



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC NO. 16 OF 2020

SUSAN NDUNGE MAINGI.....PLAINTIFF/RESPONDENT

-VERSUS-

DEE PROPERTIES LIMITED.....1ST DEFENDANT/APPLICANT

MAINGI MUKEKA TUTO.....2ND DEFENDANT/RESPONDENT

LAND REGISTRAR, MACHAKOS.....3RD DEFENDANT/RESPONDENT

FREDRICK MUTHAMA NZIOKA.....4TH DEFENDANT/RESPONDENT

BERNARD NTHUSI NDAMBUKI.....5TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. This Ruling is in relation to a Notice of Motion dated 26th August 2020 brought by Dee Properties Limited, the 1st Respondent/ Applicant, pursuant to section 19(1) & (2) of the Environmental and Land Court Act, 2011 read together with Sections 3A & 7 of the Civil Procedure Act, Order 2 Rule 15 (1) (b) & (d) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The application sought for orders that;

(a) This Hon. Court be pleased to order that the suit herein be struck out in its entirety and or dismissed.

(b) The costs occasioned by this application be provided for.

2. The Application is premised on the grounds appearing on its face, together with the Supporting Affidavit sworn on 26th August, 2020 by Dr. (Mrs) Theodorah Mwikali Malla Kilukumi, the Applicant's Director, in which she deposed that the 2nd Respondent approached her and expressed his wish to sell to the Applicant all that parcel of land known as Mavoko Town Block 3/1160, hereinafter referred to as the suit property.

3. It is the Applicant's case that the 2nd Respondent agreed to sell the suit property to the Applicant and the 2nd Respondent's wife consented to the sale; that there was no disclosure of any pending litigation over the suit property or the existence of another wife.

4. The Applicant deposed further that upon conducting an official search in the registry, the last entry in the register indicated that on 7th December 2017, a caution had been lifted vide court order dated 12th May 2017 at the Machakos High Court.

5. According to the Applicant, the 2nd Respondent occupied, was in possession and lived with his wife in the suit property and there was no disclosure of the existence of another wife and that the said 2nd Defendant's wife gave spousal consent for the sale of the suit property vide a sale agreement that was executed on 16th December, 2017.

6. She averred that the Applicant purchased the suit property as an innocent purchaser for value without notice of any pending suit; that the property was transferred to the Applicant on 2.2.2018 and a title deed issued in its favour.

7. Further that the 1st Respondent filed Machakos High Court Matrimonial Cause No. 10 of 2017 (OS) seeking among other prayers, a

declaration that the suit property be declared as matrimonial property; that the High Court delivered its judgment on 26th September 2019 where it ordered that the 2nd Respondent herein holds a sum of Kshs. 14,100,000/= in trust for the 1st Respondent herein being the proceeds of sale of the said suit property.

8. It was contended on behalf of the Applicant that the 1st Respondent was given a final decree which had not been challenged and considered the reliefs sought in the Plaint against the Applicant as unfair, inequitable and unjustified; that the suit constituted an abuse of the court process as the 1st Respondent was instituting a multiplicity of actions on the same subject matter, which could occasion contradictory orders with those issued in Machakos High Court Matrimonial Cause No. 10 of 2017 (OS) and prayed that the application be allowed.

9. The application was opposed vide a Replying Affidavit dated 12th October 2020 sworn by the Plaintiff herein who averred that the said application was frivolous, an abuse of the court process and a product of misapprehension of the judgment in Machakos Matrimonial Cause No. 10 of 2017.

10. She averred that the principles of *Res Judicata* do not apply in this suit as the applicant had not demonstrated that the settled conditions had been met; that the causes of action and the parties in the two matters were distinct notwithstanding that both were predicated on the same property.

11. It was the 1st Respondent's evidence that the court in Machakos Matrimonial Cause No. 10 of 2017 had limited jurisdiction regarding Mavoko Town Block 3/1160 and the aspect of canceling the title in favour of the Applicant could only be discharged by this court.

