REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVL SUIT 40 OF 2008

SAMUEL KATANA NZUNGA & 102 OTHERS...PLAINTIFFS

VERSUS

SALIM ABDALLA BAKSHUEIN &

ALI ABDALLA BAKSHUWEIN.....DEFENDANTS

JUDGMENT

This is a Chamber Summons application dated 6-10-08 made under Order VI Rule 13(1) Civil Procedure Rules and the inherent jurisdiction of this court.

It seeks that the Originating Summons filed by the plaintiffs herein be struck out and consequently dismissed for being scandalous, frivolous, vexatious and otherwise an abuse of court process.

It also prays that the costs of this application and the suit generally be awarded to the defendant/applicants.

It is based on grounds that:

a) The suit is RES JUDICATA Msa Application No. 70(OS) of 1989 **Samuel Katana Nzunga V Salim Abdalla Bakhswein And Anor**

b) The suit is incompetent and incurably defective.

c) The originating summons is supported by a defective affidavit.

The applicant has sworn the supporting affidavit where he avers that in the present suit which is brought by way of originating summons, the plaintiffs have sought an order for a declaration that they have acquired Title over Land Portion No. 120 Malindi Title No. LT 27 Folio 374 File 3520 by virtue of adverse possession.

He points out that this suit is similar and on all fours with Msa MSC No. 70 (OS) of 1989 between **Samuel Katana Nzunga and 19 others V Salim Abdalla Bakshwein and Ali Abdallah Bakshwein** (hereinafter referred to as the Mombasa case)

In this suit the following plaintiffs were plaintiffs in the Mombasa suit i.e

1) Samuel Katana Nzunga – 1st plaintiff

2) Wilson Kazungu Katana – 2nd plaintiff

3) Emmanuel Mlewa Mkare – 3rd plaintiff

4) Stpehen Changawa Thoya – 33rd plaintiff

5) Elizabeth Kdazo Kitula – 40th plaintiff

6) Hassan Said – 74th plaintiff

7) Gia Katana – 75th plaintiff

8) Ali Mzungu – 91st plaintiff

The suit was finalized in Mombasa on 4th May 2005 in favour of the defence – a copy of the amended Originating Summons, Ruling and Order of the Court dated 4-5-05 are exhibited as SAB-1.

He states that the people behind the current suit are the 1st, 2nd, 3rd, 27th, 33rd, 40th, 74th, 75th and 91st plaintiffs, who filed this suit after losing in the Mombasa case and without disclosing the existence of that suit.

That the case and parties are the same, notwithstanding the addition o the rest of the plaintiffs who are but close relatives and children of the Principal plaintiffs and so they are caught up by the doctrine of Res Judicata.

Further that 1st plaintiff is not candid in his averments when he swears that he has no other home except the property in question yet he owns over twelve (12) acres of land in Gede Mgombani Kilifi Title No. Gede/Mgombani/598 as per the certificate of official search.

The application is opposed and in the replying affidavit sworn by Emmanuel Mlewa Mkare who confirms that there was once filed Originating Summons No. 71 of 1989 but it was dismissed for want of prosecution under Order XVI Rules 516 Civil Procedure Rules and therefore the doctrine of Res Judicata does not apply because it was never heard and determined on merit.

In arguing the application, Mr. Mabea submitted that the Mombasa case was determined in the defendant's favour. He explains that in the Mombasa case, Hon. Maraga J. gave conditions within which the plaintiffs were to file their suit and pay costs. They failed to meet those conditions and so the claim was dismissed. Is that the spirit behind the doctrine of Res Judicata? Mr. Mabea argues that because the suit was dismissed under Order XVI Rule 5 and 6 on the court's own motion, then they could only be allowed to bring a suit if dismissal was under subrule 5. In this instance the suit was dismissed under rule 5(a) (b) (d) and so the dismissal was final and he has referred to the decision in **Benjamin ole Tina V National Bank of Kenya HCC 239 of 2006** which held:

"***The Honourable Court has no jurisdiction to entertain the said application and the entire application on the ground that the issues raised herein were also raised in a previous application …which was heard and finally determined by a competent court.***

(2)The plaintiff is guilty of non-disclosure of material facts in utter abuse of the due process of court.

*****.....the order of the dismissal was made after it had been given a substantive hearing by the court."***

Mr. Mabea also take issues with the annexed documents saying they are supposed to be produced and not

availed to the court and they do not contain the seal of the Commissioner for Oaths and should therefore be struck out.

In response Mr. Otara argues that under section 7 Civil procedure Act it is clear that when a matter is deemed to be Res Juridcata the underlying requirement being that it must be **heard** and **determined** which did not happen in this instance. He explains that Hon. Maraga J. gave a condition of 90 days in reference to Order 16 Rule 5 i.e the 3 month period and that he also draws the court's attention to an application dated 31-1-05 (which hasn't been annexed before the court) and says no one knows under what circumstances it was brought before court and under what circumstances it was withdrawn. He further points out that in the ole Tina case, parties had been given a hearing and so even in the present matter litigants should be heard and issues determined on merit instead of shutting out the plaintiffs on a fault Mr. Otara says wasn't even their making in the first place as the conditions leading to the dismissal, were given to the plaintiff's through counsel, who failed to comply.

