



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO 1 OF 2021

CHARLES MWANGI MBURU.....1ST APPLICANT/APELLANT

PAUL WAITHAKA MBURU.....2ND APPLICANT/APELLANT

GERALD MACHARIA MUGUCHU.....3RD APPLICANT/APELLANT

VERSUS

PETER NDUNGU KARIUKI Suing as the administrator of the estate of

PRIMUA OLOO OBWAYO).....RESPONDENT

RULING

1. Vide a Memorandum of Appeal dated the 13/1/2021 the Applicant proffered an Appeal against the Ruling of the Hon Atiang Mitullah SPM delivered on the 31/12/2020 in CMCC No 246 of 2013.
2. Simultaneously with the Appeal the Applicant filed an application seeking the following orders;
 - a. That this Honorable Court be pleased to set aside in its entirety the ruling issued on 31/01/2020 Chief Magistrate's Court Civil Case No. 246 of 2013 against the Applicants.
 - b. That the Honorable Court be pleased to set aside the judgment entered on 13/12/2018 in Chief Magistrate's Court Civil Case No. 246 of 2013 against the Applicants together with all subsequent decree/ orders issued thereafter and the matter be heard on merit.
 - c. That the title deeds of the two parcels MAKUYU/ KARIAINI BLOCK III/19 and MAKUYU/ KARIAINI BLOCK III/64 issued in the name of Primus Oloo Obwayo (deceased) be revoked pending the matter being heard on merit
 - d. That pending the hearing and determination of this matter a restriction be issued restraining the Land Registrar Murang'a lands registry forbidding any dealings on land title Number MAKUYU/ KARIAINI BLOCK 3/19 and MAKUYU/ KARIAINI BLOCK 3/64
 - e. That the Applicants be at liberty to apply for such further orders and/ or directions as the Honorable Court may deem just and expedient
 - f. That cost of this application be in the cause.
3. The application is premised on the grounds annexed thereto and the supporting affidavit of Pauline Mwaniki, the advocate of the Applicant.
4. That the Court dismissed the application dated the 7/2/2020 on the 13/12/2018 (meant 2020?) in CMCC No 246 of 2013. That a nexus had been established through the affidavit of the 2nd Applicant that this matter is related to the succession cause in the HCCC No 34 of 2017 with respect to parcels MAKUYU/ KARIAINI BLOCK 3/19 and 64 in the estate of Primus Oloo Obwayo. That this matter amounted to discovery of new facts and evidence. That parcel MAKUYU/ KARIAINI BLOCK 3/64 was included in the estate of Primus Oloo and yet the suit had been withdrawn against him in the lower Court.

5. The deponent further went to great lengths to question how the respondent's estate became registered as owner of the suit land despite the suit having been withdrawn.

6. The application is opposed by the Respondent through grounds of opposition dated the 25/1/2021. That the judgement was executed two years ago and the application is brought too late in the day. That the decree was adopted by consent of the parties and the advocate has been making endless applications upon application in the matter. That the titles were issued pursuant in compliance with the Court orders and cannot be revoked through an application.

7. The Applicants were sued in Murang'a CMCC No. 246 of 2013 where judgment was entered ex parte for non-attendance on the part the Applicants herein. The Applicants then filed an application to set aside the orders pending review and or Appeal which application was subsequently dismissed prompting an application to Environment Court, ELC Appeal No. 21 of 2019 for orders for leave to Appeal out of time and stay pending the determination of Appeal. The Court when dismissing the application noted that the Applicants had through their advocate consented to amendment of decree making it difficult to exercise leniency, no Appeal was preferred to the Court of Appeal instead they filed the instant application.

8. I have read and considered the written submissions of the parties.

9. In the main this application is similar word for word with the application filed in CMCC No 246 of 2013 and dated the 7/2/2020. This application was the subject of the ruling delivered on the 31/12/2020 which is now been Appealed in this Appeal.

10. The Applicant filed an application seeking to set aside the judgment vide an application dated 7/2/2020 which application was dismissed; no Appeal was filed. The Court is now being invited to discharge its mind on a similar application, unreservedly, this application is ripe for res judicata. Section 7 of the Civil Procedure Act explicitly provides that:

“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.”

11. In applying the foregoing provisions the Court in **Independent Electoral & Boundaries Commission vs MainaKiai & 5 Others [2017] eKLR Nairobi Court of Appeal Appeal 105 of 2017 lays down the elements that constitute res judicata too wit;**

(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.

12. Basing my mind on the foregoing, I find that the prayer herein meets the elements of res judicata as averred above. It should be appreciated that the purpose of this principle is for the interest of justice as noted in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** as quoted by the Court of Appeal in **Accredo AG & 3 others v Stefano Uccelli & another [2019] eKLR Civil Appeal 43 of 2018** where the Court held:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

13. The application therefore is resjudicata as the same was heard and determined by a competent Court. The impugned ruling is subject of an Appeal pending before this Court.

14. In addition, the orders sought are substantive orders which are incapable of being granted on an application.

15. The application is without merit. It is dismissed with costs to the Respondent.

16. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11TH DAY OF MARCH 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

1st – 3rd Appellants – Absent. Advocate absent.

Ndungu for the Respondent.

Court Assistants, Njeri & Kuiyaki