



**Katana v Mwamure (Environment & Land Case 30 of 2021)
[2022] KEELC 2737 (KLR) (13 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2737 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 30 OF 2021**

**MAO ODENY, J
JULY 13, 2022**

BETWEEN

SHADRACK TABU KATANA PLAINTIFF

AND

PHILIP NGOKA MWAMURE DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated September 28, 2021 by the plaintiff/applicant seeking the following orders;
 1. spent
 2. That there be a temporary injunction restraining the defendant/ respondent by himself, agents, servants, workmen, legal representatives or anyone claiming interest through him from doing any further subdividing, leasing, selling, alienating, cultivating, constructing, erecting structures and/or dealing with the suit property in any manner whatsoever pending the hearing and determination of this application inter-partes.
 3. That upon inter-parte hearing, an injunction be issued restraining the defendant/respondent by himself, agents, servants, workmen, legal representatives or anyone claiming interest through him from doing any further subdividing, leasing, selling, alienating, cultivating, constructing, erecting structures and/or dealing with the suit property in any manner whatsoever pending the hearing and determination of this suit.
 4. That costs to this suit be provided for.
2. Upon service of the application the defendant filed a notice of a preliminary objection dated November 3, 2021 on the following grounds: -
 - a. The matter being *res-judicata* MalindiELC No268 of2016.



- b. The suit does not comply with mandatory provisions of the Civil Procedure Act and Rules.
 - c. The suit is representative in nature. There was no evidence that the law had been complied with.
 - d. The subject matter now lies within Dakacha Wakala/Adjudication Section and accordingly the Honourable court lacks requisite jurisdiction to entertain the same.
3. Counsel agreed to canvas the application and the preliminary objection vide written submissions which were duly filed. i will deal with the preliminary objection first and if it is in the affirmative then will not deal with the application but if in the negative the court will deal with the application.

Defendant's Submission on the Preliminary Objection

4. Counsel stated that the Plaintiff filed the suit on October 13, 2021 against the defendant simultaneously with a notice of motion dated September 28, 2021 seeking temporary injunction to restrain him from inter-alia trespassing or selling, leasing, cultivating and erecting structure thereon and or dealing with the property in any manner whatsoever pending hearing and determination of the suit.
5. Counsel further stated that in the motion the plaintiff averred that he is one of the grandsons of Katana Mzungu Bimomo family and is representing the entire family as a representative suit which shows that the plaintiff acting in representative capacity seeking a declaration that the land measuring 6,719.3 acres at Dakacha purchased from Galogalo belongs to the Katana Mzungu Bimomo's family which means that the land does not belong to him but for the deceased grandfather.
6. Mr. Mouko submitted that the defendant filed a substantive replying affidavit and annexed pleadings of a previous suit which was determined by consent by the parties hence this suit is res-judicata ELC No 268 of 2016 which was brought against the defendant and 4 others. That the Plaintiff's son one Mzungu Tabu JustuS was the 3rd Plaintiff, while the 1st and 2nd ppaintiffs too were from the Bimomo's family.
7. Counsel relied on section 7 on the doctrine of res judicata as submitted that the plaintiff in ELC 268 of 2016 is the son of the current Plaintiff as shown in the defendant's replying affidavit which has not been controverted by the plaintiff. further that the plaintiff herein is the father of the 3rd plaintiff in ELC No 268 of 2016 who averred in that suit in which he named the defendant as the 4th defendant as representing the entire family and that the matter was resolved vide a consent and same was closed.
8. Counsel also submitted that the plaintiff is aware that the area is an adjudication section which is ongoing and until such a time that it shall be completed and the record open for inspection for (90) days and objections raised, this Honourable court lacks jurisdiction by dint of section 30 of the Land Adjudication Act which requires that a consent of the Adjudication Officer must be sought and obtained before filing a suit in court.
9. Counsel urged the court to uphold the objection and strike out the suit.