It is also pointed out that the Mombasa suit was instituted by only 20 people against 3 respondents whilst this one has 103 plaintiffs against 2 defendants and explains that the principle in Res Judicata is that the parties must be the same ones litigating in the same matter – so it can only be Res Judicata as against the certain named plaintiffs who had featured in the Mombasa case.

As for the false averments – Mr. Otara points out that the certificate of search shows the proprietor as one Samuel Katana Zuga whereas the 1st plaintiff herein is Samuel Katana Nzuga and so they can't be the same persons and allegations of falsehoods cannot stand.

As for the annextures, it is his contention that each is introduced in a paragraph in the supporting affidavit and all are marked as per the instruction and the requirement there as referred to in Halbury's Laws of England Vol 17 is that the documents must be exhibited – which is what the respondents have done.

What is considered to qualify for the Res Judicata doctrine?

Section 7 of the Civil Procedure Act reads:

"***No court shall try any suit or issue in which the matter directly and substantially in issue has been 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 suit issue has been substantially raised*** **and has been heard and finally decided by such court"**

So the simple question is were the issues in the Mombasa case substantially raised and heard and finally decided?

It is a common ground that the issues raised in the present suit are on all fours with the Mombasa case. Some of the parties appearing in this suit had also featured in the Mombasa case, yet the issues raised in the claim i.e an order for that the plaintiffs are entitled to be declared proprietors of Portion No. 120, Malindi Title No. LT 27 Folio 374 file 3520 by virtue of adverse possession was NEVER addressed, never argued and certainly never determined indeed Maraga J. in his ruling of 7th October 2004 noted as much in the phrase "***The matter has not been heard."*** The application had sought for dismissal of the originating summons for want of prosecution and there were the conditions the learned Judge set out.

"***(1) That the plaintiffs shall within 30 (thirty) days of the date hereof file and serve a list, with copies thereof, of the documents, if any that they wish to rely on. They shall not be allowed to produce or rely on any document not appearing on that list with a copy thereof also filed and served.***

(2) The plaintiff shall within 30 (thirty) days of the date hereof pay to the defendant's advocates the costs of the application assessed at Ksh. 10,000/-.

(3) That the plaintiffs shall have this matter fixed for hearing within 90 days after complying with any other procedural issue or step.

Failure to comply with condition No. 1, the plaintiff's shall not be entitled to produce or rely on any document.

Failure to comply with conditions No. 2 and 3, this suit shall stand dismissed with costs to the first defendant"

I have deliberately reproduced the ruling by the Honourable Judge to demonstrate that the ruling did NOT in any manner address the issues raised and which were in dispute as between the parties and those issues were never determined – that is the spirit of the ***ole Tina*** case.

What followed thereafter were orders by Maraga J dismissing the Originating Summons because parties had failed to comply with the court's specific orders. So the doctrine of Res Judicata cannot be invoked in this instance. Of course the orders were made as against the applicants and the question of Mr. Otara finding their counsel as the sacrificial lamb to offer on the escape route does not arise. There was non compliance of court orders – period.

Now then were those orders made pursuant to Order XVI Rule 5, a final bar to any other suit being filed.

I notice that in Hon. Maraga's ruling he referred to the application dated 31-1-05 which was under made rule Order XVI Rule 5 and when making the dismissal order, he did so not out of his own motion, but in reference to the application of 31-1-05.

My reading of Rule 5 does not disclose an absolute bar to the filing fresh proceedings unless Mr. Mabea wants an inference to be drawn using the rule of omission – that since rule 6 specifically mentions instances where a fresh suit can be filed, then it means that because rule 5 is silent, it is to be inferred that it does not give room for any fresh suits – If what Mr. Mabea submits, was the intention of the legislature, nothing could have been easier than to specifically state that an application made and granted under Rule 5 is an absolute bar to any fresh proceedings – so that limb too does not hold. Yes plaintiffs were guilty of non disclosure but I don't think it's the kind of situation that calls for shutting them out.

What about the documents referred to in the affidavit in support of the application – are they improperly marked and does the fact that they are marked mean that they are not exhibited and should therefore be struck off?

Mr. Mabea referred the court to Halsbury's Laws of England, 4th Edition Vol -7, page 218 which reads:-

"***Any document to be used in conjunction with an affidavit must be exhibited and not annexed to the affidavit and any exhibit to an affidavit must be identified by a certificate of the person before whom the affidavit is sworn. The certificate must be entitled in the same manner as the affidavit"***

I have read the affidavit in support of the originating summons – the documents and photos are not just annexed, they are annexed and exhibited and marked. To annexe is merely to attach or peg to an object, to exhibit is to display and make reference to – my finding is that those documents meet the requirements envisaged in the Halsburys` extract in terms of being exhibits – it does not mean plucking out and presenting to court – "***I now produce this photo as Ex.1"*** – it means an actual specific reference.

The documents and photos are marked as annexed and exhibit and stamped by a commissioner for oaths and so that limb is a non starter.

The upshot is that the application has no leg upon which to stand and must fail, it is dismissed with costs to the respondents.

Delivered and dated this 1st day of December 2008 at Malindi.

H. A. Omondi

JUDGE

Mr. Otara for plaintiffs

Mr. Mayaka holding brief for Mabea for defendant