REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

JUDICIAL REVIEW DIVISION NO. 4 OF 2017

FORMERLY MERU MISC APPLICATION CASE NO.4 OF 2007

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS

IN THE MATTER OF LAND PLOT NUMBER 160 MARIANI LAND ADJUDICATION SECTION

AND

IN THE MATTER OF OBJECTION NUMBER 1128

BETWEEN

DESDERIO NKONGE KIRUGU...APPLICANT

VERSUS

THE LAND ADJUDICATION OFFICER MARIANI ADJUDICATION SECTION.............1ST RESPONDENT

BENSON NCHUNGE KUJOGA...INTERESTED PARTY

RULING

1. The matter is brought vide a notice of motion application dated the 29th of November 2021, Pursuant to Section 1A,1B and 3A of the Civil Procedure Act.

2. The applicant is seeking for orders that;

   i. The application be certified as extremely urgent and service of the same be dispensed with at the first instance.

   ii. That the Honourable court do order that Mariani Adjudication officer to alter the adjudication records and return land plot number 160 Mariani Adjudication section.

   iii. Cost of this application be provided for.

3. The application is supported by the affidavit of **DESIDERIO NKONGE KIRIGU** and premised on the following grounds: -

   a) That ruling in this matter was entered in favour of the applicant herein.

   b) THAT the respondent has in disregard of the court's order went ahead to transfer the suit property to different numbers

   c) THAT litigation must come to an end.

   d) THAT the applicant has suffered/will suffer irreparably if the said respondent is not compelled to comply with the court orders.

4. In the supporting affidavit the applicant has deponed that the matter herein has been litigated and decision made subsequently in favour of the applicant and has annexed an extract copy of the ruling and judgement marked 'DNK-"1a and 1b.''

5. The applicant further states that the respondent did move the court vide ELC Judicial Review No.5 of 2019 and the same was also dismissed and the applicant has annexed a copy of the said ruling marked ‘’DNK-2’’.

6. The applicant contends that the respondent has moved to transfer the suit property to third parties’ names despite an order dated 28th March 2007 barring adjudication officer from in any way interfering with applicants plot no 160 Mariani Adjudication Section.

7. The applicant further contends that he has suffered irreparably in his reversion because this matter has taken too long on account of the applicant’s procrastinating maneuvers and that litigation must come to an end

8. The matter came up for hearing on the 21.02.2022 before court for inter parties hearing and there was no representation of the interested party and the respondent though they were duly served and there is an affidavit of service filed on 4.2. 2022.Consequently, the applicant prayed for the application to be allowed as prayed.

ANALYSIS AND DETERMINATION

9. On the face of the application the applicant prays that he is in dire need to execute the orders of court arising out of the decision of the honourable court in the judgement delivered on the 14th May 2018.The applicant avers that the respondent despite the judgement is not ready to ensure smooth transition/execution of the orders of the court. The applicant has annexed rulings and judgement in this case and in Chuka ELC Judicial Review No.05 of 2019 as well as High Court at Nairobi Miscellaneous Application No.306 of 2007.

10. I frame the issues for determination in respect of the application herein as follows:

> **i. Whether the application is Res Judicata.**
>
> **ii. Whether the applicant is entitled to the prayers sought.**

11. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under ***section* 7** of the Civil Procedure Act. The doctrine of resjudicata as stated has been explained in a plethora of decided cases. In the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

> ***"(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.”***

12. In the case of **Henderson vs Henderson (1843) 67 ER 313** res-judicata was described as follows;

> ***“…where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.***

13. Similarly, in the case of **Attorney General & another ET vs (2012) eKLR** it was held that;

> ***“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as 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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & 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, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC 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 in every occasion he comes to court, then I do not see the use of doctrine of res judicata…..”.***

14. The applicant filed an application dated the 27th of March 2007 in Nairobi High Court Miscellaneous No.306 of 2007 wherein he was

granted leave to apply for an order of judicial review in the nature of certiorari to bring up and quash the decision of the land adjudication section Meru South District adjudication area. On 10th of April 2007 the applicant filed a notice of motion application seeking orders of judicial review in the nature of certiorari to bring up and quash the decision of the respondent dated 29th September 2006 pursuant to the objection No.1128 lodged by the interested party, an order of Judicial Review in the nature of Mandamus to compel the Respondent to alter the adjudication records and return land plot No.160 to the ex parte applicant as initially registered in the records and an order of judicial review in the nature of prohibition to prohibit the respondent from in any way interfering with the ex parte- applicant land Plot No.160 Mariani Adjudication Section.