12. She averred that the present suit sought cancellation of the title pursuant to an overriding interest under section 28 of the Land Registration Act which the Defendant was deemed to be a constructive trustee of the Plaintiff's interest; She averred that in the current suit she is pursuing 50% of the suit property.

13. She finally averred that from the application, it was evident that the applicant herein was not a party to Machakos High Court Matrimonial Cause No. 10 of 2017 and therefore the issue of *Res Judicata* does not arise; that if this application was allowed she would suffer irreparable loss and the same should be dismissed with costs.

14. The 2nd Defendant/Respondent herein, Maingi Mukeka Tuto, also filed a replying affidavit sworn on 12th April 2021 where he deposed that he was in support of the 1st Defendant/ Applicant's Notice of Motion and supporting affidavit dated 26th August 2020 and that the plaintiff's interest in property title Number Mavoko Town Block 3/1160 and the distribution from the sale thereof have already been determined with finality in Machakos High Court Matrimonial Cause No. 10 of 2017.

15. The application was canvassed by way of written submissions and on record are the Applicants' submissions filed on 24.03.2021, the Plaintiff/Respondent's submissions filed on 5th July 2021 and the 2nd Defendant's submissions filed on 6th July 2021.

THE APPLICANT'S SUBMISSIONS

16. The Applicants' Counsel submitted that the 1st Respondent sued her erstwhile husband in Matrimonial Cause No. 10 of 2017 (OS) where she sought to be declared a part owner of the suit property. Counsel contended that, meanwhile, the suit property had, during the pendency of the proceedings been purchased by the Applicant and its purchase price fully paid to the 2nd Respondent. Counsel argued that the 1st Respondent sought and obtained orders to join the purchaser as an interested party which orders were vacated by consent and the Plaintiff was estopped from commencing any fresh proceedings against the Applicant.

17. Counsel submitted that the High Court having rendered a conclusive determination that the Plaintiff was entitled to half of the matrimonial properties and decreed that the 2nd Respondent was holding Kshs. 14,100,000/= in trust for the Plaintiff, there was no further dispute left for this court to entertain. That the sum of Kshs. 14,100,000/= was arrived at from the sale of parcel No. Mavoko Town Block 1/5785 and Mavoko Town Block 3/5785 which were sold at a sum of Kshs. 4,700,000/= and Kshs. 23,500,000/= respectively resulting in a cumulative figure of Kshs. 28,200,000/=, which was divided in to two to yield a sum of 14,100,000/=.

18. Counsel contended that this suit is aimed at embarrassing courts of coordinate jurisdiction as the applicant is now seeking for contradictory and conflicting orders.

19. Counsel stated that the Plaintiff's remedy lied in filing an appeal which she had never done and referred the court to the case of **Saif Ali v Sydney Mitchell & Co** where Lord Diplock held;

“Under the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. This is not based solely on technical doctrines of *res judicata* but upon principles of public policy, which also discourage collateral attack on the correctness of a subsisting judgment of a court of trial upon a contested issue by re-trial of the same issue, either directly or indirectly in a court of co-ordinate jurisdiction.”

20. Counsel submitted that the 2nd suit sought substantially similar orders against a 3rd party who paid the entire purchase price, half of which was being held by the 2nd Defendant as a trustee for the Plaintiff and that if the orders sought in this suit are granted, the Plaintiff will receive double portion in respect of the suit property, without lawful justification which will be contrary to the decision in Machakos HCC Matrimonial Cause No. 10 of 2017 (OS). He contended that the Plaintiff is therefore barred by the doctrine of *Res Judicata* as outlined under section 7 of the Civil Procedure Act. Counsel relied on the Court of Appeal cases of **William Koross (Legal representative of Elijah C.A**

Koross) v Hezekiah Kiptoo Komen and John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others, which decisions have been considered by this court.

