



**Minyonga v Simion & 3 others (Environment & Land Case
34 of 2019) [2022] KEELC 14567 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 34 OF 2019
MN KULLOW, J
OCTOBER 18, 2022**

BETWEEN

ESTHER BOSIBORI MINYONGA PLAINTIFF

AND

SOSYTENUS MBOYA SIMION 1ST DEFENDANT

**FLORENCE MUMBI NJINE AS THE LEGAL ADMINISTRATIX OF THE
ESTATE OF JAMES NJINE NDIGIRIGI, DECEASED 2ND DEFENDANT**

**GRACE KEMUNTO ROBI AS THE LEGAL ADMINISTRATIX OF THE ESTATE
OF SIMEON ROBI MARWA, DECEASED 3RD DEFENDANT**

LAND REGISTRAR, KEHANCHA 4TH DEFENDANT

RULING

1. The 1st, 2nd and 3rd Defendants herein filed a Notice of Preliminary Objection dated June 19, 2019 in response to the Plaintiff's Plaint dated May 30, 2019, on the following grounds: -
 - a. The Honourable Court is devoid and/or bereft of Jurisdiction to entertain and/or adjudicate upon the subject dispute.
 - b. The dispute herein/ cause of action is barred by the provisions of the *Limitation of Actions Act*, Cap 22, Laws of Kenya
 - c. The plea and/or claim founded on fraud, is barred by the provisions of section of the *Limitation of Actions Act*, Cap 22, Laws of Kenya.
 - d. The instant suit is *res-judicata* and hence barred by the provisions of section 7(4) of the *Civil Procedure Act*, Cap 21, Laws of Kenya.
 - e. At any rate, the Plaint by the Plaintiff does not disclose any reasonable cause of action.



- f. The suit herein is pre-mature, misconceived and bad in law.
 - g. In the premises, the instant suit is mischievous, amounts to and/or constitutes an abuse of the due process of court.
 - h. Besides, the Plaintiff is non-suited.
2. The Preliminary objection was canvassed by way of written submissions; both parties filed their rival submissions which I have read and taken into account in arriving at my Ruling as hereunder;

Defendants'/ Applicants Submissions

3. On the 1st and 2nd grounds of the P.O; it was the Applicants submission that the issue of fraud which is at the center of the instant suit has been dealt with in various cases to wit; Migori CMCR No. 777 of 2004, Kisii HCC Succession Cause No. 391 of 2008, Migori Elc No. 889 of 2017 and Migori Elc Misc. Application No. 10 of 2018. It was therefore their submission that the issues raised in the instant suit are *res judicata*. Further, that the issue of fraud was determined by Ong'ondo J. *vide* the ruling delivered on 25.06.2019 in ELC Misc. Application 10 of 2018.
4. It was further his submission that the alleged fraud as pleaded by the Plaintiff was on account of the transfer of the original parcel of land which took place sometimes around 2002 whereas the instant suit was lodged/ filed around 30.05.2009 outside the statutory timelines contrary to the provisions of section 4 of the *Limitation of Actions Act*.
5. That the delay on the part of the Plaintiff is inordinate and he did not take reasonable steps to prosecute and protect her interests.
6. It was the Applicants contention that they have met the threshold as laid out in the celebrated case of *Mukbisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 and urged the court to strike out the Plaint dated 30.05.2019 with costs.

Plaintiff/ Respondent Submissions

7. On whether the suit is *res judicata*; it was the Respondent's submission that the criminal case cited by the Applicants as one of the cases that determined the issues fraud; the said case was lodged against Simeon Robi Marwawho is since deceased, who was arrested and charged but passed on before the conclusion of the case. Moreover, that the parties in the criminal case are not the same parties in the instant suit. She further submitted that the issue of the title of the suit property could not be determined in the said criminal case and as such the said criminal case cannot render the instant suit *res judicata*.
8. With regard to the Kisii HCC Succession Cause No. 391 of 2008 cited by the Applicants; it was her submission that the same was a pure succession matter where the plaintiff was never involved at all. The issue before the succession court was for the revocation of grant that had been issued to the 2nd Defendant/ Applicant. Again, she maintained that the same cannot render the instant suit *res judicata*.
9. In Migori ELC No. 889 of 2017; it was his contention that the case was between the 2nd defendant and another party who is not a party in the present proceedings. Further, that the subject matter in Migori ELC No. 889 of 2017 and Kisii HCC Succession Cause no. 391 of 2008; was over a portion of the suit property while the instant suit claims the entire suit property being L.R. No. Bukira/ Buhirimono/ 273 which was illegally transferred and subdivided into the three separate parcels. She thus maintained that the said cases have never determined the issue of fraud over the entire suit property.



10. That the honourable court in Migori HCC Succession Cause No.14 of 2019; directed the parties to file the present suit for purposes of determining the issue of fraud and cited its lack of jurisdiction to determine the same.
11. It is also her submissions that the allegations by the Applicants that Migori ELC Misc. Application No. 10 of 2018 determined the issue of fraud are unfounded since the said Application was only brought to seek leave to file a suit out of time and the issues of fraud were not substantially canvassed. It is therefore the Respondent's case the doctrine of *res judicata* cannot apply to the present suit from all the former suits listed.
12. On whether the suit is time barred; he submitted that even though the cause of action dates back to the year 2004 when the Plaintiff/ Respondent discovered that the defendants had fraudulently transferred the suit property to himself and thereafter subdivided the same into 3 separate parcels; there have been various steps taken by the Plaintiff in protecting her rights and the same has been demonstrated by the various suits filed with regards to the suit property.
13. She maintained that the filing of the instant suit was dependent on the outcome of the earlier/ previous suit and thus the same cannot be said to be time barred. He therefore urged the court to dismiss the P.O. as the same seeks to prematurely terminate the suit and proceed to hear and determine the case on merit.
14. The sole issue for determination before me is whether the Notice of Preliminary Objection dated June 19, 2019 is merited and I will proceed to discuss the same on account of
 - a. Whether the suit *res judicata*
 - b. Whether the suit is time barred.
15. The law on what constitutes a preliminary objection is now well settled. In the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 E.A. 696; the Court defined Preliminary Objection as follows;

