Silas & another v Minister for Lands and Settlement & another; Mbogo (Interested Party) (Environment and Land Judicial Review Appeal 1 of 2021) [2022] KEELC 2465 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2465 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND JUDICIAL REVIEW APPEAL 1 OF 2021

A KANIARU, J

JUNE 30, 2022

IN THE MATTER OF LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

IN THE MATTER OF ARTICLE 159 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF MBEERE/MBITA ADJUDICATION SECTION OF MBITA LOCATION OF GACHOKA DIVISION

IN THE MATTER OF AN APPEAL TO THE MINISTER'S LAND APPEAL CASE NUMBER 117 OF 2000

BETWEEN

IMAN MURIUKI SILAS ..... 1ST APPLICANT

KIRANGI NGURE ..... 2ND APPLICANT

AND

MINISTER FOR LANDS AND SETTLEMENT ..... 1ST RESPONDENT

REGISTRAR OF LANDS MBEERE SOUTH DISTRICT ..... 2ND RESPONDENT

AND

EFUREITHI IRIMA MBOGO ..... INTERESTED PARTY

RULING

1. This ruling is on a preliminary objection raised here vide a notice to raise it dated 21/4/2021. It is a multi-pronged objection premised on five (5) points as follows:

    1) That the application herein as drawn and filed offends Order 53 rule 2 of the *Civil Procedure Rules*.

2) That the application herein as drawn and filed offends Section 7 of the *Civil Procedure Act*, Cap 21, Laws of Kenya.

3) That application herein as drawn and filed does not disclose any cause of action against the respondents herein.

4) The said application as drawn and filed and the reliefs sought therein are incapable of being granted.

5) That the said chamber summons application as drawn and filed is based entirely on conjecture, ill-will and malice at least against the respondents and the same ought to be dismissed with costs.

2. The target of the objection is a summons in chambers filed here on 20/1/2021 and dated 28/12/2020. In the summons, Iman Muriuki Silas and Kirangi Ngure are described as 1st and 2nd Applicants. In actual fact, they are, or should be, the 1st and 2nd Exparte Applicants. The Minister for Lands and Settlement and the Registrar of Lands Mbeere South District are 1st and 2nd respondents respectively while Efureithi Irima Muga is an Interested party.

3. The exparte applicants intend to file a judicial review application in order to get orders of Certiorari and prohibition and the summons before the court now is essentially seeking leave to do so.

4. The objection was canvassed by way of written submissions. The respondents submissions were filed on 2/2/2022. It was submitted that the 2nd Exparte Applicant was also an exparte applicant in Judicial Review No. 40 of 2011, EMBU relating to the same parcels of land and asking for the same reliefs being sought in this matter. The court pronounced itself on that matter vide a ruling delivered on 7/11/2012. It dismissed the application.

5. This matter is therefore said to be Res-Judicata and the court was told that it violates Section 7 of the *Civil Procedure Act* (Cap 21). It was also said to be in conflict with Section 28 of the *Environment and Land Court Act*. Various decided authorities including the authority of *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 others* [2017] eKLR were cited to illustrate the essential element required to prove Res-Judicata.

6. It was submitted that Res Judicata principle aims at locking out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. According to the respondent, the subject matter and the reliefs sought in the present application are the same as those sought in the earlier matter before the High Court. The parties were more or less the same. The Exparte Applicants were said to be intending to re-open the same issues or causes of an action which rightly belonged in the earlier matter. It was stated that parties can not evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.

7. The application was also said to have been brought outside the 6 month period prescribed by order 53 rule 2 of *Civil Procedure Rules*.

8. Also pointed out is that the claims lack merits and the applicants were said to lack *Locus standi*. The court was urged to dismiss the application.

9. The applicants submissions were filed on 27/4/2022. According to the applicants what is before the court is not a true preliminary objection since, as pointed out by the respondents themselves, a true objection raises a pure point of law premised on the assumption that the facts by the other side are correct. It can not be raised if the facts are disputed or have to be ascertained.

10. Then the issue of jurisdiction was raised and the Attorney General was faulted for not backing the objection with valid evidential proof of judgement. He was said to lack *Locus standi* to raise the objection. The issue of Res-Judicata was said to be a contested one and the court was also stated as being called to exercise discretion.

11. Further, it was stated that the court that rendered determination in JR No. 40 of 2011, Embu, does not have jurisdiction over the present matter and its determination of the earlier matter was said to be unconstitutional. The applicants claim was said to be justified as there was arbitrary deprivation of property and limitation to enjoy property rights by 2nd respondent.