21. Counsel submitted that it is against the policy of the law to allow litigants to litigate in installments, hence the development of the *Res Judicata* principle, to encompass every aspect that should have been part of the previous litigation which is deemed to have been litigated upon and a determination made. Counsel cited the case of *Pop-In (Kenya) Limited & 3 others v Habib Bank [1990] e KLR*, for the proposition that the plea of *Res Judicata* applies not only to points which the court pronounced itself on, but to all points which belonged to the subject of litigation if parties in exercise of reasonable diligence ought to have brought to the court's attention.

22. Counsel submitted that indeed, if the Plaintiff genuinely believed that she had a cause of action against the 1st Defendant, she would not have consented to the 1st Defendant being discharged from the matrimonial proceedings which issues would have been raised and adjudicated upon in that forum and to raise such issues in a fresh suit is an abuse of the court process.

23. Counsel finally submitted that the purchasers of Mavoko Town Block 1/5785 and Mavoko Town Block 3/5785 who purchased land from the 2nd Respondent in similar fashion had not been sued thereby exposing the extortion and harassment motive behind this suit. Counsel urged the court to strike out this suit with costs to the Applicant. Reliance was placed on the case of *Graham Rioba Sagwe & 2 Others v Fina Bank Limited & 5 Others [2017] eKLR*, for the proposition that filing a second suit to seek for what could have been obtained in an earlier suit is an abuse of the court process.

THE PLAINTIFF/RESPONDENT'S SUBMISSIONS

24. Counsel for the Plaintiff/Respondent referred the court to the case of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others (1996) eKLR* where the Court of Appeal summarized the ingredients for the doctrine of *Res Judicata*, that parties were the same or litigating under the same title; that a competent court heard the matter in issue and the issue has been raised once in a fresh suit.

25. Counsel submitted that the cause of action in the two matters were distinct as the plaintiff in Matrimonial Cause No. 10 of 2017 (O.S) sought to secure her rights as a spouse of the 2nd Respondent, whereas in the present suit, the case involved constructive trust and fraud. Counsel argued further that the claim in the earlier suit was brought under the Matrimonial Property Act, while the current suit was brought pursuant to Article 162 (2) (b) of the Constitution as well as section 28 of the Land Registration Act.

26. Counsel submitted that the parties in both suits were different and it was instructive to note that though the Applicant wished the court to believe that there was a consent on 4th July 2018 to exclude them from the proceedings in the matrimonial cause, the Plaintiff/Respondent withdrew the suit since the jurisdiction that had been invoked was in regard to division of Matrimonial property, which could not involve a third party.

27. It was further submitted for the Plaintiff/ Respondent that excerpts from the judgment in the Matrimonial Cause demonstrated that the aspect of conclusiveness and finality in the issues between the parties were not achieved to wit Paragraph 67 of the judgment, which stated as follows;

“Regarding the properties sold by the Defendant to the third parties, this court cannot nullify the said dispositions as the said third parties are not before me hence have not been afforded an opportunity to be heard.”

28. Counsel argued that the aspect of overriding interests of a spouse was not determined as evidenced in paragraphs 67 and 68 of the judgment in the matrimonial cause. He submitted that it would be a travesty of justice and draconian for the Plaintiff's case to be struck out summarily and the doctrine of *Res Judicata* could not be used as a shield against fraudulent transactions. Counsel pointed the court to the case of *Robert M. Muga v Muchangi Kiunga & 2 Others [2007] eKLR*, which I have considered. Counsel further relied on the case of *Samuel Kiiru Gitau v John Kamau Gitau, Nairobi HCC No. 1249 of 1998*, for the proposition that the test of *Res Judicata* is the identity of the issue and not the identity of the property involved in the former and current suits.

