



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 156 OF 2018**

**HASSAN MASTAJABU (Suing as the legal administrator**

**of the Estate of the late Mastajabu Athumani Suleiman)...1<sup>ST</sup> PLAINTIFF**

**ALI ATHUMAN MADZENGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**THE CHIEF LAND REGISTRAR KWALE.....1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**WILFRED JAMES KIMANI KAMAU.....3<sup>RD</sup> DEFENDANT**

**FAITH NJERI KAMAU.....4<sup>TH</sup> DEFENDANT**

**RULING**

*(Res Judicata; preliminary objection by the 3<sup>rd</sup> and 4<sup>th</sup> defendants seeking to have suit struck out because it is res judicata; dispute having been part of the disputed land in four previously decided cases between the predecessors of the parties; court cannot re-open litigation that was already heard and determined by the predecessors in title of the parties herein; preliminary objection upheld; suit dismissed with costs)*

1. The preliminary objection before me is that dated 20 July 2020 filed by the 3<sup>rd</sup> and 4<sup>th</sup> defendants herein and it seeks to have this suit dismissed for being *res judicata*. This is opposed by the plaintiff.

2. By way of background, this suit was commenced through a plaint which was filed on 29 June 2018 against the Chief Land Registrar Kwale and the National Land Commission. It was later amended on 16 December 2019 to introduce the 3<sup>rd</sup> and 4<sup>th</sup> defendants. It is the pleading of the plaintiffs that they are the legal owners of the land parcel known as Kwale/Galu Kinondo/339 (the suit land) having acquired the same through ancestral rights. The plaintiffs aver that on 5 January 2012, they sought the assistance of the Commissioner of Lands after failing to get assistance from both the Kwale Land Registrar and the Kwale Land Survey Officer. They state that on 11 November 2017, the National Land Commission gave out their decision in the plaintiffs' favour, reaffirming their right of ownership, and directing the Chief Land Registrar to revoke title held by one Mutuku Ngei and to issue title to the Plaintiffs as the legal owners of the suit land. The plaintiffs claim against the defendants in this suit is for a permanent injunction restraining the defendants from interfering or dealing with the suit land, and for a declaration that the suit land belongs to the plaintiffs.

3. The 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a replying affidavit to an application for injunction which was filed contemporaneously with the plaint and in it they gave their version of the history of the matter and annexed various pleadings. They also filed this preliminary objection raising the issue of *res judicata*.

4. The 3<sup>rd</sup> defendant, has deposed *inter alia* that he and the 4<sup>th</sup> defendant are the legally registered proprietors of the suit land having purchased the land from the previous proprietor, Mutuku Ngei, on 18 October 2007. He has annexed copies of the application for board consent, the consent to transfer, the transfer document, and the title deed in his name, together with the title deed of the suit land as it existed in the name of Mutuku Ngei. He deposes that he has had quiet possession of the suit property from the time of purchase till 28 May 2015 when he received a call from the Kwale County Land Management Board requiring him to appear before them to answer to a complaint relating to a dispute of ownership of the suit land. He sent his legal representative with the title deed to show ownership. The Kwale County Land Management Board did not however heed his position and he then filed *High Court Constitutional Petition No. 35 of 2015, Wilfred James Kimani Kamau & Faith Njeri Kamau vs. National Land Commission, the Government of Kwale County, Kwale County Land*

Management Board, the AG, Mwinyi Kimoru, Juma Mastajabu and Hassan Mastajabu vide which they contested the jurisdiction of the respondents to hear the dispute. Judgment in that petition was delivered on 31 May 2016 and the court issued orders *inter alia* that the proceedings by the Kwale County Land Management Board were *ultra vires*; a declaration that Section 35 of the National Land Commission Act does not give jurisdiction to the Commission to investigate title to private land; and an order of certiorari and prohibition against the National Land Commission and the County Government of Kwale against investigating the validity of the title to the suit land. The 3<sup>rd</sup> defendant points out that the National Land Commission's decision cited by the plaintiffs in their plaint was made on 11 November 2017, which is after the decision of the court in the constitutional petition. The 3<sup>rd</sup> and 4<sup>th</sup> defendants contend that this matter is *res judicata* as a decision was rendered in the said constitutional petition. He also avers that there were other previous suits relating to the suit land herein which were ruled in favour of Mutuku Ngei the previous owner of the suit land. They included the following;

(i) *Mombasa PMCC No. 350 of 1990- Athumani Suleiman Mwakisha vs. Luke Musomba Mutio*;

(ii) *Mombasa High Court Civil Appeal No. 113 of 1994-Athumani Suleiman Mwakisha vs. Luke Musomba Mutio*;

(iii) *Mombasa High Court Misc. Civil Application No. 110 of 2005- Republic vs. Land Registrar Kwale ex parte Mutuku Ngei vs. Mastajabu Athumani Suleiman*;

(iv) *Mombasa High Court Civil Case No. 52 of 2007- Mutuku Ngei vs. Mastajabu Athumani Suleiman*.

He annexed the pleadings to these cases.

5. I invited counsel to file written submissions on the preliminary objection and I have taken note of the submissions filed by counsel for the plaintiff and counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendant. No submissions were filed on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> defendants although counsel did signal that he supported the preliminary objection.

