



Sesi v Musyoki & another; Munguti (Intended Defendant) (Environment & Land Case E034 of 2022) [2022] KEELC 14551 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14551 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E034 OF 2022
CA OCHIENG, J
OCTOBER 31, 2022**

BETWEEN

LEONARD SESI PLAINTIFF

AND

ZUBERI MUSYOKI 1ST DEFENDANT

JANE NGINA NTHENGE 2ND DEFENDANT

AND

ISAIAH MUNYANZA MUNGUTI INTENDED DEFENDANT

RULING

1. What is before for determination are two notice of motion applications dated the May 19, 2022 and May 27, 2022 respectively. In the application dated the May 19, 2022, which is brought pursuant to sections 1A, 2A, 3A of the *Civil Procedure Act* as well as Order 40 and 50 of the *Civil Procedure Rules*, the plaintiff seeks for the following orders:
 1. Spent
 2. Spent
 3. That the honourable court be pleased to restrain the defendants or their agents or anybody acting under them from trespassing, interfering with applicant's quiet possession of all that parcel of land comprised in Matungulu/Kyaume/2354 pending the hearing and determination of the main suit.
 4. That cost do abide the Application.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Leonard Sesi where he deposes that he is the owner and in possession of land reference number Matungulu/



Kyaume/ 2354 hereinafter referred to as the 'suit land', where he has established a licensed slaughter house. He contends that the defendants have trespassed on the suit land, started cutting down mature trees, fencing as well as interfering with flow of water to the slaughterhouse including demolishing a perimeter wall. He explains that since the defendant sold land to him, he has been taking him in circles. Further, at one time he purported to sign Land Control Board forms for him and requested for Kshs. 30,000 for transfer but refused and failed to honour it. He avers that he bought the suit land in 1993 and paid requisite purchase price. He reiterates that the defendant wants to evict him unprocedurally and without due process. Further, that unless restraining orders are issued, he stands to suffer immensely.

3. In opposition to the application, the 1st defendant Zuberi Musyoka filed a replying affidavit where he deposes that the suit land is a subdivision of plot number Matungulu/Kyaume/2331 which was a subdivision of Matungulu/Kyaume/2309. Further, that Matungulu/ Kyaume/2309 and 2331 were originally in the name of Zuberi Musyoka Ndunda (*deceased*) who was his father. Further, that his father died on June 22, 1985 and succession in respect of his estate was not filed until 1994. He explains that on July 3, 1996, land parcel number Matungulu/Kyaume/2331 was transferred to him, together with his two other brothers vide a succession cause. Further, immediately upon transfer to their names, his two brothers Mohamed Zuberi and Husein Zuberi donated to him a Power of Attorney to enable him transact over the said properties. He avers that in 1993, the suit land was not in existence and subdivision which created it, was done on July 26, 1996. Further, he disputes that the plaintiff purchased the suit land on March 25, 1993 as the same did not exist, hence the said Agreement can only be a forgery. He denied filling in any application for Land Control Board Consent and insists the attached form is not signed. He claims the ex parte orders issued in this matter are being used by the plaintiff to evict owners of subdivisions of Plot Numbers Matungulu/Kyaume/2808, 2807 and 2810 respectively. Further, that the Plaintiff failed to disclose to court that he filed ELC No. 31 of 2019 at Kangundo Law Courts against him, which suit was dismissed. He reiterates that the matter before court has been determined in Kangundo ELC 31 of 2019 and the plaintiff has no basis invoking jurisdiction of this court save on appeal whose time has lapsed. Further, that this suit is *res judicata*. He reaffirms that land parcel number Matungulu/Kyaume/2354 does not exist as the same has been subdivided with the subdivisions sold to other purchasers for value who have since fenced their portions as well as taken possession. Further, that the plaintiff has deliberately concealed that there exists other parties who are owners of the sub-divisions some of whom have filed suits against him.
4. In the Application dated the May 27, 2022 which is brought pursuant to article 40 of the [Constitution](#), sections 1A, 1B and 3A of the [Civil Procedure Act](#) as well as Order 40 of the [Civil Procedure Rules](#), the 1st defendant seeks the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. This court be and is hereby pleased to declare that the matter herein is *res judicata* and/or *sub judice* having been determined in Kangundo ELC 31 of 2019.
 5. The plaintiff's suit against the 1st defendant be struck out with costs to the 1st defendant/ applicant and the entire suit be dismissed.
 6. That cost of this application be awarded to the applicants.
 7. that this honourable court be pleased to issue any order it deems just and fair in the circumstances.



