



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 24 OF 2012

MARY WANJIRU MWANIKI.....1ST PLAINTIFF

MICHEL NDUNGU MWANIKI.....2ND PLAINTIFF

VERSUS

PETER ANJEYO VOHYA.....1ST DEFENDANT

CRESTERS KULOBA WAMBU.....2ND DEFENDANT

AND

PAUL KAMAU MWANGL.....INTERESTED PARTY

RULING

This ruling is in respect to the first limb of the 2nd defendant's Notice of Motion dated 16th January 2018 in which he seeks the following orders: -

(a) Spent

(b) That this Honourable Court be pleased to find that this suit is res – judicata BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006 and the same should be struck out.

(c) Spent

(d) Costs of this application and suit be borne by the plaintiffs.

The application is predicated on the provisions of Section 7 of the Civil Procedure Act and is founded on the grounds set out therein and is also supported by the affidavit of **CRESTERS KULOBA WAMBU** the 2nd defendant herein. The other limb of the application which questioned the jurisdiction of this Court to handle this suit in view of the provisions of **Section 18** of the **Land Registration Act** was earlier determined via my ruling dated 22nd November 2018.

The gravamen of the application is that the plaintiffs' suit touches on the boundary dispute between the land parcels **NO EAST BUKUSU/SOUTH KANDUYI 1596** and **8830** which was infact the subject of **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006** which was heard and determined on 4th November 2014. That appeal arose from the decision of the **DISTRICT LAND REGISTRAR BUNGOMA** which was adopted in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL APPLICATION No 157 of 2006** and related to the same parties or parties under whom they claim. That this Court cannot therefore try this suit as the matters directly and substantially in issue have been directly and substantially in issue in another suit which has been heard and determined. Therefore, this suit contravenes the provisions of **Section 7 of the Civil Procedure Act**.

In opposing the application, the 1st plaintiff and with the authority of the 2nd plaintiff filed a replying affidavit dated 23rd February 2018 in which she deponed, inter alia, that this application is not only incompetent but is also an abuse of the Court process intended to circumvent and frustrate the orders of this Court issued on 7th November 2017. That this suit is not res – judicata because the decision in **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006** was in respect to the land parcels **NO EAST BUKUSU/SOUTH KANDUYI/8830** and **1595** which no longer exist. That the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/8830** was sub – divided during the pendency of this suit and no longer exists while land parcel **NO EAST BUKUSU/SOUTH KANDUYI/1596** was sub – divided to give rise to the various parcels which are the subject of this suit. Those parcels are parcels **NO EAST BUKUSU/SOUTH KANDUYI/13955, 13956, 13960** and **13961**. That there was a consent order dated 24th May 2017 between the parties which the 2nd defendant has frustrated by filing this

application.

When the parties appeared before me on 23rd January 2020, it was agreed by Counsel that the Court determines the said application on the basis of the parties' affidavits.

I have considered the application and the rival affidavits by the plaintiffs and the 2nd defendant.

Section 7 of the Civil Procedure Act provides 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.”

It is clear from the above therefore, that before a plea of res – judicata can be successfully invoked as a bar to a suit, the following conditions must be met: -

- 1. The issue in dispute in the former suit between the parties must be directly and substantially in dispute in the suit where the doctrine of res – judicata is pleaded.**
- 2. The former suit must have been between the same parties or those under whom they or any of them claim litigating under the same title.**
- 3. The former suit must have been heard and finally decided.**
- 4. The Court or Tribunal which heard the former suit must have been competent.**

The term res – judicata is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as follows: -

“An issue that has been definitively settled by judicial decision. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been – but was not – raised in the first suit. These essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”

The rationale behind the doctrine of res – judicata is that litigation must come to an end. Parties who have litigated over a matter in a previous case should not live in fear that a sword of that previous litigation which was heard and determined will continue to hang over them in perpetuity. In **JAMES NJUGUNA CHUI .V. JOHN NJOGU KIMANI C.A CIVIL APPEAL No 322 of 2014 [2017 eKLR]**, the Court of Appeal described the doctrine in the following terms: -

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has had his dispute decided must learn to live with it. It is not open to him to relitigate or reargue the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the specter of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated Courts but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue, courtesy of the repeat litigation.”

In urging the Court to find that this case is res – judicata, the 2nd defendant averred that this case and **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006** relate to the same parties. I have therefore looked at the Judgment in **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006** which was annexed to the application. In that case, the 2nd defendant had moved to Court against one **JACKSON MWANIKI NDUNGU** to challenge the decision of the **DISTRICT LAND REGISTRAR BUNGOMA** with regard to the boundary between the land parcels **NO EAST BUKUSU/SOUTH KANDUYI/8830 and 1596**. That decision had been adopted by the **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT** in **MISCELLANEOUS APPLICATION No 157 of 2006**. The subsequent appeal was dismissed. **JACKSON MWANIKI NGUNGU** (now deceased) has since been substituted as plaintiff, by **MARY WANJIRU MWANGI** and **MICHAEL NGUNGU MWANIKI** his wife and son respectively. Therefore, it is obvious that the two plaintiffs herein must be pursuing the interests of the deceased **JACKSON MWANIKI NDUNGU**. However, the 1st defendant **PETER ANJOYO VUHYA** was not a party in **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006** and it has not been suggested that he has any relationship with the parties therein.

Most importantly, however, it is clear from the plaint filed herein on 8th March 2012 that this dispute involves a claim to trespass on land parcels **NO EAST BUKUSU/SOUTH KANDUYI/13955, 13956, 13960 and 13961**. A perusal of the documents of title relating to the above parcels of land show that they were created in or about September and October 2009 being sub – divisions of land parcels **NO EAST BUKUSU/SOUTH KANDUYI/1596**. Therefore, the land parcels **NO EAST BUKUSU/SOUTH KANDUYI/13955, 13956, 13960 and 13961** which are the subjects of this suit were not in existence by the time **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006** was being canvassed. Certainly, those parcels were not the subject of the said appeal although it was determined on 4th November 2014 long after the said parcels had been created. It cannot therefore be argued that the claim of trespass and the remedies of injunction, eviction and general damages being sought by the plaintiffs in this case were **“directly and substantially in issue”** in **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006** which would render this suit res – judicata. Both the issues and the subject matter in this case and

BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006 are very different. And it cannot by any stretch of imagination be argued that the issues being canvassed in this suit could have been raised before the **LAND REGISTRAR** in July 2006 when he made the decision with regard to the boundary between land parcels **NO EAST BUKUSU/SOUTH KANDUYI/8830** and **1596** which was adopted by the **MAGISTRATE'S COURT IN BUNGOMA MISCELLANEOUS CIVIL APPLICATION No 157 of 2006** that precipitated **BUNGOMA HIGH COURT CIVIL APPEAL No 43 of 2006**.

The up – shot of the above is that this suit is not res – judicata. The first limb of the 2nd defendant's Notice of Motion dated 16th January 2018 is equally without merit. It is dismissed. Costs shall also be in the cause as was directed on 22nd November 2018.

Boaz N. Olao.

J U D G E

18th January 2021.

Ruling dated, signed and delivered at **BUNGOMA** on this 18th day of January 2021 by way of electronic mail on keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

18th January 2021.