



**Safari (Suing as an Administrator of the Estate of Baya Msanzu) v Nzaro (Environment & Land Case 94 of 2021) [2023] KEELC 17849 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17849 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 94 OF 2021**

**EK MAKORI, J**

**JUNE 8, 2023**

**BETWEEN**

**JULIUS SAFARI (SUING AS AN ADMINISTRATOR OF THE ESTATE OF BAYA MSANZU) ..... PLAINTIFF**

**AND**

**JOSEPH NZARO ..... RESPONDENT**

**RULING**

1. A Preliminary Objection dated December 13, 2022 has been raised in the matter that the current suit is *res judicata*, having been heard and determined in Kilifi Land Dispute No 40 of 2008, and ought to be dismissed in limine with costs.
2. The objection is opposed with the parties agreeing to dispose of the same by way of written submissions.
3. It is the defendant's contention that the orders sought are similar to the ones issued in Kilifi Land Dispute No 40 of 2008, insofar as the claim in this suit seeks a declaration that the agreement of sale of part of the suit property to the defendant on 2<sup>nd</sup> February 2001 between the defendant and Tabu Baya was null and void, a declaration that the decision of the Tribunal in favour of the defendant was null and void for want of jurisdiction, a declaration that the transfer of the entire suit to the defendant and subsequent adoption of the said decision as a judgment of the court was null and void for want of jurisdiction, a declaration that defendant was the absolute owner of the suit property was null and void, an order to the Land Registrar Kilifi Land Registry to cancel the registration of the suit property in the name of the defendant and re-issue the title in the name of the plaintiff and vacant possession of the suit property, demolition of any structures erected by the defendant and eviction of the defendant.
4. The defendant submitted that Section 7 of the *Civil Procedure Act*, sets out what amounts to *res judicata*, as echoed in *Solomon Onyango Ouko v Joyce Penina Adhiambho [2021]* eKLR, *Charity*



*Njanja Mwaniki (Suing on her behalf and 8 other siblings) v James Mwaniki Gaturu & Anor. [2017]* eKLR and *Diocese of Eldoret Trustees (Registered) v AG (on behalf of the Principal Secretary Treasury) & Anor. [2020]* eKLR rips the jurisdiction of the court as the matter at hand has long been settled in the Kilifi Land Dispute No 40 of 2008 and should not be revived at all. It does not matter whether a new party has been introduced – as in this case.

5. The defendant averred that a Preliminary Objection should be raised purely on points of law as held in the decision in *Moses Mbatia v Joseph Wamburu Kihara [2021]* eKLR reiterating the leading decision in this realm - *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969]* EA 696, on the threshold to be achieved to sustain a Preliminary Objection.
6. The defendant submitted that holistically looking at the current suit and the former suit, the subject matter is the same, and therefore the objection should be sustained by striking out the current suit.
7. The plaintiff in submissions opposes the application and asserted that this suit is not similar to the former suit stating that the current suit raises issues that are substantially different. In the case of *John Florence Maritime Services Ltd v Cabinet Secretary, Transport & Infrastructure & 3 others* Petition No 17 of 2015 [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court set out the factors to be achieved for the doctrine of res judicata to yield.
8. The plaintiff sets out the differences as being that in the current suit, the tribunal did not set down the issue for determination, the parties litigating were different, the party who is named the plaintiff in this suit is the Estate of Baya Msanzu and not Tabu Baya named in the former suit. The Tribunal did not have jurisdiction to deal with the sale of land hence the award adopted was null and void. The Tribunal was to deliberate on one acre of land but proceeded to deal with the whole land measuring one hectare or 3.5 acres, leading to the issuance of a title for the whole land. The former suit dealt with the estate of a deceased person- Baya Msanzu and did not take into account the law of succession.
9. The plaintiff further submitted that the land being dealt with in this suit is land parcel No Kilifi/ Matsangoni/459 while in the former suit, the Tribunal dealt with the sale of one acre of land known as DS/001/1/A1457 or DS/OO1/A1459.
10. The plaintiff contended that there are other issues raised in this matter like fraud, and illegality and or mistake in the manner the whole parcel of land was acquired. Those issues were never heard and determined in the former suit and need to be revisited in this suit.
11. The plaintiff proceeded to state that the former forum - the Land Disputes Tribunal had no jurisdiction to hear and determine the dispute before it under Section 3 of the repealed Land Disputes Tribunal Act No 18 of 1990.
12. The plaintiff states that being agricultural land, consent was never obtained from the relevant Land Control Board before the sale or transfer of the land in dispute hence the agreement that was relied on by the Land Disputes Tribunal in arriving at its decision was void by dint of the law.
13. The issues that fall for the determination of this court is whether the Preliminary Objection should be sustained with the focus being on the doctrine of res judicata and who should bear the costs of the application.
14. I have considered the submissions by the parties in this application. The authorities submitted before me, the threshold to be achieved for a Preliminary Objection to be sustained and for the doctrine of res judicata to attach, they were quite germane and relevant.