5. The Application is based on the grounds on the face of it and the supporting affidavit of Zuberi Musyoki where he reiterates his averments as per his replying affidavit in the application dated the May 19, 2022 and insists it is in the interest of justice and to avoid abuse of the court process that the orders sought herein be granted.
6. The plaintiff opposed the application and filed a replying affidavit where he deposes that the defendant's Application is full of falsehood and meant to perpetuate fraud. He avers that the 1st defendant sold him the suit land which he fully paid for. He contends that he has made three separate Agreements with the 1st defendant over suit land with the latest being in 2014. Further, that the 1st defendant gave him possession which he enjoys to date. He explains that he could not have constructed a slaughter house and run it from 1996 to date. Further, that he has never been sued by the defendants either for trespass or eviction. He insists the alleged Agreements have been available since 1993 and the 1st defendant has never alleged forgery even when they appeared before the DO Matungulu in 2014. Further, that the 1st defendant wants to defraud him and while the transfer to the 2nd defendant is not genuine as there is no evidence she ever bought the land. further, that the 1st defendant registered a restriction on the said title on July 14, 2020 to stop the 2nd defendant from interfering with the suit land as evident in the Green Card and only lifted the caution when he wanted to subdivide the said land. He argues that the subdivision and transfer is between the 1st defendant and 3rd parties and not the 2nd defendant who is supposed to be the registered owner. Further, that the intended defendant claims to have bought the land from the 1st defendant in 2022 when the Green Card shows the 2nd defendant is the owner. He explains that Mr. Munguti Advocate for the 1st defendant took advantage of him when he represented him on February 23, 2021 when the Kangundo Judgment was delivered. Further, the title Mr. Munguti holds was issued in 2022 upon subdividing the suit land. He reiterates that no seller has produced any Agreement to indicate when and how they bought land and there is no buyer in occupation thereon as the Slaughterhouse covers it. He insists that the allegation that he forged the Agreements is an afterthought in order to re sell the suit land. Further, that the matter is not res judicata as it was not conclusively heard and determined with finality as issues between parties remain unresolved to date. He confirms that the Kangundo Case No. 31 of 2019 was against the 1st defendant only and the cause of action was to compel him to transfer the suit land to him pursuant to the 2014 Agreement. Further, the said matter which was ex parte was dismissed on the ground that the defendant was deceased yet this was an error as the 1st defendant who possesses similar names as his father Zuberi Musyoka Ndunda was still alive. He reaffirms that in the instant case there are new parties involved, 1st defendant is no longer the registered owner of the suit land and he is seeking to be declared as its owner as well as cancellation of the sub titles. further, that the 1st defendant was cited for succession but failed to attend court.
7. The 1st defendant filed a further affidavit reiterating his averments, denying that he sold the plaintiff land and insisting he even issued an eviction notice in 2014 but the plaintiff continues to trespass on the suit land. Further, that the suit land was subdivided in 2019 and the plaintiff is only in occupation of Matungulu/Kyaume/2806, 2805 and 2804 respectively while Matungulu/Kyaume/2808, 2807, 2809 and 2810 is occupied by third parties.
8. The two applications were canvassed by way of written submissions.

Analysis and Determination

9. Upon consideration of the two notice of motion applications dated the May 19, 2022 and May 27, 2022 respectively including the various affidavits as well as the rivaling submissions, the following are



the issues for determination: Whether the plaintiff is entitled to orders of temporary injunction pending the outcome of the suit. Whether this suit is res judicata.

