



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munyalo & another v Nzioka (Environment and Land Appeal  
E023 of 2022) [2024] KEELC 5379 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E023 OF 2022**

**A NYUKURI, J  
JULY 10, 2024**

**BETWEEN**

**MWENDWA MUNYALO ..... 1<sup>ST</sup> APPELLANT**

**KYALO MUNYALO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PRESTON MBONDO NZIOKA ..... RESPONDENT**

*(Being an appeal from part of the decision of the Chief Magistrate's Court  
at Machakos in ELC Case No. E088 of 2021 delivered by Hon. Anne  
Nyoike, Principal Magistrate made and/or issued on 30th June 2022)*

**JUDGMENT**

**Introduction**

1. This interlocutory appeal was filed by Mwendwa Munyalo and Kyalo Munyalo against the ruling of Honourable Anne Nyoike, Principal Magistrate delivered on 30<sup>th</sup> June 2022 in Machakos Chief Magistrate's Court Case No. 88 of 2021. In the impugned decision, the learned Magistrate dismissed the appellant's motion dated 16<sup>th</sup> February 2022, which sought for orders of injunction; on grounds that the application was res judicata as similar orders were granted in Nairobi High Court Civil Case No. 2684 of 1978.
2. Aggrieved with the said decision, the appellants filed a Memorandum of Appeal dated 5<sup>th</sup> July 2022 citing the following 9 grounds;
  1. The learned trial magistrate erred in law and fact in dismissing the appellant's notice of motion dated 16<sup>th</sup> February 2022 and upholding the respondent's notice of preliminary objection dated 16<sup>th</sup> March 2022 on account that the application was res judicata because similar injunctive reliefs for Land Parcel Number Machakos/Kiima Kimwe/37 (the suit land) were



granted in the High Court at Nairobi Civil Case No. 2684 of 1978: Nelson Munyalo -vs- Nzioka Mutevu.

2. The learned trial magistrate erred in law and fact in dismissing the appellant's notice of motion dated 16<sup>th</sup> February, 2022 on a wrong premise that the application was res judicata for the said High Court Civil Case No. 2684 of 1978 which was a previous court case filed by the appellants' deceased father, Nelson Munyalo against the respondent's deceased father Nzioka Mutevu.
  3. The learned trial magistrate erred in law and fact in dismissing the appellants' application based on eviction orders issued way back on 6<sup>th</sup> April, 1982 against their deceased father, the late Nelson Munyalo and not them as the administrators and defendant of the estate of the deceased.
  4. The learned trial magistrate erred in law and fact in dismissing the appellants' application on an assumption that their late father ought to have vacated the suit land yet the substratum of the suit pending in court is about ownership of the said suit land.
  5. The learned trial magistrate erred in law and fact in dismissing the appellants' application for injunction yet the appellants and other dependants of the late Nelson Munyalo have been and continues to be in possession of the suit land since the year 1977.
  6. The learned trial magistrate erred in law and fact in failing to consider from the statement of defence and counterclaim on the court's record and the said High Court Case No. 2684 of 1978 was withdrawn way back on 24<sup>th</sup> September, 1984.
  7. The learned trial magistrate erred in law and fact in failing to consider and to give a reasoned ruling on the application for injunction on the known principles of law guiding applications of that nature.
  8. The learned trial magistrate erred in law and fact in rendering a conclusive finding at the interlocutory stage on issues that ought to have been determined at a proper hearing.
  9. The learned trial magistrate erred in law and fact in rendering a contradictory decision for on one hand she appreciates that there are unresolved issues (touching on the suit property) while on the other hand she proceeds on the assumption that the late Nelson Munyalo ought to have vacated the suit land.
3. Consequently, the appellants sought the following orders;
- a. This appeal be allowed.
  - b. The ruling and order of the Chief Magistrate's Court at Machakos (the ruling of Hon. Anne Nyoike, PM) erroneously referred to as Judgment and delivered on the 30<sup>th</sup> June 2022 be set aside.
  - c. Incidental and/or consequential to (2) above, an order of injunction do issue as sought in prayer Number 3 of the Appellants' Notice of Motion dated 16<sup>th</sup> February 2022.
  - d. Costs of this appeal and costs of the application dated 22<sup>nd</sup> February 2022 lodged in Machakos CMCC No. 88 of 2022 be awarded to the appellants.
  - e. This Honourable Court be pleased to make such further orders as it may deem necessary.

