



REPUBLIC OF KENYA



**Tonui v Mavoko Land Dev. Co. Ltd (Environment & Land Case
3 of 2014) [2022] KEELC 4876 (KLR) (19 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4876 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 3 OF 2014
CA OCHIENG, J
SEPTEMBER 19, 2022**

BETWEEN

PHILIP KIBET TONUI PLAINTIFF

AND

MAVOKO LAND DEV. CO. LTD DEFENDANT

RULING

1. What is before court for determination is the defendant's notice of motion application dated the June 26, 2020 brought pursuant to section 3a and 7 of the [Civil Procedure Act](#) as well as section 80 of the [Land Registration Act](#). The defendant seeks the following orders:
 1. Spent
 2. That the honourable court be pleased to dismiss the plaintiff's suit with costs as the suit is res judicata following the judgment delivered on May 31, 2019, between the defendant herein and kasina housing scheme, Machakos ELC No 366 of 2009 in which the boundary dispute was determined and settled.
 3. The suit be dismissed with costs to the defendant.
2. The application is premised on the grounds on the face of it as well as the supporting affidavit of Jackson Makali Kalolwe, one of its directors, where he explains that sometime in 2009, the defendant's land LR No 25062 measuring 17.58 Ha was illegally and unlawfully trespassed as well as encroached upon by kasina housing scheme society which purported to have a leasehold title LR No 11895/27. He claims the said kasina housing scheme society without regard of the defendant's leasehold title LR No 25062 subdivided and gave the defendant's land to its members and the plaintiff was one of them. he contends that the defendant filed a suit being Machakos ELC Civil Suit No 366 of 2009 and duly claimed trespass on its land being LR No 25062 by the society for the breach of its boundaries. Further, while the Machakos ELC Civil Suit No 366 of 2009 was pending, the plaintiff herein without regard



of the defendant's leasehold title LR No 25062 filed this suit, took possession including occupation of Plot No 33 Kasina Mlolongo as allotted by kasina housing scheme society and commenced building thereon, despite several warnings. Further, this was despite the fact that he was aware of the defendant's suit against kasina housing scheme society in which he was a member and sought for orders which the court declined to grant. He confirms that the suit between the defendant and kasina housing scheme society proceeded for hearing and determination with judgment delivered on May 31, 2019 in favour of the defendant. He reiterates that in the impugned Judgment, the court determined the boundary dispute and an independent surveyor was hired to establish and put beacons on the defendant's land being LR No 25062. He reiterates that from the judgment and established beacons, the plaintiff's land kasina Plot No 33 is within the defendant's leasehold title LR No 25062 in which the matter has been heard and determined.

3. In opposition to the instant application, the plaintiff filed a replying affidavit where he contends that Judgment in ELC No 366 of 2009 was delivered five (5) years after the instant suit had been filed in court. He explains that the parties in ELC No 366 of 2009 are not parties in the instant suit. He avers that he is not a party in ELC No 366 of 2009. Further, that the suit property in ELC No 366 of 2009 is not the same as in the instant suit. He contends that he has constructed houses and has title to his property being title number Athi River/Athi River Block 9/20. He denies being a member of Kasina Housing Scheme Society as alleged by the applicant. He insists the dispute between the defendant and himself has never been adjudicated upon by any court. He reiterates that this application should be struck out for similar reasons ELC No 42 of 2020 was struck out.
4. The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the notice of motion application dated the June 26, 2020 including the respective affidavits as well as the rivaling submissions, the only issue for determination is whether this suit should be dismissed with costs for being res judicata.
6. The defendant in its submissions reiterated its averments in the instant application including Supporting Affidavit and contended that this suit is res judicata as the issues herein were already determined in Machakos ELC No 366 of 2009 which was between the defendant and Kasina Housing Scheme Society. To buttress its averments, it relied on the following decisions: Malindi HCCC No 26 of 2017 and ELC Civil Case No 308 of 2017 Fredrick Mutham Nzioka & Another v Peter Mathenge.
7. The plaintiff in his submissions insists this suit is not res judicata and reiterated his averments as per the replying affidavit. To buttress his averments, he relied on the following decisions: *Moses Mbatia v Joseph Wamburu Kihara* (2021) eKLR and *Margaret Njiba Gatambia & 2 Others v Peninah Ngechi Njaaga & 3 others* (2019) eKLR.
8. In this instance, the plaintiff filed this suit seeking the following orders:
 1. A declaration that the plaintiff is the lawful owner of plot no 33 (kasina mlolongo) and that the same is not within land parcel No LR No 25062.
 2. A permanent injunction restraining the defendant by itself, its servants or agents from entering, remaining in or interfering with the plaintiff's occupation and user of Plot No 33 Kasina Mlolongo.
 3. Costs