6. In his submissions, counsel for the plaintiff submitted *inter alia* that the prayers sought and cause of action in all the cases listed by the 3<sup>rd</sup> and 4<sup>th</sup> defendants' affidavit are completely different from what is in the suit herein. On the part of counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants, it was submitted that the suit is *res judicata* as all the matters listed above involved the same parties and the same suit land. Counsel submitted that this suit should be dismissed with costs.

7. Section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya, espouses the principle of *res judicata*. It 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."*

8. The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 (2017) eKLR*, the Court of Appeal held that:

*"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive, but conjunctive terms;*

*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."*

9. The question therefore is whether the 3<sup>rd</sup> and 4<sup>th</sup> defendants have satisfied the conditions for the application of the principle of *res judicata* in view of the facts of this case. I will analyze each suit submitted by the counsel.

10. In the case *Mombasa PMCC No. 350 of 1990, Athumani Suleiman Mwakilisha vs. Luke Musomba Mutio*, the plaintiff therein filed suit over the same land in dispute herein. He claimed that the defendant therein, Mr. Mutio, had fraudulently acquired title on the pretext that he (Mr. Mwakilisha) had sold the suit land to him. The defendant (Mr. Mutio) filed defence and stated that the plaintiff (Mr. Mwakilisha) had sold to him the land in the year 1974. I have seen the judgment delivered on 17 June 1992. The court dismissed the plaintiff's suit and upheld the title of Mr. Mutio.

11. There followed an appeal by Mr. Mwakilisha, being *Mombasa High Court, Civil Appeal No. 113 of 1994*. The appeal was heard and dismissed, the title of Mr. Mutio being upheld.

12. There followed the suit *Mombasa High Court Miscellaneous Civil Application No. 110 of 2005*, a case of Judicial Review filed by Mutuku Ngei against Mastajabu Athumani Suleiman (1<sup>st</sup> plaintiff in this case). I don't have the full pleadings therein and I may not wish to comment much about it, save to state that in a replying affidavit filed by Mr. Mastajabu, he asserted that Mr. Mutio wrongfully took title to the suit land and thereafter transferred the land to Mr. Mutuku Ngei.

13. Next is *Mombasa High Court Civil Case No. 52 of 2007, Mutuku Ngei vs. Mastajabu Athumani Suleiman*. The plaint in that case is annexed and I have seen that Mutuku Ngei, pleaded that he purchased the suit land from Mr. Mutio and he obtained title in the year 1978. He pleaded that on 22 October 2004, the defendant, Mastajabu Athumani Suleiman, through illegal means, colluded with officials of the Ministry of Lands and obtained title to the suit land. He sought cancellation of this title. Mr. Mastajabu, as the defendant, filed defence and counterclaim. He pleaded that this land was owned by his late father Mr. Mwakilisha (also described as Mwakirisa) and that Mr. Mutio had fraudulently obtained title. In the counterclaim, he asked to be declared as the rightful owner of the suit land. In a ruling delivered on 26 July 2007, the Court (Seragon J), stated as follows :-

*“In my humble view, the defendant’s defence in the circumstances of this case is a sham, frivolous and scandalous hence it cannot be allowed to stand. The issue of fraud was raised, heard and determined in the suit (referring to the cases Mombasa PMCC No. 350 of 1990) and the resultant appeal (referring to Mombasa HCCA No. 113 of 1994) filed by the defendant’s deceased father. The same cannot be re-agitated by the defendant now. This amounts to an abuse of this court’s process.”*

In the end the defence of the defendant was struck out.

14. In this case, the 1<sup>st</sup> plaintiff has filed suit on behalf of the estate of Mastajabu Athumani Suleiman (deceased) claiming ancestral rights over this land together with the 2<sup>nd</sup> plaintiff. The 3<sup>rd</sup> and 4<sup>th</sup> defendants are the successors in title to Mutuku Ngei. It will be recalled that Mutuku Ngei had already sued Mastajabu Athumani Suleiman in *Mombasa HCCC No. 52 of 2007*. It will also be recalled that there was previous litigation, being the case *Mombasa PMCC No. 350 of 1990 and Mombasa HCCA No. 113 of 1994* between the successor in title to Mutuku Ngei and the father of Mastajabu Athumani Suleiman. These cases have already been decided.

15. It is patently clear to me that this suit, however couched, is a re-litigation of the previous dispute that the successors in title to the parties herein had. The parties herein may be different but the issue of who is entitled to ownership of the land was the issue in the previous suits and this was settled. The parties herein litigate on the basis of the same cause of action that the parties under whom they claim had, and/or are litigating under the same title, thus subject to being captured by the res judicata rule. It has already been held in the previous cases that the predecessor in title to the 3<sup>rd</sup> and 4<sup>th</sup> defendants held a good title as against the predecessors of the plaintiffs. The plaintiffs cannot now re-open that dispute for it has already been decided. As I have said, however the pleadings are couched, there is nothing different being raised here which was not raised in the previous litigation and decided.

16. I find that this suit is *res judicata* and the only option that I have is to have the suit dismissed. It is hereby dismissed with costs to the defendants.

17. Orders accordingly.

**DATED AND DELIVERED THIS 10 DAY OF FEBRUARY 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**