### **Background**



4. Prestone Mbonzo Nzioka, the respondent herein, in his capacity as administrator of his late father Nzioka Mutevu (deceased) filed a plaint dated 7<sup>th</sup> September 2021 against Mwendwa Munyalo and Kyalo Munyalo seeking the following orders against the appellants herein;
  - a. A declaration that the defendants are strangers trespassing on the suit premises and should be evicted from the same as per the order dated 6<sup>th</sup> April 1982.
  - b. A declaration that the bodies of the deceased persons, Florence Mwikali Munyalo, Nelson Kavela Munyalo and Wavinya Nelson Munyalo were illegally buried on the said plot No. 37.
  - c. An order that the remains of the bodies of the deceased persons, Florence Mwikali Munyalo, Nelson Kavela Munyalo and Wavinya Nelson Munyalo were illegally buried on the said plot No. 37 be exhumed.
  - d. A declaration that the land parcels No. Machakos/Kiima Kimwe Settlement Scheme/37 and Plot No. 37B in Machakos/Kiima Kimwe Settlement Scheme/51 form part of the estate of the deceased – Nzioka Mutevu.
  - e. An order removing the caution placed on Plot No. 37 dated 10.02.1986.
  - f. A permanent injunction to restrain the defendants and/or their agents, their family members and/or persons claiming under/through them from constructing any fixtures, farming or keeping livestock on Plot No. 37.
  - g. A permanent injunction to restrain the defendants and/or their agents, family members and/or other persons claiming under/through them from illegally using and/or letting the Plot No. 37B to third parties.
  - h. General damages for loss of use of Plot No. 37 from 6<sup>th</sup> April 1982, the date in which the first eviction order was issued.
  - i. General damages for the loss of use on Plot No. 37B from 2013 to the date of delivery of vacant possession.
  - j. Costs of this suit plus interest thereon.
  - k. Any other or further relief this court may deem fit and just to grant.
5. The plaintiff averred that the parcels of land known as Machakos/Kiima Kimwe Settlement Scheme/37 and Machakos/Kiima Kimwe Settlement Scheme/37B, (suit property) were registered in the name of the late Nzioka Mutevu (deceased). That in 1976, the deceased granted a temporary occupation of the suit property to the late Nelson Munyalo, who is father of Mwendwa Munyalo and Kyalo Munyalo the defendants in the lower court, and appellants herein. He stated that on 26<sup>th</sup> January 1977, the late Nelson Kavela Munyalo claimed to have purchased Plot Number 37 from the deceased prompting the deceased to report the forgery to the Lands and Settlement Officer in Machakos, whereof the latter wrote a letter dated 12<sup>th</sup> October 1978 asking the late Nelson Munyalo to vacate Plot Number 37.
6. The plaintiff stated that the foregoing prompted the late Nelson Munyalo to sue the deceased vide HCCC No. 2684 of 1978, seeking orders of specific performance of a sale agreement allegedly entered into or refund of purchase price, but that the said suit was determined in favour of the deceased, and the late Nelson Munyalo ordered to vacate the suit property within six months. That the late Nelson Munyalo and his family defied the court order leading to issuance of a warrant of arrest against him on 16<sup>th</sup> October 1985. Further that the late Nelson placed a caution on the suit property claiming a purchaser's interest on 10<sup>th</sup> February 1986, but that thereafter the court file went missing todate.