29. On the issue of jurisdiction of the ELC court and the High court exercising its jurisdiction under the Matrimonial Properties Act, counsel referred the court to the case of *AKM v NNN [2019] eKLR* where the court held that;

“On the other hand, the jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the constitution of Kenya and Section 13(2) of the ELC Act No. 19 of 2011. Article 162 (2)(b) states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land. The provisions of Section 13(2) of the ELC Act clearly gives power to ELC to hear and determine disputes relating to inter alia, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues. The division of matrimonial property upon dissolution of marriage in my view is outside the purview of the scope of ELC and the relief cannot be granted in that court and it is only to that extent that I find that this cause though it touches on similar properties like the ones mentioned in the cited ELC Court in Embu, is not *Sub Judice*. What this court is being called upon to do can only be done in this court. Although the issue of Ownership is claimed at the ELC, the claim arises from the contribution made by virtue of marriage and it is not a challenge to the title of listed properties.”

THE SECOND DEFENDANT'S SUBMISSIONS

30. Counsel for the 2nd Defendant/Respondent submitted that indeed the suit was barred by the doctrine of *Res Judicata* as provided for in section 7 of the Civil Procedure Act Cap 21 Laws of Kenya. Counsel relied on the cases of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & Another [2020] eKLR* and *Pangaea Holdings LLC & another v Hacienda Development Limited & 2 Others [2020] eKLR* for the proposition that the doctrine of *Res Judicata* cannot be evaded by adding

new parties or introducing a new cause of action to the fresh suit.

31. Counsel finally submitted that the application dated 26.08.2020 be allowed as prayed and the Plaintiff/Respondent's suit herein be dismissed with costs to the Defendants.

ANALYSIS AND DETERMINATION

32. I have considered the Application, the replies, rival submissions by counsel and authorities cited. In my considered view, the key issue that crystalize for determination is whether this suit is *Res Judicata*.

33. The statutory provisions in regard to the doctrine of *Res judicata* are contained in section 7 of the Civil Procedure Act Cap 21 Laws of Kenya, which provides 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.”

34. The Court of Appeal in the case of [*The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, \[2017\] eKLR](#) stated;

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *Res Judicata* thus rest in the public interest for swift, sure and certain justice.”

35. The Supreme Court reiterated this position in its judgment in [*John Florence Maritime Services Ltd & Another vs Cabin et Secretary for Transport and Infrastructure & 3 Others \(2021\) eKLR*](#), and held that the doctrine of *res judicata* prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action and serves the cause of order and efficacy in the adjudication process. Further, that it ensures that litigation comes to an end and prevents a multiplicity of suits.

36. Similarly, in the case of [*Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company & Another \(Interested Parties\) \[2020\] e KLR*](#), at Paragraph 44 the court held as follows;

“A close reading of section 7 of the Act reveals that for the bar of *Res Judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine five essential elements which are stipulated in the conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that;

- i. The suit or issue raised was directly and substantially in issue in the former suit.**
- ii. That the former suit was between the same party or parties under whom or any of them claim**
- iii. That those parties were litigating under the same title**
- iv. That the issue in question was heard and finally determined in the former suit**
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”**

37. It is therefore clear from both statute and the long line of authorities that a plea of *Res Judicata* will only be tenable where it is demonstrated that the issues in the former and current suit are the same; in principle, the parties are the same, the court that determined the former suit had jurisdiction to determine both the former and current suits, and the determination of the former suit was with finality.

38. I have considered the judgment in Machakos High Court Matrimonial Cause No. 10 of 2017, which is the only document that was presented by the parties in respect of the former suit, as none of them attached the pleadings in that suit. The attached judgment though having mentioned that the Originating Summons by the Plaintiff herein “sought for the following orders,” did not state the orders sought. In that decision, the court stated in paragraph 50 thereof as follows;

“The case revolves around the application of Article 45 (3) of the Constitution as read with section 7 of the Matrimonial Property Act”

39. In Machakos High Court Matrimonial Case No. 10 of 2017, the issue before court was the extent of the Plaintiff's contribution to the acquisition of the matrimonial property acquired during her marriage with the 2nd Defendant. Consequently, the court proceeded to determine the Plaintiff's rights in accordance with the Matrimonial Property Act and made the following orders;

i. "A declaration that the properties mentioned hereinabove are matrimonial property;

ii. A declaration that the Plaintiff is entitled to an equal interest in the said properties;

iii. An order do issue that the properties herein be shared equally and if incapable of being shared that the same be sold and the net proceeds be shared equally between the Plaintiff and the Defendant. Pursuant thereto, the said properties will be valued in order to determine their worth. The cost of the valuation to be shared between the plaintiff and the Defendant equally.