Plaintiff's Submissions on the Preliminary Objection

10. Counsel for the Plaintiff respondent the preliminary objection and stated that the parties and the subject matter in Malindi ELC 268 of 2016 are different in that the plaintiffs therein are:
 1. Ibrahim Katana Muzungu
 2. Nicodemus Sulubu Katana



3. Muzungu Tabu Justa
While the defendants are; -
 1. Kahindi Kenneth Samuel
 2. Rensomn Kambi
Thoya Mramba
 4. Philip Mwamure
 5. Julias Angore
11. Mr. Otara submitted that the subject matter in that suit is land measuring about 1500 hectares situated at Bungale while the suit property in this case is land measuring 6,719.3 acres situated at Dakachaarea. Further that the defendants have not filed a survey report confirming that the subject matter in Malindi ELC No. 268 of 2016 is one and the same as the subject matter in this suit.
12. Counsel therefore submitted that section 7 of the Civil Procedure Act does not apply in this case as there is no evidence that the parties in this suit are litigating under the same interest as parties in Malindi ELC No. 268 of 2016.
13. On the issue of a representative suit counsel submitted that the plaintiff filed a verifying affidavit and an authority list of 50 people who are family members to the Plaintiff and who have duly executed an authority authorizing the filing and prosecution of this suit on their behalf by the plaintiff/applicant. That it is therefore wrong and misleading to state that the Plaintiff's suit has failed to comply with the mandatory requirements of a representative suit.
14. Finally, on the issue of adjudication, counsel submitted that the defendant has failed to attach even a confirmation from the local adjudication office in Malindi confirming that the suit property is situated in an adjudication section that is on-going. Counsel urged the court to dismiss the preliminary objection and allow the plaintiff's application for injunction.

Analysis and Determination

15. The issues for determination is whether the preliminary objection on the ground that this suit is res judicata, is not a representative suit and that the Plaintiff has not complied with section 30 of the Land Adjudication Act. The other issue is whether the plaintiffs have proved that they have a prima facie to be granted an order of injunction.
16. In the case of Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 the court defined preliminary objection as: -

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".

Further Sir Charles Nebbold, JA stated that: -

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary



objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

17. Preliminary objections should be purely on points of law which is argued on the assumption that all facts pleaded by the other side are correct. The quest is whether the facts pleaded by the defendant are correct and a preliminary objection is capable of determining the matter at an interlocutory stage.
18. The doctrine of res judicata is provided for under Section 7 of the Civil Procedure Act Cap 21 which provides that: -

"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"
19. This doctrine bars court from trying suits as mentioned above and this serves the purpose of preventing multiplicity of suits which can clog the court system with unnecessary suits and costs, further the doctrine ensures that there is an end to litigation and aggrieved parties can move to a higher court for redress and not file other suits disguised as fresh suits.
20. In the case of Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 others (2010) eKLR, the court summarized the principles of res judicata as follows: -
 - a. The matter in issue is identical in both suits;
 - b. The parties in the suit are the same;
 - c. Sameness of the title/claim;
 - d. Concurrence of jurisdiction; and
 - e. Finality of the previous decision.
21. I have looked at the pleadings attached and find that the parties involved in the Malindi ELC No. 268 of 2016 are different and the reliefs sought are in respect of 1500 hectares in Bungale and the current one is in Dakacha.
22. On the second issue whether the Plaintiff has complied with the provisions of Section 30 of the Land Adjudication Act which requires a party to seek and obtain a consent from the Land Adjudication Officer when an area has been declared an adjudication Section and still ongoing to be allowed to go to court if aggrieved.
23. The Respondent did not provide any gazette notice to show that the area has been gazetted as an adjudication area and that the adjudication is ongoing. Without that the court cannot look for evidence outside what it is provided with. If the Respondent had provided proof the court would have checked whether the Plaintiff has complied with this Section.
24. On the issue of as to whether the Plaintiff have established a prima facie case with a probability of success to be granted an order of injunction, I will not belabor much as I have looked at the pleadings and noticed that the Plaintiff has just attached faint photographs which the court cannot associate with any suit land.



25. The plaintiff has not attached any documents to show any link to the ownership of the suit land. A party who claims must prove by evidence and in the absence of such proof the court finds that the Plaintiff does not deserve the orders of injunction.
26. The upshot is that the both the Preliminary Objection and the application for injunction are dismissed with each party bearing their own costs. The parties to fast track the hearing the case.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JULY, 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.

