



REPUBLIC OF KENYA



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**Maweu (Suing as the Administrator & the Legal Administrator of
William Maweu Munyoli - Deceased) v Kitama (Environment & Land Case
E004 of 2020) [2024] KEELC 13548 (KLR) (4 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13548 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E004 OF 2020**

TW MURIGI, J

DECEMBER 4, 2024

BETWEEN

**MUSYOKA MAWEU (SUING AS THE ADMINISTRATOR & THE
LEGAL ADMINISTRATOR OF WILLIAM MAWEU MUNYOLI -
DECEASED) APPLICANT**

AND

JULIUS MATHEKA KITAMA RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 6th June, 2023 brought under Article 23 (2), 169 (1) (a) (2) of *the Constitution*, Section 26 of the *Environment and Land Court Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 40 Rule 1 of the Civil Procedure Rules, 2010 in which the Plaintiff/Applicant seeks the following orders: -
 1. Spent.
 2. Spent.
 3. That this Honourable court does issue preservative orders restraining the Defendant and or his agents by himself, his agent, servants or anybody acting on his behalf from constructing, clearing bushes and pastures, cutting down trees, burning charcoal, cultivating, selling, grazing and/or dealing with land parcel number Nzau/Kithumba/345 in any manner that offends the Plaintiff's right to quiet and peaceful possession pending the hearing and determination of this suit.
 4. That the OCS Nziu Police Station be ordered to ensure compliance of the orders granted in this application.



5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Musyoka Maweu sworn on even date.

The Applicant's Case

3. The Applicant averred that he is claiming together with other beneficiaries over 27 acres out of the suit property which belongs to their deceased father William Maweu Munyoli, which claim is supported by a surveyor's report. He further averred that the Defendant has started cutting down trees and clearing bushes on the suit property, which activities will prejudice their claim to the suit property. He urged the court to order for status quo be maintained pending the hearing and determination of this suit.
4. He further averred that third parties who purchased land from his deceased father have been in occupation of the suit property for many years without interference from the Defendant. He contended that if the orders sought are not granted, the unlawful constructions and wastage of vegetation will continue and render the damage irreversible. In conclusion, he urged the court to allow the application as prayed.

The Respondents Case

5. In opposing the application, the Defendant filed grounds of opposition on 21st June, 2023 raising the following grounds:-
 1. That Section 7 of the Civil Procedure Act 2010 is clear that a court is barred from determining issues similar to the issues previously in dispute between the same parties who were litigating under the same title and which have been conclusively determined on merit by a court of competent jurisdiction.
 2. That the instant application is similar to the applications dated 2/7/2021 and 20/11/2019 which were filed in Makueni Succession Cause No. 108 of 2019:- In the Matter of the Estate of Kitula Muveva previously by the Applicant against the Respondents litigating on similar issues and same having been heard on merit and ruling by Hon. G. Sagero(SRM) on 1/12/2020 and 28/2/2023 respectively dismissing the said applications.
 3. Similarly, that the Applicant previously instituted an application dated 28/10/2020 seeking similar orders founded on similar issues between the same parties and the same having been heard on merit and a ruling was delivered on 28/10/2021 by Hon. Justice Mbogo dismissing the said application.
 4. That the Applicant has made it a habit of bringing endless applications/suits on the same subject matter and this being the fourth time that the Applicant is bringing a similar application after all his previous applications between the same parties and on the same subject matter were dismissed.
 5. That the Applicant's averments are baseless as no tangible evidence has been adduced in support of the claims that the Applicant's grandfather was the owner of the land.
 6. That a surveyor's report does not in any way confer ownership over the suit property.
 7. That the instant application has been made in bad faith and with the sole intention of frustrating the administration of the deceased estate by the Respondents