7. He averred that one of the children of the late Nelson Munyalo one Florence Mwikali Munyalo died, whereof the plaintiffs obtained an injunction in Machakos CMCC No. 1131 of 2003 restraining the late Nelson from burying Florence on the suit property, but that he breached the order and went ahead to bury her body on the suit property. He further stated that in 2013, the wife of the late Nelson, one Wavinya Munyalo passed on and despite the plaintiffs obtaining an injunction to stop her burial on the suit property vide Machakos Case No. 540 of 2013, the late Nelson breached the injunction and buried her on the suit property. The plaintiff averred that the defendants' occupation of the suit property since 1970's to date was unlawful and in violation of court orders of 21<sup>st</sup> October 2021.
8. The defendants entered appearance and on 3<sup>rd</sup> November 2021, they filed a statement of defence and counterclaim dated 28<sup>th</sup> October 2021. They averred that although the suit property was registered in the name of the deceased, the same did not belong to him as he sold it to the late Nelson Munyalo on 26<sup>th</sup> January 1977 and that the suit property is held by the plaintiff in trust for the defendants who have been in possession since 1977.
9. They further averred that the deceased wrote a letter to the settlement officer in 1976 surrendering his interest in the suit property and that the purchaser who is the late Nelson Munyalo paid the loan to the settlement office, being a total of Kshs. 3,678.50 between 2<sup>nd</sup> August 1976 and 21<sup>st</sup> September 1978. They stated that the late Nelson Munyalo entered into a sale agreement with the deceased to purchase Parcel No. Machakos/Kiima-Kimwe/37 at a cost of Kshs. 10,000/-, which included movables like cows and goats. That the deceased asked the late Nelson Munyalo to permanently occupy the suit property as the deceased has never been in occupation of the same and that apart from paying the purchase price, the late Nelson Munyalo also paid the loan owed to the settlement office, and that the sale agreement was witnessed by the plaintiff.
10. They conceded the fact that the late Nelson Munyalo filed Case No. 2684 of 1978 at the High Court as the deceased had refused to transfer the suit property to him. They denied the suit having been determined in favour of the deceased and alleged that the late Nelson Munyalo withdrew the case and sought a consent of the Land Control Board on 23<sup>rd</sup> May 1986 which was granted on 19<sup>th</sup> September 1986. That upon withdrawal of the suit by the late Nelson on 23<sup>rd</sup> January 1978, a dispute was lodged at the Chief's Office who determined it in favour of the late Nelson Munyalo as per the Chief's letter dated 15<sup>th</sup> January 1986.
11. They confirmed that the order of eviction and warrant of arrest were issued in HCC No. 2684 of 1978, but that the suit was subsequently withdrawn with incidental orders as per the orders of 24<sup>th</sup> September 1986, which withdrawal order was never challenged, reviewed, appealed or set aside.
12. They contended that the late Nelson Munyalo died on 5<sup>th</sup> July 2004 which is 17 years ago and no substitution was done, hence his suit abated. That the said orders were issued in persona against Nelson Munyalo who died and cannot be enforced against the defendants. Further that at the time the orders were made, the defendants had not been borne as they were born in 1987 and 1989 respectively.
13. They conceded that the late Nelson Munyalo placed a caveat on the suit property on the basis that he purchased the same. They insisted that the suit property belong to the heirs of the late Nelson Munyalo. Concerning injunctive orders obtained by the plaintiff to stop burial of their relatives, they stated that the injunctions obtained were overtaken by events as service was done after the burial. They further stated that the plaintiffs claim to exhume the bodies buried on 2<sup>nd</sup> November 2003, 5<sup>th</sup> July 2004 and 2013, is a late claim.
14. That the plaintiff is estopped by the doctrine of adverse possession. They counterclaimed the following orders;