“...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”.
16. The Supreme Court also addressed its mind on the issue of a preliminary objection in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 others* [2015] eKLR and stated as follows:

“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.”
17. The 1st – 3rd Defendants has sought the dismissal of the Plaintiff's suit on the basis that the same is *Res Judicata* and further that the suit which is primarily hinged on the issue of fraud is time barred and that no Leave was sought. Section 7 of the [Civil Procedure Act](#) on *res judicata* defines what amounts to *res judicata* 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.”

18. From a reading of the above mentioned section, the key elements to be established in a claim of *res judicata* are that; the issues raised in the present suit must directly and substantially be in issue as the issues raised in the former suit that has been heard and finally determined by a competent court. The same must be between the same parties.
19. Applying the foregoing to the present case, it is the Respondent’s assertion that the cause of action in the present suit has been the subject of several other suits/ litigation, between the same parties and the said issues were heard and finally determined by competent courts. The Applicants thus contends that there must be an end to litigation. The Applicants outlined the said former suits to wit; Migori CMCR No. 777 of 2004, Kisii Hcc Succession Cause No. 391 of 2008, Migori ELC No. 889 of 2017 and Migori ELC Misc. Application No. 10 of 2018.
20. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
 - (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That 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.
 - (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.”
21. I now seek to discuss the alleged cases as outlined by the Applicants in order to sufficiently determine whether the said cases finally determined the issues raised in the present suit and whether the said issues in the present suit are directly and substantially in issue with the issues raised in the previous suits. I will categorize the said cases into 2 and discuss the same as hereunder;
22. The first category and/or classification includes; Migori CMCR No. 777 of 2004 and Kisii HCC Succession Cause No. 391 of 2008. The Applicants contends that the issues of fraud as alleged by the Plaintiff in the instant suit have been heard and finally determined by courts of competent jurisdiction. Before delving into the last ambit of the doctrine of *res judicata*, I wish to restate the issues in dispute in the instant case. The Plaintiff’s cause of action is that she is the registered owner of L.R. No. Bukira/ Buhirimonono/ 273, sometimes in the year 2002, she discovered that one Simeon Robi Marwawho is since deceased, fraudulently transferred the said land parcel to his names and subsequently caused the same to be subdivided into 3 new parcels No’s. 2021,2022 & 2023 without her consent or authority and with the intent to defeat her title.
23. The Plaintiff/ Respondent on the other hand contends that parties and subject matter/ issues in the above mentioned cases were significantly different and does not meet the threshold set in a claim of *res judicata*.
24. Article 162 (2) (b) of *the Constitution* of Kenya establishes the Environment and Land Court to hear and determine disputes relating to the environment, use and occupation of land. Further, Section 13



of the *Environment and Land Court Act* outlines the jurisdiction of the court. Owing to the cause of action and/or main issue in the present suit which touches on the title of the suit property I find that the said issue could not have been determined in the said fora since the courts in question were not vested with the requisite jurisdiction to determine the same on merit.

25. Moreover, the Plaintiff submitted that the criminal case abated upon the death of the accused person one Simeon Robi Marwa. The deceased died before the conclusion of the matter and thus the same cannot have been said to have been finally determined. To this end I find that the cases mentioned in this category does not satisfy the elements of the doctrine of *res judicata* and thus the instant suit cannot be said to be *res judicata* on account of the same.
26. The second category includes Migori ELC No. 889 of 2017 and Migori ELC Misc. Application No. 10 of 2018. This court has taken the liberty to call for the said files in order to ascertain the allegations made by the Respondent. I do note that what is at the center of the suit Migori ELC No. 889 of 2017 is a claim of a portion of the subject land and not the entire land parcel as in the instant case.
27. Migori ELC Misc. Application No. 10 of 2018 on the other hand dealt with the issue of leave to institute a suit against the Defendants herein out of time. *Vide* a ruling dated June 25, 2019, my predecessor Ong'ondo J. dismissed the said Application for leave and dismissed the *ex-parte* Originating Summons filed by the Respondent herein. This in my considered view, sufficiently dealt with the substantive issues that underpin the claim in the instant suit and it is therefore my humble opinion that the said Ruling satisfies the elements of *res judicata*. Upon delivery of the said ruling, whose effect was to dismiss the Application for Leave, the Respondent herein was at liberty to appeal against the said ruling. What the instant suit seeks to do, if allowed to proceed, is to appeal the ruling of Ong'ondo J. A look at the issues raised in the said Application and the *ex-parte* Originating Summons are directly and substantially in issue in the instant suit.
28. In view of the foregoing analysis, I find that the instant suit amounts to *res judicata*. The issue of *res judicata* goes to the root of the case and having held that the suit is *res judicata*, I find that discussing the statutory time limit in instituting matters of fraud would amount to an academic exercise.
29. In the upshot, I find that the Notice of Preliminary Objection dated June 19, 2019 raises pure points of law on the issue of *res judicata* and is thus merited.
30. In the circumstances, I find that the Defendant's Preliminary Objection dated June 19, 2019 is merited and is hereby allowed with costs. Consequently, the Plaint dated May 30, 2019 is hereby dismissed. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 18TH DAY OF OCTOBER, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

for the Applicant/Plaintiff

for the Respondent/ Defendant

Tom Maurice - Court Assistant