12. This court was said to have jurisdiction to entertain the matter and that it is the High Court itself that had wrongly assumed to have jurisdiction to entertain the earlier matter that was before it.

13. Order 53 rule 2, which was said to have been violated was said to be irrelevant, as the application is brought under Order 51 Rule 1 of *Civil Procedure Rules*. The court was told that this matter is not bad in law.

14. I have read the rival submissions, considered the preliminary objection as filed, and also looked at the chamber summons. I have read the determination that was rendered by the High Court. It is true that the subject matter was the same. The 2nd respondent was an Exparte Applicant in that application and the reliefs sought were the same.

15. Infact, the application before this court and the one before the High Court for determination at the time are materially similar. I am convinced that the High Court had jurisdiction to handle the matter at the time it did. To me, the Exparte applicants are trying to have a second bite at the cherry.

16. It is important to appreciate how the doctrine of res-judicata operates. In *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 others* [2017] eKLR the High Court stated the elements for proof of Res-Judicata as follows:

    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 under whom they or any of them claim.

    c) The parties were litigating under the same title.

    d) The issue was heard and formerly determined in the former suit.

    e) The court hat formerly heard and determined the issue or matter was competent to try the subsequent suit or the suit in which the issue was raise.

17. The High Court did not stop there. It went on as follows:

> " The rule or doctrine of Res-Judicata serves the salutary aim of bringing finality to litigation and affords the 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 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 and calumny. The foundation of Res-Judicata thus rest in the public interest for swift, sure and certain justice."

18. Further, in the case of *William Koross Vs Hezekiah Kiptoo Komein & 4 others* [2015] eKLR, the court expressed itself thus:

> " The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

19. It is clear to me that the applicants in the matter intended now to be filed want to launch a second round of litigation similar to the one that the High Court handled in JR No. 40 of 2011, Embu. They have introduced a few minor changes – liked adding some parties – but its very clear that the subject matter is the same and the issues are the same. It is not acceptable that a few changes are made to a suit in order to evade the doctrine of res-judicata. Our courts have seen or experienced this habit in the past.

20. In *Njangu Vs Wambugu & Another*: HCC No. 2340 of 1991 Nairobi the court had this to say:

> " If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I don't see the use of the doctrine of res judicata.

The test to apply in order to determine the issue of Res Judicata was well stated by *Richard Kuloba in his seminal book: judicial hints on civil procedure: Law Africa publishing (K) LTD: 2nd Edition* at page 47. The matter was stated as follows:

> " The test whether a suit is barred by res judicata is this: Is the plaintiff in the 2nd suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which had been adjudication upon? If so, the plea of res judicata applies not only to the points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

21. The central issue in the objection raised is that of Res-Judicata. To this issue is tied also the issue of jurisdiction of the court and whether the objection meets the criteria of being a proper objection before this court. The respondents submissions are largely focused on the issue of Res-judicata. As I pointed out earlier, a similar matter had been handled earlier by the High Court. My considered view is that the matter intended to be filed would be res judicata. I also think that the applicants are wrong to try and bring an application for review this late in the day. Their chamber summons invoke order 53 rules 1 and 2 of *Civil Procedure Rules*. Rule 2 requires that the application be made within a period of six months after the decision being challenged is made. The applicants are making the application long after that period. In judicial review matters, time is of essence. This is particularly so where, as here, a party is relying on order 53 of the *Civil Procedure Rules*. The court would be acting contrary to law if it allowed judicial review proceedings this late in the day.

22. In my view, the only true points in the objection as raised are 1, which is about Order 53 rule 2 of *Civil Procedure Rules*, and 2, which is about Section 7 of the *Civil Procedure Act*. The other facets of the objection – points 3, 4 and 5 – do not qualify as points of law. That is why I have focused on points

1 and 2 in this ruling. The other points would require some prosecution for proof. My finding is that the matter is res judicata and also that it is brought outside the period prescribed by law.

23. The upshot, when all is considered, is that the respondents has sufficiently demonstrated that the matter is res judicata. He has also demonstrated that the matter is being brought outside the six month period provided for by the law. I therefore uphold the objection and dismiss the chamber summons before me with costs to the respondents and the interested party.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF JUNE, 2022.

In the presence of Kiongo for respondents; Rose Njeru (absent) for the interested party and Kiongo for Rose Njeru.

Court Assistant: Leadys

A.K. KANIARU

JUDGE