- a. A declaration that the defendant has acquired by adverse possession an absolute title to the Land Reference Number Machakos Kiima/Kimwe Settlement Scheme/37 and Plot No. 37B.
  - b. A declaration that the plaintiff holds Land Reference Number Machakos Kiima/Kimwe Settlement Scheme/37 and Plot No. 37B in trust for the defendant.
  - c. An order requiring the Land Registrar Machakos to rectify the register by cancelling the plaintiff's name from the records in respect to Land Reference Number Machakos Kiima/Kimwe Settlement Scheme/ 37 as well as Plot No. 37B.
  - d. A permanent injunction restraining the plaintiff and or his agents from interfering, trespassing, selling and or subdividing the suit property and or not to whatsoever interfere with the defendant's quiet occupation of the suit premises.
  - e. An order compelling the plaintiff to do all necessary acts and sign all necessary documents to effect a transfer of all his interest and shares held in trust for the defendants in the said land and plot, in default thereof, the Deputy Registrar to act for the plaintiff as aforesaid.
  - f. Costs of this suit together with interest at court rates.
  - g. Any other or further relief as this Honourable Court may deem fit to grant.
15. Subsequently, on 18<sup>th</sup> February 2022, Jacob Mwendwa Kavela in his capacity as administrator of the estate of Nelson Munyalo filed a Notice of Motion dated 16<sup>th</sup> February 2022 seeking the following prayers;
- a. For the reasons set out in the certificate of urgency filed herewith, service of this application be dispensed with, the application be certified urgent and be heard ex parte in the first instance.
  - b. Pending the hearing and determination of this application inter partes, an order of injunction be and hereby issued by this Honourable Court, restraining the plaintiff/respondent whether by himself individually or jointly, his servants and/or agents or otherwise from entering into the said land, subdividing, making any roads therein, selling, transferring, disposing of, pledging, leasing, charging or in any other manner howsoever alienating or dealing and interfering with the applicant's possession of all that piece of land known as Machakos/Kiima Kimwe/37 (hereinafter, "the suit property").
  - c. Pending the hearing and determination of this suit, an order of injunction be and is hereby issued by this Honourable Court, restraining the plaintiff/respondent whether by himself, individually or jointly, his servants and/or agents or otherwise from entering into the said land, subdividing, making any roads therein, selling, transferring, disposing of, pledging, leasing, charging or in any other manner howsoever alienating or dealing and interfering with the applicant's possession of all that piece of land known as Machakos/Kiima Kimwe/37.
  - d. Costs of this application be provided for.
16. The basis of the Motion was that the applicant was administrator of the late Nelson Munyalo and that the late Nelson Munyalo purchased the suit property from the deceased on 26<sup>th</sup> January 1977 and took possession but on 3<sup>rd</sup> February 2022, the plaintiffs invaded the suit property began ploughing it, cutting trees and made a path therein. They argued that if the plaintiff is not stopped, the estate of the late Nelson Munyalo will suffer loss.
17. The motion was opposed. Prestone Mbonzo Nzioka the plaintiff, filed a replying affidavit dated 16<sup>th</sup> March 2022. He stated that the applicants were not proper parties to the suit as they were not the



defendants and that a court of competent jurisdiction had ordered the defendant to vacate the suit property vide Civil Suit No. 2684 of 1978 and subsequently in an order dated 6<sup>th</sup> April 1982 the late Nelson Munyalo was evicted and subsequently a warrant of arrest issued against him and that the application was an abuse of the court's time.

18. In addition, the plaintiff filed a Notice of preliminary objection dated 16<sup>th</sup> March 2022 on grounds that the applicant is not a proper party to the suit and that the orders sought were already dispensed with in a former suit being suit No. 2684 of 1978 and that therefore the application is res judicata. Jacob Mwendwa Kavela swore a supplementary affidavit dated 20<sup>th</sup> April 2022 wherein he stated that Mwendwa Munyalo the 1<sup>st</sup> defendant in the suit and Jacob Mwendwa Kavela is one and the same person, a fact not challenged by the plaintiff.
19. It is upon considering the application, response and preliminary objection that learned trial magistrate upheld the preliminary objection and dismissed the application dated 16<sup>th</sup> February 2022 on grounds that the same was res judicata, provoking the instant appeal.
20. This appeal was canvassed by way of written submissions and on record are submissions filed by the appellants on 28<sup>th</sup> September 2023 and those filed by the respondent on 28<sup>th</sup> April 2023.