10. As to whether the plaintiff is entitled to orders of temporary injunction pending the outcome of the suit.
11. In line with the principles established in the case of *Giella v Cassman Brown & Company* (1973) EA 358 as well as the definition of a *prima facie* case as stated in the case of *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) KLR 125, I will proceed to decipher whether the plaintiff has established a *prima facie* case with probability of success at the trial.
12. The plaintiff claims he is the owner and in possession of the suit land and has established a licensed slaughter house therein. He avers that the defendants have trespassed thereon, started cutting down mature trees, fencing as well as interfering with flow of water to the slaughterhouse including demolishing a perimeter wall. The 1st defendant has denied selling the suit land to the plaintiff and insists the Agreements presented are a forgery. From a perusal of the documents presented including the photographs produced, it is evident there is a slaughterhouse on the suit land which is run by the plaintiff. The 1st defendant has not explained how the plaintiff commenced developing the slaughterhouse on the suit land and has been thereon over a period of time. To my mind these issues require evidentiary proof before the court can arrive at a just determination of the suit. From the Green Card, it is evident the 1st defendant jointly owned the land with two persons and it is not clear how the said land moved to the 2nd defendant before the sub divisions. Since the plaintiff is on the suit land claiming to be a purchaser and noting that there are issues that need to be explained, I find that it is pertinent to maintain an order of status quo where no one should interfere with the suit land until this suit is heard and determined.
13. As to whether this suit is res judicata
14. The 1st defendant has claimed this suit is res judicata by virtue of the fact that the aforementioned Kangundo Case between the plaintiff and himself was dismissed.
15. The doctrine of res judicata is set out in the [Civil Procedure Act](#) at Section 7 which stipulates inter alia:

"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."
16. 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.”

17. In the case of *Uhuru 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.”

18. I wish to highlight the prayers the plaintiff sought in the plaint dated the May 19, 2022 which were:

- a. An order to reverse or cancel all subdivision arising from parcel No. Matungulu/Kyaume/2354 and the same do reverse to the mother title.
- b. An order of transfer of parcel No. Matungulu/Kyaume/2354 in the names of the Plaintiff herein.
- c. Costs of this suit.

19. The defendants have not filed a defence to controvert the averments in the plaint but the 1st defendant opted to file the Application seeking to strike out the suit for being *res judicata*. From a reading of the legal provisions cited above, I note the doctrine of *res judicata* can only apply where a matter has been heard and determined by a court of competent jurisdiction. In the Kangundo case which was between the plaintiff and the 1st defendant, the plaintiff sought the following orders:

1. An order directing the defendant to transfer parcel No. Kyume/ Matungulu/ 2354 to the Plaintiff forthwith. In default the Land Registrar Machakos County do sign all relevant documents to facilitate transfer of title to the plaintiff.
2. Costs of the suit.

20. The trial Magistrate proceeded to dismiss the case on the ground that the defendant was deceased.

21. In the case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited* (1969) EA 696; the court held 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 has 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 nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”



22. While the Supreme Court addressed its mind on this issue in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR and stated that:

"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts." [Emphasis added]

23. Further in the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, the court held that:-

"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

24. From the legal provisions cited above, it is pertinent that for a party to rely on the doctrine of *res judicata*, the decisions must emanate from the same court with competent jurisdiction; parties must be the same and litigated under one title and the court dealt with all the issues. In this instance, the 1st defendant except for filing the instant Application has not filed a Defence to controvert the plaintiff's averments. Further, he has provided pleadings in his Application but from a perusal of the said Judgment, it emerged that the suit was dismissed since the defendant therein was deceased. From a proper reading of the explanations cited above, while associating myself with the decisions I have quoted, it is my considered view that the issues both parties raise herein need to be ascertained before the court proceeds to make a proper determination of this case.

25. In the circumstance, I find that the 1st defendant has failed to fulfill all tenets of the doctrine of *res judicata* to enable the court dismiss the suit on this point.

26. It is against the foregoing that I find the plaintiff's Application merited but will issue an order of *status quo* instead. I find the 1st defendant's Application unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF OCTOBER, 2022

CHRISTINE OCHIENG

JUDGE