iv. It also follows that the sums which the defendant received from the aforesaid dispositions of the matrimonial properties, the law deems him to be a trustee of the funds which ought to have been receivable by the plaintiff. Accordingly, the defendant holds a sum of Kshs. 14,100,000.00 in trust for the Plaintiff.

v. Liberty to apply granted to the parties

vi. Each party will bear own costs."

40. On the question of sale of matrimonial properties to third parties, the court at paragraph 67 of the judgment rendered itself as follows;

"Regarding the properties sold by the Defendant to third parties, while this court cannot nullify the said dispositions as the said third parties are not before me hence have not been afforded an opportunity of being heard, in the case of *Mugo Muiru Investments Limited vs. E.W.B & 2 Others* [2017] e KLR the court of Appeal held that;

Elizabeth's interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth's interest."

41. As I understand it, the Judgment in the former suit addressed the question of whether or not the Plaintiff herein had contributed to the acquisition of Matrimonial property and how the same ought to be shared between the erstwhile couple.

42. In the current suit, in the plaint filed on 25th February 2020, the Plaintiff has alleged that she is entitled to 50% interest in the property known as Mavoko Town Block 3/1160 owing to her marriage to Maingi Mukeka Tuko and her contribution to the acquisition of the same as declared in Machakos High Court Matrimonial Cause No. 10 of 2017 (OS). She contends that her interest in the suit property, was overriding, equitable and unregistered interest. She has further stated that the sale and transfer of the suit property by the defendants was fraudulent as the same was done during the pendency of Machakos High Court Matrimonial Cause No. 10 of 2017 and when the same had a caution and injunctive orders registered against the title. In the current suit, the Plaintiff has sought for the following orders;

i. A declaration that the 1st Defendant acquired Mavoko Town Block 3/1160 illegally and unprocedurally thereby disenfranchising the Plaintiff of her 50% share in the said property.

ii. A declaration that the 1st Defendant holds 50% of the suit property, Mavoko Town Block 3/1160 in trust for the Plaintiff herein.

iii. An order of this honourable court cancelling the title deed of the suit property Mavoko Town Block 3/1160 issued in the names of the Defendant herein and directing the land Registrar Machakos to register 50% interest of the suit property, Mavoko Town Block 3/1160 in the names of the Plaintiff.

iv. A permanent order of injunction restraining the 1st Defendant whether by itself or its directors, its servants or agents from, dealing, subdividing, constructing, disposing, trespassing, interfering, charging and whatsoever dealing with 50% of the suit property Mavoko Town Block 3/1160.

v. An order of the Honourable Court directing the first Defendant to give an account of the sum of Kshs. 23, 500,000/=.

vi. Costs of this suit

vii. Any other relief that the honourable court may deem just and fit to grant.

43. On the other hand, the Defendant by his defence filed on 10th June 2020, denied the plaintiff's claim and averred that they were innocent purchasers for value, that their proprietary rights are protected under Article 40 of the Constitution and that this matter is *Res Judicata* by virtue of the judgment in Machakos High Court Matrimonial Cause No. 10 of 2017 (OS).

44. Therefore, the main issue in contention in the instant suit is whether the plaintiff herein has an overriding, equitable, and unregistered 50% interest in the suit property by dint of section 28 of the Land Registration Act. And the question that ought to be answered by this court is whether the High court sitting in Machakos High court Matrimonial Cause No. 10 of 2017, had jurisdiction to determine that issue and or grant the prayers sought by the Plaintiff in this matter.