9. The defendant has sought for this suit to be dismissed as it is *res judicata* since the matters in issues were heard and determined in Machakos ELC No 366 of 2009 (*Mavoko Land Development Co Ltd v Kasina Housing Scheme Society & 4 others*) where the defendant was the plaintiff therein. I will proceed to highlight the final orders in the said Judgment delivered on May 31, 2019:
- a. A declaration be and is hereby issued that the 1st defendant's leasehold title LR No 11895/27 Mavoko Municipality bearing the names 'Kasina Housing Scheme Society' is fake, null and void.
 - b. A mandatory and/or permanent injunction be and is hereby issued directed to the defendants, their members, servants, employees and agents to stop encroaching, trespassing into, destroying the boundaries, constructing shelters, erecting temporary or permanent structures, or interfering with the plaintiff's properties and quiet possession in all that parcel of land, LR No 25062, Mavoko Municipality.
 - c. An independent surveyor be appointed and directed to show survey beacons of LR No 25062 Mavoko Municipality for the plaintiff to put a permanent fence on the plaintiff's parcel of land LR No 25062.
 - d. That the re-survey conducted by the director of survey on land parcel LR No 25062, Grant IR 84437 with a Deed Plan No 231422 attached to the said title 25062, and as appearing on the re-survey map registered and dated December 14, 2007 with file Ref No CR 34/52/72, computation No 55575 and Field No W C be and is hereby declared null and void for infringing and violating the plaintiff's rights of ownership of property.
 - e. That land LR No 25062, Grant IR 84437 and its attached Deed Plan No 231422 its size, beacons, boundaries, shape or form be restored and maintained as it was appearing before the re-survey and as appearing in the Deed Plan No 231422 and attached to the said Leasehold Title No 25062.
 - f. Costs and interest of this suit to be paid by the defendants.
10. On perusal of the court records and documents filed by the plaintiff, I note as per the sale agreement dated the September 5, 2006, it indicates the plaintiff's land is Plot No 033 Kasina Mlolongo. Further, that the vendor Nicholas Muchene Njau is the registered allottee of the said land which was allocated by Kasina Housing Scheme Society. The plaintiff in response to the instant application denies being a member of Kasina Housing Scheme Society and insists he now has a title to the land but the same was not annexed to the Replying Affidavit.
11. The doctrine of *res judicata* is set out in the *Civil Procedure Act* at Section 7 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 can 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.”
12. The *Civil Procedure Act* provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:
- Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.*



Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

13. In the case of *Uburu 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.”

14. In applying the legal provisions cited above to the circumstances at hand, I note the plaintiff filed this suit after Machakos ELC No 366 of 2009 had been filed. Further, he admitted in a supplementary affidavit filed on November 5, 2014 in respect to an application for injunction that he was advised by officials from Kasina Housing Scheme Society that they surrendered the original title with respect to LR No 11895/27 to the Director of physical planning for subdivision. He also insisted that the suit plot was on LR No 11895/27 and not LR No 25062. In the impugned Judgment whose excerpt I have highlighted above, it emerged that title held by Kasina being LR No 11895/27 was found fake, null and void. It is trite that for a party to rely on the doctrine of res judicata, the decisions relied upon must emanate from a court with competent jurisdiction. Insofar as the plaintiff insists he was not a party to the ELC No 366 of 2009, I find that the issue concerning of the suit plot was directly and substantially in issue in the former suit and parties litigated under the same title since Plot No 033 emanated from LR No 11895/27 whose existence was in dispute therein. Further, the issue of trespass and ownership of Plot No 033 from LR No 11895/27 have been raised by the plaintiff in this suit. I opine that the dispute revolving around the plaintiff’s root of title was already heard and determined in the previous suit but he has raised it again. I find that the plaintiff’s claim is still the same but the only thing he has done is to cloth the cause of action in a different apparel but if the same is dissected it remains one and the same. It is against the foregoing that I find that the instant suit is indeed res judicata.

15. It is against the foregoing while associating myself with the decision cited above that I find the notice of motion dated the June 26, 2020 merited and will allow it. I will proceed to dismiss the plaintiff’s suit and award costs to the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