8. That the Applicant has proved to be a vexatious litigant with no intention of ever putting the matter to rest.
9. That the application is fatally defective, incompetent and bad in law for want of jurisdiction and for being brought contrary to the law.
6. On the basis of the above, the Respondent urged the court to strike out the application with costs.
7. The Respondent also filed a replying affidavit in opposition to the application. He reiterated the grounds of opposition and added that the Applicant has not produced evidence in support of his claims over the suit property. He asserted that the late Kitula Muveva is the absolute registered owner of the suit property having been registered on 11/10/1976 and a title deed issued on 17/10/2007. He contended that neither the Applicant, the Applicant's father nor the Applicant's grandfather have ever owned the suit property.
8. He further contended that it is within his right to carry out any activity on the suit property since he is a dependant of the estate of Kitula Muveva (Deceased) while the Applicant has no recognizable interest therein. In conclusion, he urged the court to dismiss the application with costs.
9. The application was canvassed by way of written submissions.

The Plaintiff's Submissions

10. The Plaintiff filed his submissions dated 27th May, 2024. On his behalf, Counsel submitted that for an injunction to issue, the Applicant must satisfy the following conditions: -
 - i. He must establish a prima facie case with a probability of success
 - ii. He must show that he will suffer irreparable loss which cannot be compensated by an award in damages
 - iii. That if the court is in doubt, it will determine the issue of a balance of convenience
11. On the first condition, Counsel submitted that the Respondent has not been disputed the Applicant's occupation and use of the suit property. Counsel further submitted that the Applicant and other beneficiaries carried out a survey of the suit property and obtained a report showing that 27 acres out of the suit property belongs to William Maweu Munyoli (Deceased). It was submitted that during the first adjudication process done in Kithumba area, the late Kitula Muveva caused the suit property to be included in his land when the boundaries were being surveyed. From the foregoing, Counsel submitted that the Applicant has established a prima facie case with a probability of success.
12. On irreparable loss, Counsel submitted that the annexed photographs clearly demonstrate that the Plaintiff is in occupation of the suit property. Counsel further submitted that should the court fail to issue the orders sought, the Applicant stands to be disinherited and/or displaced from the suit property where they are in occupation adding that such loss cannot be compensated an award of damages.
13. On the third condition, Counsel submitted that it is trite that the balance of convenience tilts in favour of a successful litigant. Counsel further submitted that should the court decline to grant the order of injunction, the inconvenience that the Applicant and the beneficiaries of the estate of William Maweu Munyoli are likely to suffer is greater compared to that of the Respondent.
14. Concluding his submissions, Counsel urged the court to allow the application as prayed. None of the authorities cited by Counsel were availed for the court's perusal.



The Respondents Submissions

15. The Respondents filed his submissions dated 21st November, 2024. On their behalf, Counsel submitted that the only issue for determination is whether the Applicant should be granted an order of injunction.
16. Counsel submitted that the Applicant is undeserving of the orders sought as the application herein is res judicata. Counsel argued that the Applicant did not contest the averments in the replying affidavit that similar applications seeking similar orders were dismissed on four occasions. Counsel submitted that the application offends the provisions of Section 7 of the *Civil Procedure Act*.
17. Counsel further submitted that the application has not met the threshold for the grant of an of injunction. Counsel submitted that the evidence tendered shows that Kitula Muveva (Deceased) is the registered owner of the suit property having been registered on 11/10/1976 and having been issued with a title deed on 17/10/2007. Counsel further submitted that the Applicant has not adduced any evidence to show that part of his property was surveyed together with the suit property. On the basis of the foregoing, Counsel submitted that the Applicant has not established a prima facie case with a probability of success.
18. Counsel argued that the assertions by the Applicant that the suit property belonged to his deceased father, William Munyoli, were unsubstantiated. In In conclusion, Counsel urged the court to dismiss the application with costs. To buttress his submission Counsel relied on the following authorities: -
 - i. Kenya Commercial Bank Limited v Muiro Coffee Estate Limited & another [2016] eKLR
 - ii. National Bank of Kenya Ltd & 2 others v Sam-Con Ltd [2003] eKLR

Analysis And Determination

19. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination:-
 - a) Whether the application herein is res judicata?
 - b) Whether the Applicant is entitled to the orders sought?
20. The Respondent contended that the application herein is res judicata on account of the applications dated 20/11/2019 and 02/07/2021 filed in Makueni Succession Cause No. 108 of 2019 and the application dated 28/10/2020.
21. The doctrine of Res judicata, is embodied in Section 7 of the *Civil Procedure Act* which 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.