45. In the case of *Uhuru Highway Development Ltd vs. Central Bank of Kenya* [1996] e KLR, the court noted that one of the key elements that would give rise to *Res Judicata* was that the decision in the former suit must have been rendered by a court having jurisdiction over the subject matter in the suit.

46. The court seized with jurisdiction to determine matters in respect to interest in land is the Environment and Land Court. Under Article 162 (2) (b), of the Constitution, the Environment and Land Court is the court with jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Section 13 (1) and (2) of the Environment and Land Court Act No. 19 of 2011 provides the jurisdiction of the Environment and Land Court as follows;

“(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any or other law applicable in Kenya relating to Environment and land.

a. In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the court shall have power to hear and determine disputes-

a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) Relating to compulsory acquisition of land;

c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.”

47. As regards questions touching on provisions of the Land Registration Act, which includes section 28 of the said Act, section 2 of the said Act, defines “court” as follows;

“Means the Environment and Land Court Established by the Environment and Land Court Act, No. 19 of 2011, and other courts having jurisdiction on matters relating to land.”

48. I therefore find and hold that the High Court in Machakos Matrimonial Cause No 10 of 2017, did not have jurisdiction to determine the question of the plaintiff’s claim in respect to 50% interest in the suit property as an overriding, equitable and unregistered interest in the suit land and therefore that question was properly raised in a fresh suit before this court.

49. Looking at the decision in Machakos High Court Matrimonial Cause No. 10 of 2017, it is clear from paragraph 67 that the court restrained itself from pronouncing itself on the plaintiff’s right vis-a-vis third parties who had purportedly purchased the matrimonial property, only indicating that, even where third parties purchase property with overriding interests, the property is transferred to them subject to the overriding interests.

50. It is therefore clear that the issues in Machakos High Court Matrimonial Cause No. 10 of 2017 and the issues in this suit are not the same. I am alive to the legal position as argued by the Applicant that even if the issues were different, as long as there was an opportunity for the Plaintiff to raise the new issue in the former suit, but did not, then he/she cannot raise the new issue in the fresh suit. Therefore, this court must consider whether the question of the plaintiff having an overriding interest in the suit property under the provisions of section 28 of the Land Registration Act could have properly been raised in the former suit. The plea of *Res Judicata* can only be raised in a matter where the court that tried the former suit had jurisdiction to try the fresh suit. My considered view is that in view of Article 162 (2) (b), section 13 (1) and (2) of the Environment and Land Court Act as well as section 2 of the Land Registration Act, the High Court did not have jurisdiction to determine a matter in respect of overriding or equitable interest in registered land under the provisions of section 28 of the Land Registration Act No. 3 of 2012, which provides that all registered land is subject to overriding interests although the same may not be noted on the register.

51. The 1st Defendant/ Applicant’s arguments that there is a likelihood of double enrichment by the Plaintiff is unfounded as the decision of the court in the former suit although predicated on the presupposition that the sale of the suit property was lawful, yet the court did not consider nor render itself on the question of the legality or otherwise of the sale of the suit property between the 1st and 2nd Defendants, nor the question as to whether the plaintiff had acquired overriding interest in the suit property, which interest could ultimately be registered as against the 1st Defendant/ Applicant under the Land Registration Act.

52. Additionally, for the doctrine of *Res Judicata* to apply, the former suit must have been between the same parties as those in the current suit, or between parties under whom they or any of them claim, litigating under the same title. The 1st Defendant/Applicant was not a party in the former suit neither are they parties under whom any of the parties in the former suit claim.

53. It is for the above reasons that I hold and find that this suit is not *Res Judicata*. I therefore find that the 1st Defendant’s application dated 26th August 2020 lacks merit and the same is dismissed with costs.

54. Orders accordingly

**RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 7TH DAY OF FEBRUARY 2022
THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

A. NYUKURI

JUDGE

In the presence of:

Mr. Maingi for the Plaintiff

Mr. Kaluu for the 1st Defendant

Mrs. Okumu for the 2nd Defendant

Ms Josephine Misigo – Court assistant