



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 65 OF 2021

MOHAMED ANWAR ABDIRAHMAN HAJI ABBAS.....PLAINTIFF

VS

MANGALE DZOMBO NGOKA

SHISHILI TWO THOUSAND INVESTMENT LTD

NATIONAL LAND COMMISSION

THE REGISTRAR OF TITLES KILIFI.....DEFENDANTS

RULING

This ruling is in respect of a Notice of a Preliminary Objection dated 29th July 2021 by the 1st and 2nd Defendants on the following grounds:

- a) THAT the application and suit is malicious, misconceived, lacking in merit and an abuse of the court process.***
- b) THAT this Honourable Court lacks the administrative and pecuniary jurisdiction to entertain this suit and therefore should be struck out with costs.***
- c) THAT this application offends Section 7 of the Civil Procedure Act Cap 21 and the same is Res judicata having been adjudicated in ELC No. 555 of 2021- MOMBASA MULGOLD LIMITED -VS- MAIMUNA ABDULLAH MOHAMMED, ABUBAKAR SALIM MOHAMED, MANGALE DZOMBO NGOKA, SAMMY MOCHU DAVID and EMERY MIHAKI KARIUKI and ELC No. 35 of 2012 – MOMBASA.***
- d) THAT the suit offends Section 6 of the Civil Procedure Act Cap 21 and the same is Res subjudice since there is another suit touching over the same subject matter ELC No. 555 of 2011- MOMBASA and ELC No. 35 of 2012- MOMBASA MOHAMED ANWAR ABDIRAHMAN HAJI ABBAS-VS- MEMUM ABDULLAHI MOHAMMED.***

Counsel agreed to canvas the Preliminary Objection by way of written submissions which were duly filed.

1ST AND 2ND DEFENDANTS' SUBMISSIONS

Counsel submitted that this suit is res judicata, the Plaintiff herein having filed **Mombasa ELC No. 35/ 2012 Mohamed Anwar Abdirahman Haji Abbas vs Memum Abdullahi Mohammed** wherein the Plaintiff sued a party whom the 1st Defendant sold a portion of 2 acres of the suit property

Counsel submitted that paragraph 2 and 3 of the Judgment in ***Mombasa ELC No. 35 of 2021*** stated that the Defendants in that case bought the portion of land from the Ngoka family through a Sale Agreement dated 22nd September, 2009. That in both cases the Plaintiff had claimed that the Defendants had trespassed into his land and sought injunction orders of which a Judgment was delivered on 30th July, 2020 dismissing the Plaintiff's case.

Counsel relied on the cases of ***Henderson vs Henderson (1843) 67 ER 313*** and ***Dioceses of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another (2020) eKLR*** where the principle of res judicata was extensively discussed.

Counsel therefore urged the court to uphold the Preliminary Objection and dismiss the Plaintiff's suit with costs.

PLAINTIFF'S SUBMISSIONS

Counsel for the Plaintiff relied on the case **Mukisa Biscuit Manufactures Ltd vs West End Distributors Ltd** which enunciated the meaning of a Preliminary Objection which raises a pure point of law.

Counsel submitted that the Defendants have not raised a pure point of law as some facts have to be ascertained by further evidence and relied on the cases of **Kandara Residence Association and Another vs Ananas Holdings Limited & 4 Others; Director of Survey & 3 Others (Interested Parties) 2020 eKLR** and **Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR** where the courts elaborated on what constitute a Preliminary Objection.

Mr. Siminyu submitted that in the latter case, the court noted that the true Preliminary Objection serves two purposes of merit; first, it serves as a shield for the originator of the objector against profligate deployment of time and other resources and also serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement.

Counsel therefore urged the court to dismiss the Preliminary Objection with costs to the Plaintiff.

ANALYSIS AND DETERMINATION

The only issue for determination is whether the Defendants have raised pure points of law which touches on the jurisdiction of the court to hear and determine a matter that has been litigated by a competent court, involving same parties and the same subject matter which is in short dealing with the doctrine of res judicata. This doctrine is provided for under Section 7 of the Civil Procedure Act and it bars courts from engaging with such cases.

The doctrine of res judicata is a pure point of law which goes to the jurisdiction of the court and if raised then it must be cleared from the way before the case can be heard. If it is upheld, then that is the end of that case.

The other issues raised in the Preliminary Objection are repetitive of the main point on whether this matter is res judicata. The court will therefore only deal with the issue of res judicata.

As aptly put in the case of **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR**, litigation must come to an end at some point and parties must not be allowed to file fresh suits on matters that have been litigated and determined by a competent court. When a Judgment is rendered and a party is aggrieved, such a party has the right to appeal and not file a fresh suit.

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 that an individual should not be harassed twice with the same suit if it is not one that has gone on Appeal.

Looking at the current case and the **Mombasa ELC No. 35 of 2012 Mohamed Anwar Abdirahman Haji Abbas vs Memum Abdullahi Mohamed** where the Plaintiff was seeking injunctive orders against the Defendant in L.R No. 28290 situate S.E of Mariakani Trading Centre are similar. The Plaintiff is the same in both suits but has added the first Defendant Mangale Ngoka and the National Land Commission, 2nd Defendant and the Registrar of titles Kilifi. The issue of trespass and injunction currently being sought against the Defendants on the same parcel of land was heard and determined whereby the court dismissed the Plaintiff's case.

I will state and repeat what I always say that parties should know that courts are very vigilant on parties who add and subtract parties in fresh suits to circumvent the doctrine of res judicata. In the case of **Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR**, the court observed that:

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”

I have considered the pleadings, the Preliminary Objection and the submissions by Counsel and find that the Preliminary Objection has merit and is therefore upheld. The Plaintiff's suit is struck out with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.