### **Appellants' submissions**

21. Counsel for the appellant submitted that as the appellants had been in possession of the suit property since 1977, dismissing the application exposed them to eviction during the pendency of the suit. Counsel argued that the decision determined some of the issues in the substantive suit and counterclaim at the interlocutory stage which is an error in law.
22. Counsel submitted that the appeal raised two issues namely;
  - a. Whether the trial magistrate erred in law and fact in dismissing the appellants notice of motion dated 16<sup>th</sup> February 2022 on a wrong premise that the application was res judicata.
  - b. Whether the learned trial magistrate erred in law and fact in failing to consider and give a reasoned ruling on the application for injunction on the known principles of law guiding applications of that nature.
23. On the first issue, counsel submitted that the trial court was wrong in dismissing the application on grounds that it was res judicata because of the orders in High Court Civil Case Number 2684 of 1978 a case filed by the late Nelson Munyalo against Nzioka Mutevu (deceased). Counsel argued that the parties in that suit are administrators and dependants of the estates of the parties in HCC No. 2684 of 1978 and therefore they are different parties. Counsel further argued that the trial court was wrong in basing her decision on eviction orders made on 6<sup>th</sup> April 1982 against the late Nelson Munyalo when the same was not against the administrators and dependants of his estate.
24. Reliance was placed on Section 7 of the *Civil Procedure Act* and the case of Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others [2017] eKLR for the proposition that the elements of res judicata were not met in this case.
25. Counsel argued that in High Court Civil Case No. 2684 of 1978, no judgment or final orders were issued as the suit was withdrawn before it was determined as the interim orders were granted pending determination of the suit. Counsel argued that a plea of res judicata cannot apply where a suit was withdrawn before being heard on merit. The court was referred to the case of George W. M. Omondi & Another v National Bank of Kenya Limited & 2 Others [2001] eKLR and Sagalla Lodge Limited v Samuel Mazera Mwamunya & Another (Suing as executors of Eliud Timothy Mwamuunya (deceased)



[2022] eKLR for the proposition that where a suit is withdrawn before being heard on merit, the plea of res judicata does not apply.

26. On whether the trial court considered the principles for grant of injunction, counsel submitted that the trial court only considered the question of res judicata and did not touch on the principles governing grant of injunction which include establishment of a prima facie case; imminent irreparable injury and the balance of convenience. Counsel argued that the appellants' case being their entitlement to the suit property as administrators of the estate of Nelson Munyalo based on the agreement of 26<sup>th</sup> January 1977, had established a prima facie case by demonstrating occupation of the suit property since 1977. Counsel argued that as the late Nelson Munyalo was son in-law of the deceased, an injunction ought to have issued to preserve the best interests of the two families.