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.”

22. The Black’s Law Dictionary, 9th Edition at page 1425, defines the doctrine of res judicata as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

23. The elements which must be present to succeed on a defence of res judicata were enunciated in Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR where 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 all 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.”

24. Similarly, the Court of Appeal expressed the elements which must be demonstrated when the doctrine of res judicata has been invoked in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR as follows: -

- “(a) the former judgment or order must be final;
- (b) the judgment or order must be on merits;
- (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- (d) there must be between the first and the second action identical parties, subject matter and cause of action.”



25. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
26. Firstly, the matter in issue should be directly and substantially the same as in the former suit.
27. In his replying affidavit, the Respondent annexed the ruling in respect of the Notice of Motion dated 28th October, 2020. In the application dated 28th October 2020(annexure JMK4), the Applicant had sought the following orders against the Respondent and one Samuel Ndivo Kitula: -
- i. That this application be certified urgent and ipso facto be heard in the first instance.
 - ii. That this Honourable Court be pleased to stay any further proceedings in the Succession Cause No. 108 of 2019 before the Senior Principal Magistrate Court at Makueni until this application is heard and determined.
 - iii. That this Honourable Court be pleased to stay any further proceedings in the Succession Cause No. 108 of 2019 before the Senior Principal Magistrate Court at Makueni until the hearing and determination of the suit.
 - iv. That this Honourable Court do suspend the use of the Temporary Grant by the Respondents until this matter is heard and determined.
 - v. That this Honourable Court do order that all parcels of land of Kitula Muveva (Deceased) that have been sold and/or transferred by the Respondents allegedly using the said temporary grant having been done illegally, be cancelled and all the parcels of land do revert to the estate of Kitula Muveva (Deceased).
 - vi. That the Respondents, their agents or servants or any other person be restrained by an order of injunction from interfering, selling or charging or doing any action with the land parcel Nzaiu/ Kithumba/345 until this matter is heard and determined.
 - vii. That the costs of this application be paid by the Respondents.
28. The Honourable Justice Mbogo C.G. dismissed the application with costs vide the Ruling delivered on 28th October, 2021(annexure JMK5).
29. The ruling clearly shows that the Applicant sought injunctive orders against the Respondent to restrain any form of interference with land Parcel No. Nzaiu/Kithumba/345 pending the hearing and determination of this suit. In the instant application, the Applicant has sought for similar injunctive orders against the Respondent herein.
30. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in the application dated 28th October 2020, were the Applicant versus the Respondent and one Samuel Ndivo Kitula. The Applicant in the application herein was also the Applicant in the application dated 28/10/2020. It goes without saying that the parties in both case are similar and are litigating under the same title.
31. Lastly for res judicata to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally determined. It is not in dispute that



the Court seized with the application dated 28/10/2020 had the requisite jurisdiction to determine the dispute therein.

32. The application was heard and determined vide the ruling delivered on 28th October 2021. The said ruling has neither been appealed against nor set aside. Similarly, the Applicant did not contest the Respondents averments which were supported by evidence that similar applications were made against the Respondents in Makueni SPM Succession Cause No. 108 of 2019 whose outcome was a dismissal.
33. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice on account of the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR. The essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. That was the holding in Omondi Vs National Bank of Kenya Ltd and Others (2001) EA 177.
34. From the foregoing, this court finds and holds that the application herein is res judicata on account of the application dated 28/10/2020. In the circumstances, I find that the Applicant is not entitled to the orders sought. The upshot of the foregoing is that the application dated June 6, 2023 is devoid of merit and the same is hereby dismissed with costs.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4TH DAY OF DECEMBER, 2024.

In the presence of:

Ms Kyalo for the Plaintiff/Applicant

Muumbi for the Defendant/Respondent

