration or change of registration in the ownership, leasing, subleasing, allotment, user occupation or any kind of right title or interest in all those pieces of land known as LR No 1883 (original No 424/31 (one half 1/2 undivided share) with any land registry, government department, and all other registering authorities be and is hereby inhibited pending the hearing and determination of this suit and the order be noted on the respective land register;
  6. That the orders sought in prayers 2, 3, 4 and 5 above do bind the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and further that the 1<sup>st</sup> defendant be and is hereby directed to make the entries of the said orders in the relevant land register; and
  7. That the costs of this application be provided for.
3. That application is supported by an affidavit sworn by Ernest K Murimi, a director of the plaintiff and is premised on the grounds that:
- (i) On October 9, 2006, the Social Ministry Research Network Centre (SOMINEREC) received a gift/donation of the above mentioned suit property from one Rocchi Pompeo who was the registered owner of the 1/2 undivided share thereof. The other ½ undivided share was registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants;
  - (ii) On September 1, 2014, SOMINEREC appointed the plaintiff to be its trustee wherein it was agreed that the plaintiff would be the registered owner of the suit property. An indenture of conveyance dated March 16, 2015 was then executed transferring the ownership of the property from the said Rocchi Pompeo to the plaintiff's.
  - (iii) On March 30, 2015, the 1<sup>st</sup> defendant registered the indenture of conveyance at the Coast Land Registry in favour of the plaintiff who became the legal and registered owner of half share of the subject property. The other half remained in the hands of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants;
  - (iv) Sometimes in August, 2019 the plaintiff went to inspect the suit property and found that their half share had been occupied by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants claiming to be the owners of the entire property;
  - (v) It subsequently came to the knowledge of the plaintiffs that the entire suit property had since been transferred and registered solely in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants;
  - (vi) The said registration was fraudulent and illegal as it was done without the plaintiff's consent. Accordingly, the plaintiff stands to suffer irreparable loss if the fraudulent and illegal registration is left to be as it is;
  - (vii) If the orders sought are granted, the defendants are not likely to suffer any prejudice as compared to the loss the plaintiff stands to suffer and the plaintiff prays that the orders sought be granted.
4. By their second application dated October 15, 2020 however, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants urge the court to be pleased to dismiss the plaintiff's suit on the grounds that the same is *res judicata*. The said



application which is supported by an affidavit sworn by the defendants' learned advocate on record Gicharu Kimani is premised on the grounds that:

- (i) i) The plaintiff's entire suit is *res judicata* this honourable court having rendered its judgment in Malindi ELC Case No 132 of 2015 (OS); [\*Fabia Campanella & another v Rocchi Pompeo and 3 others\*](#) on September 14, 2016;
  - (ii) Subsequently on December 4, 2019, the plaintiff filed this suit being Malindi ELC Case No 105 of 2019 over the same subject matter involving the same parties and the plaintiff is thus pushing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to litigate twice over the same subject matter involving the same parties herein.
5. I have carefully perused and considered the two applications and the respective responses thereto. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the plaintiff as well as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The Chief Land Registrar sued herein as the 1<sup>st</sup> defendant did not take part in the two rival motions.
6. The second application dated October 15, 2020 has been instituted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants pursuant to their notice of preliminary objection dated March 2, 2020 wherein they assert that the present suit is *res judicata* Malindi ELC Case No 132 of 2015 (OS); [\*Fabia Campanella & another v Rocchi Pompeo and 3 others\*](#) which suit was instituted earlier on September 14, 2016. Given its ramifications to the entire suit, it is trite that I consider first the defendants' application.
7. The doctrine of *res judicata* is captured under section 7 of the [\*Civil Procedure Act\*](#) which provides 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.”
8. Considering the application of the doctrine in [\*Kenya Commercial Bank Limited v Benjob Amalgamated Limited\*](#) [2017] eKLR, the Court of Appeal held that:
- “The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit.
- (a) The 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; and
  - (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.”
9. In support of their contention that the suit herein is *res judicata*, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants depose at paragraphs 1 to 5 of the seven – paragraph affidavit sworn by their advocate on record as follows:



1. That (the) defendant/applicants filed an originating Summons dated August 3, 2015 in Malindi ELC Case No 132 of 2015 (OS) *Fabia Campanella and Another v Rocchi Pampeo and 3 others*. In the summons the defendants/applicants sought orders that they (had) become entitled by adverse possession and be registered as the proprietors of plot No 1883 (424/31) situated in Malindi. (Annexed herewith and marked GK 1 (are) copies of the pleadings);
  2. That subsequently, on the September 14, 2016, this honourable court rendered its judgment in the said suit in favour of the defendants/applicants herein. (Annexed herewith and marked GK2 is a copy of the said judgment);
  3. That a decree was subsequently issued on the October 12, 2016, (Annexed herewith marked GK3 is a copy of the decree);
  4. That the issue of the ownership of the parcel of land known as LR No 1883 (original No 424/31), (the) suit property herein was heard and determined by the ELC Court in Malindi between the plaintiff/respondent and the defendants herein in ELC (Case) No 132 of 2015 (OS);
  5. That it is in the interest of justice that the plaintiff/respondent's suit be dismissed as it is res judicata and thus an abuse of the court process.
10. I have had occasion to peruse the said pleadings as well as the judgment of the Honourable Justice Oscar Angote annexed to the supporting affidavit. In the originating summons filed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the four respondents were named therein as Rocchi Pampeo, Angello Ricchi, the Land Registrar Mombasa as well as the Honourable the Attorney General. There is no explanation in the supporting affidavit filed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as to the relation between the said respondents and the plaintiff herein – Mwamule Company Limited.
  11. That explanation however emerges from the affidavit filed in reply to the defendant's application by the plaintiff's director Ernest K Murimi and filed herein on February 16, 2021. A perusal of the said affidavit reveals that the suit land had previously been acquired vide an indenture of conveyance dated February 14, 1997. By the said indenture, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants came to own one half (1/2) undivided share of the property while the other undivided share was owned by Rocchi Pompeo and Angello Ricchi who are named in the originating summons as the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  12. Those two respondents however did relinquish their shares on the land by gifting the same to the plaintiff vide two indentures registered in March, 2015. From a perusal of a certificate of search dated May 7, 2015 annexed to the plaintiff's replying affidavit afore said and marked "EKM 1" it was apparent that as at the said date, the suit property was registered in the names of the two defendants herein as owners of a half share while the plaintiff company owned the other half share.
  13. That being the case the two defendants could not purport as they did on August 3, 2015 to file ELC Case No 132 of 2015 against the said Rocchi Pompeo and Angello Ricchi as the owners of the other half share of the suit land. The two had long gifted the land to the plaintiff company which had subsequently been registered as a co-owner prior to the institution of the suit. There is no evidence at this stage that the plaintiff herein was a party to the suit and/or that the same was brought to its attention.
  14. Given the fact that the plaintiff was already registered as a co-owner of the suit land together with the defendants, the suit previously instituted for adverse possession by the defendants could only have been the result of gross negligence on their part and/or a massive attempt to mislead the court and abuse its process. It is little wonder that a perusal of the judgment of the court rendered on September 14, 2016



reveals that the persons named as the 1<sup>st</sup> and 2<sup>nd</sup> respondents therein did not enter appearance and/or respond to the claim. They had no obligation to do so as they had already relinquished any interests they had on the land.

15. Arising from the foregoing, it was clear to me that the present suit is not *res judicata*. The plaintiff herein who was a registered owner of the subject half undivided share in LR No 1883 neither knew of the existence of the suit nor were they given a chance to be heard on the same. In addition, it was clear to me that the issues in the present suit were not the same as those directly and substantially in issue in the former suit. In the matter before me, the plaintiff raises the substantial question of whether its interest as a legally registered proprietor to land can be defeated in the manner it was done herein and without notice or being heard thereon.
16. In the circumstances herein, it was apparent that the judgment delivered on September 14, 2016 in Malindi ELC 132 of 2015 was a consequence of misrepresentation and non-disclosure of material facts on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff was and remains the legal owner of the subject land as per the indenture dated March 16, 2015. Such registration is indeed *prima facie* evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner and the same can only be challenged on grounds of fraud or if obtained illegally or as a result of misrepresentation. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not challenged the plaintiff's title on those grounds and I did not think that they can enforce a decree against a party who was not party in the proceedings they had filed.
17. By the first application dated November 26, 2019 the plaintiff pray for orders of injunction and inhibition to issue against the defendants from dealing with the land and or alienating the same. From the foregoing circumstances I was left in no doubt that the plaintiff has made out a prima facie case with the probability of success.
18. The plaintiff has demonstrated that as at March 16, 2015, it was the registered proprietor of the suit property. It has also demonstrated that the same property was subsequently registered without any notice to itself in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein. In my considered view I did not think that property owned in undivided share can be subjected to adverse possession by one party before sub-division.
19. In any case it was clear to me that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein could not bring a proper claim of adverse possession against persons who were not the registered proprietors of the property at the point in time in which the action was brought.
20. Arising from the foregoing and for the avoidance of any doubt, I did not find an iota of merit in the second application as instituted by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. I dismiss the same. On the other hand, I was persuaded that there was overwhelming merit in the plaintiff's application. I allow the same in terms of prayers 3, 5 and 6 thereof.
21. The plaintiff shall also have the costs of both applications.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

In the presence of:

No appearance for the plaintiff

No appearance for the defendants

Court assistant - Kendi

**JO OLOLA**



**JUDGE**