### **Respondent's submissions**

27. Counsel for the respondent submitted that submissions cannot be treated as evidence and relied on the case of Daniel Toritich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR. Reliance was also placed on the case of Okero v Republic [1972] EA 32 and counsel submitted that an appellate court is entitled to examine the entire evidence afresh and come to its own conclusion.
28. Citing Section 107 of the *Evidence Act*, counsel submitted that the burden of proof is borne by the person making allegations. Counsel relied on Section 7 of the *Civil Procedure Act* and the case of Uhuru Highway Development Ltd v. Central Bank of Kenya [1999] eKLR in urging the court to consider the elements of res judicata. Counsel argued that the respondent had satisfied all elements of res judicata and that the trial court was right to dismiss the application on that basis. Counsel argued that the orders sought in the application before the trial court are the same orders which were directly and substantially in issue in Civil Case No. 2684 of 1978 which orders were awarded to the respondent's father who was a respondent in that case.
29. Counsel submitted that the litigants herein are litigating under the same title and the issue in question is the same as the one determined in a former suit by a competent court with jurisdiction. Counsel argued that the parties in this matter are children of the parties in the former suit and administrators of the deceased estates. Therefore, counsel argued that the application was rightly dismissed.
30. It was also submitted for the respondent that in High Court Civil Suit Number 2684 of 1978, an order dated 6<sup>th</sup> April 1982 was issued against the late Nelson Munyalo together with his servants and/or agents from interfering with the suit property until determination of the suit and that an application to set aside the order of injunction was dismissed and the court gave the late Nelson Munyalo six months to vacate the suit property vide the court's ruling dated 17<sup>th</sup> June 1983.
31. On the question of whether Section 7 of the *Civil Procedure Act* bars the appellants, counsel relied on the case of Charity Njanja Mwaniki (Suing on her behalf and 8 other siblings) v. James Mwaniki Gaturu & Another [2017] eKLR for the proposition that children of a party in a former suit are barred from litigating on the same subject matter under Section 7 of the *Civil Procedure Act*.
32. On the import of withdrawal of the former suit, counsel submitted that a notice of withdrawal has the legal effect of bringing a suit to an end; a party withdrawing the suit may file another suit; the withdrawal of a suit cannot be raised as a defence in a subsequent suit and that once a suit is withdrawn, the court shall enter judgment for costs against the plaintiff.
33. Counsel contended that the trial court was right in dismissing the application as they had defied orders of eviction against them and whoever comes to equity can only do so with clean hands. To buttress this



point, counsel referred to the case of Caliph Properties Limited v Barbel Sharma & Another [2015] eKLR.

### **Analysis and determination**

34. The court has carefully considered the appeal, the record and the parties rival submissions. The decision the subject of this appeal is discretionary order. Principles for setting aside a discretionary order on appeal are well settled. The appellate court will not ordinarily interfere with the exercise of discretion of the trial court unless the appellant demonstrates that the trial court misdirected itself or considered irrelevant matters or failed to consider relevant matters leading to a wrong conclusion.
35. In the case of Shah v Mbogo [1968] EA page 93, the Court of Appeal held as follows;  
I think it is well settled that this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that it's decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
36. A question of the bar of res judicata under Section 7 of the *Civil Procedure Act* is a question of jurisdiction, which must be determined first. If a court finds that it has jurisdiction and the issue in dispute is not res judicata, then it can proceed to consider the merits of the issue raised. However, where a court finds that it has no jurisdiction by dint of Section 7 of the *Civil Procedure Act*, it downs its tools and does not proceed to consider the merits of the matter placed before it, and for these reasons therefore, I disagree with the appellants' submissions that the court having found that the application was res judicata, it ought to have considered the merits of the application by testing it against the settled legal principles for grant of temporary injunction; as set out in the celebrated case of Giella v. Cassman Brown [1958] EA 358.
37. Therefore, the only question that arise from this appeal is whether the trial court was right in dismissing the application dated 16<sup>th</sup> February 2022 on grounds that the same was res judicata due to orders issued in HCC No. 2684 of 1978.
38. Section 7 of the *Civil Procedure Act* provides for the doctrine of 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.  
Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.  
Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.  
Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.  
Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.  
Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