15. For a Preliminary Objection to be achieved, as held by Law JA. In *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969]* thus:

“...so far as I’m aware, a preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. A Preliminary Objection can be raised at any time in the proceedings but it is better raised at the earliest possible time because it has a bearing on disposing of a matter. The point of law raised in this application is that there is a former suit - the Kilifi Land Dispute No 40 of 2008, which allegedly disposed of the issues, raised in the present suit, and if so the current suit stands *res judicata* and rips the jurisdiction of this court.

17. For *res judicata* to be achieved as held in several of the authorities quoted by the parties, the following salient features have to be apparent in the current suit and the former suit, significantly as held by the Supreme Court in the case of *John Florence Maritime Services Ltd v Cabinet Secretary, Transport & Infrastructure & 3 others Petition No 17 of 2015 [2021]* KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) thus:

“Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads:

- i. the matter in issue is identical in both suits; (ii) the parties in the suit are the same;
- ii. sameness of the title/claim;
- iii. a concurrence of jurisdiction; and
- iv. finality of the previous decision.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the *res judicata* principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case, the court quoted Kuloba J, in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating



forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

60. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final) The Judgment or order was on merit) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and) There must be between the first and the second action identical parties, subject matter, and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 (2013) eKLR)”
18. The current lawsuit asks for the cancellation of the land title Kilifi/Matsangoni/459 because it was acquired by fraud, error, or misrepresentation. The land was previously registered in the name of a person named Baya Msanzu (now deceased), who was never a party to the sale agreement between the defendant and a person named Tabu Baya, who was the main character in the Kilifi Land Dispute No. 40 of 2008, for one acre of the said land. In the previous lawsuit, the Tribunal was only concerned with this one acre, not the entire parcel, which is more than 3.6 acres.
19. A look at the award of the Tribunal and the sale agreement shows that the acreage of the land purchase was one acre and not one hectare. It is not clear from the proceedings whether the Tribunal was aware that the land never belonged to Tabu Baya but to Baya Msanzu. Whereas the Tribunal made an award of one acre and not one hectare, it will seem at the registration stage it was captured as one hectare in favour of the defendant herein. Whether this was a misrepresentation, fraud or mistake cannot be determined at this stage. It is not an issue that was settled by the Tribunal nor was it an issue for decision before it, but it will seem to be an implementation or execution crop up.
20. I can see from the record that the late Baya Msanzu was never a party in the former suit; it is not clear whether Tabu Baya had a good title to pass or acted as her agent.
21. This court is not asked to sit as an Appellate Court to consider the Kilifi Land Dispute No 40 of 2008, but rather to find that, whereas there was a sale agreement of one acre of land between the parties disclosed in the dispute before the Land Tribunal in the former suit, the final product resulted in an outcome which was never envisaged by the Tribunal and needs to be probed on merit by this court. The issue of the sale of one acre and not one hectare has to be addressed by this court hence in my view, we have a new cause of action, res judicata cannot apply as envisaged under Section 7 of the *Civil Procedure Act*, and the authorities cited.
22. I need not consider the other issues for instance whether the Tribunal had jurisdiction or whether there was obtained consent from the relevant Land Control Board, those should have been appeal issue arising from the decision of the Tribunal.
23. The upshot is that the Preliminary Objection is hereby dismissed with costs in the cause.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 8<sup>TH</sup> DAY OF JUNE, 2023.**

**EK. MAKORI**  
**JUDGE**



**In the Presence of:**

Mr. Shujaa for Plaintiffs/Respondents

Mr. Mwangunya holding brief for Omondi for the Applicant

Court Clerk: Happy