15. The matter was later transferred to the High court at Meru and allocated case Miscellaneous Application No.4 of 2007 before the same was again transferred to this court and re-named CHUKA JUDICIAL REVIEW No.04 of 2017.

16. By a judgement delivered on 14th May 2018, P. M. Njoroge J found that the order of certiorari to bring up and quash the decision of the respondent dated 29th September 2006 pursuant to objection No.1128 lodged by the interested party was meritorious. The court then issued an order of Certiorari. The court however, found no basis for issuing orders of mandamus and prohibition as prayed by the ex- parte applicant. In the instant application, the applicant is seeking an order that the Mariani Adjudication officer to alter the adjudication records and return plot No.160 Mariani Adjudication section. In my view this will amount to seeking the grant of the order of mandamus which was rejected by the court in its previous judgement delivered on 14th May 2018.

17. My understanding of the case is that the applicant is seeking to reopen a case that has already been finalized by the court in the judgement delivered on the 14th of May 2018.The applicant himself has in the application stated that there must be an end to litigation since the matter had been heard and finalized before. One wonders then why the applicant has still brought the instant application over matters already dealt with and determined by the court.

18. In particular, the case of **Herderson vs Herderson (Supra)** is applicable herein where it was stated that ***"Where a given matter becomes subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case…".***

19. Expounding further on the essence of the doctrine the Court in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows:

> ***"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."***

20. The court explained the role of the doctrine thus:

> '***The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as 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 for, to obtain at last, outcomes favorable 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 foundation of res judicata thus rest in the public interest for swift, sure and certain justice.***''

21. In my understanding the res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the application herein has satisfied the conditions for the principle of res judicata in view of the facts of the case.

22. From the pleadings it is not in dispute that the subject matter in the previous application and the current one is the same. Both the former application and the present application are between the same parties. In the applicant's supporting affidavit he avers that the matter herein has been litigated and decision made subsequently in favour of the applicant herein and has annexed an extract copy of the ruling and judgement marked ''DNK-1a'' and 1b''. The applicant further avers that the respondent did move the court vide ELC Judicial Review no.5 of 2019 and the same was also dismissed and the applicant annexed a copy of the ruling marked ''DNK-2''. In the previous application, the applicant sought inter alia, an order of Judicial Review in the nature of mandamus to compel the Respondent to alter the adjudication records and return land plot No. 160 to the Applicant as initially registered in the records.

23. The applicant has now again come to court seeking for orders that the Honourable court do order that Mariani Adjudication officer to alter the adjudication records and return land plot number 160 Mariani Adjudication section and the Cost of this application.

24. In the case of E.T.V –V- Attorney General & Another (2012) eKLR Majanja .J stated that :

> ***''The courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.''***

25. Applying the stated law to the facts before me, it is clear that the applicant seeks to open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the courts previously. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this application the applicant is trying to litigate a concluded matter by bringing same issues or causes of action which rightly have been or could have been raises in the former application.

26. The court holds that the essence of the principles of res-judicata is to not only to protect the courts from disrepute, but also to protect litigants from unending litigation and that this principle is so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to the inadvertence of the parties or their counsel.

27. The court vide the judgement dated 14th May 2018 did put to rest this matter before all the parties. It therefore follows that the matter was dealt with effectively by a court of competent jurisdiction and the same brought to a finality.

28. Accordingly, the court finds that the elements set herein above which give rise to the application, the doctrine of *res-judicata* could be discerned from the record and I find that this application is res judicata and an abuse of the court process.

29. In the result Applicant's application dated 29th November, 2021 is dismissed with costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY MARCH, 2022 IN THE PRESENCE OF:

C/A: MARTHA

N/A FOR APPLICANT

N/A FOR RESPONDENT

N/A FOR INTERESTED PARTY

C. K. YANO,

JUDGE.