39. Therefore, the court is barred to determine an issue or matter where the issue was raised before court, was to a great extent in issue in a former matter which was determined on merit between the same parties or their privies by a competent court.
40. The Black's Law Dictionary 10<sup>th</sup> Edition defines res judicata as;  
An issue that has been definitely settled by judicial decision....the three essentials are (1) an earlier decision on the issue, (2) a final judgment on the merits and (3) the involvement of same parties or parties in privity with the original parties.....
41. The doctrine of res judicata applies on both suits and applications, whose issues in contention have been determined before. Regarding applications, the doctrine applies to both applications made in the same suit where there is a former determination on the raised issue and where a determination on the issue was made in another suit. In the case of Uhuru Highway Development Limited v Central Bank of Kenya, Exchange Bank Limited (In voluntary liquidation) and Kamlesh Patni, the court held that an application which had been heard thrice in the High Court and twice by the Court of Appeal could not be heard again as the same was res judicata.
42. It is therefore clear that the elements of res judicata are that;
- a. The suit or issue raised was directly and substantially in issue in the former suit.
  - b. The parties in the former suit are the same or their privies in the current suit.
  - c. The parties are litigating under the same title.
  - d. The issue in the current suit was heard and finally determined in the former suit.
  - e. The court that determined the issue in the former suit was competent to try the matter raised in the subsequent suit.
43. In the case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others, [2017] eKLR), the court held that;  
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.
44. In the instant matter, it is not disputed that the late Nelson Munyalo filed Nairobi HCC No. 2684 of 1978 against Nzioka Mutevu (deceased) seeking orders of specific performance to transfer the suit property to him or in the alternative an order for refund of the purchase price. The suit was defended and the defendant filed an application of injunction restraining the late Nelson Munyalo his servants



and agents from interfering with the suit property until the determination of the suit. That application was allowed on 11<sup>th</sup> December 1981. The late Nelson Munyalo sought to set aside the said order but the application was dismissed, and the applicant evicted from the suit property. Subsequently, on 16<sup>th</sup> October 1985, warrants of arrest were issued against Nelson Munyalo on the basis that he was in contempt of the orders of 11<sup>th</sup> December 1981. The plaintiff withdrew his claim HCCC No. 2684 of 1978 on 24<sup>th</sup> September 1984.

45. Therefore, the issue to be determined herein is whether the determination of an application for injunction in Nairobi HCC No. 2684 of 1978 rendered the application for injunction in Machakos CMC No. E023 of 2022 res judicata.
46. I have considered the decision made in Nairobi HCC No. 2684 of 1978 and it is clear that the same determined the issue of injunction and in the application dated 16<sup>th</sup> February 2022, the issue raised is an injunction and therefore, it is the finding of this court that the issue raised in Nairobi HCC No. 2684 of 1978 is directly and substantially in issue in the application dated 16<sup>th</sup> February 2022.
47. Regarding the question as to whether the parties in the former suit are the same as those in Machakos CMCC No. E023 of 2022, the appellants submitted that the parties are different because the parties in the current suit, are the administrators of the estates of the parties in the former suit. This argument is in my view, self defeatist as an administrator of the estate of a deceased person is in law the privy of the deceased person as he or she immortalizes the deceased for all purposes and intents. In the premises, I find and hold that the parties in Nairobi HCC No. 2684 of 1978 are the same parties in Machakos CMCC No. E023 of 2022 as they are their privies.
48. On whether the decision made in HCC No. 2684 of 1978 was final, the record shows that the application by the late Nelson Munyalo seeking to set aside those orders was dismissed and I therefore find and hold that the decision in HCC No. 2684 of 1978 was a final determination of the issue of injunction.
49. Concerning the competency of the court that determined the matter, HCC No. 2684 of 1978 was determined by the High Court. Under Section 60 of the old Constitution, the High Court had unlimited original jurisdiction to hear and determine all civil and criminal matters. Therefore, the High Court was competent to hear and determine the question of injunction which was filed before it and if the application filed herein had been filed then before the High Court, the said court then had jurisdiction to determine the issue of injunction. In the premises, I find and hold that the determination in the former suit was made by a court of competent jurisdiction.
50. In the premises, it is the finding of this court that the question of injunction raised herein was already determined in HCC No. 2684 of 1978 and therefore the trial court was justified in concluding that the application dated 16<sup>th</sup> February 2022 was res judicata.
51. Consequently, I find no merit in the appeal and the same is hereby dismissed with costs.
52. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10<sup>TH</sup> DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

.....

**JUDGE**

I certify that this is a true copy of the original



Signed

**DEPUTY REGISTRAR**

**In the presence of;**

Mr. Wanga for appellants

Ms. Musau for respondent

Court assistant – Josephine

