



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 308 OF 2017

FREDRICK MUTHAMA NZIOKA.....1ST PLAINTIFF

JULIA NDUNGE NZIOKA.....2ND PLAINTIFF

VERSUS

PETER W. MATHENGE *t/a* JOMAN

TIMBER YARD HARDWARE (*Kwa Mathenge*).....DEFENDANT

RULING

1. In the Notice of Motion dated 15th August, 2019, the Defendant has sought for the following orders:

a) That the Honourable Court be pleased to dismiss this suit with costs as the suit is res judicata following the Judgment delivered on 31st May, 2019 upon which the boundary dispute between, Mavoko Land Development Company Limited versus Kasina Housing Scheme Society Machakos ELC No. 366 of 2009, the Honourable Court ruled and declared Kasina Housing Scheme Society Title L.R No. 11895/27 or new 11895/35 fake, null and void and the dispute is determined.

b) That the Honourable Court be pleased to issue a permanent injunction order restraining the Plaintiffs, their agents, servants or any other person claiming under the fake leasehold title 11895/27 or 11895/35 to the Defendant's plot number 8 Phase IIC being a sub-division from L.R No. 25062 Mlolongo Market.

c) That the suit be dismissed with costs to the Defendant.

2. The Application is supported by the Affidavit of the Defendant who has deponed that he is a member of Mavoko Land Development Company Limited which is the registered proprietor of Land Reference No. 26062 and that his plot being Plot No. 8 Phase IIC is a sub-division of L.R. No. 26062 (*the suit property*).

3. According to the Defendant, the Plaintiffs are members of Kasina Housing Scheme Society which was allegedly the registered proprietor of L.R. No. 11895/27 or new 11895/35 and that in the Judgment of this court dated 31st May, 2019, the said title was found to be fake, null and void.

4. It is the Defendant's deposition that following the Judgment of this court in Machakos ELC. No. 366 of 2009, the dispute between Mavoko Land Development Company Limited versus Kasina Housing Scheme Society was determined; and that the Judgment of the court in Machakos ELC. No. 366 of 2009 renders this suit *res judicata*.

5. The Defendant finally deponed that from the beginning, the Plaintiffs were aware of Machakos ELC. No. 366 of 2009 but decided to institute the current suit and that this suit should be dismissed for being *res judicata*.

6. In reply, the 1st Plaintiff deponed that this suit is not *res judicata* because the parties before this court were not parties in Machakos ELC No. 366 of 2009; that the suit property herein is Athi River/Athi River Block 9/19 which was acquired through allotment and that the issues in Machakos ELC No. 366 of 2009 are in respect to ownership and boundaries of the mother titles of the respective groups.

7. The 1st Plaintiff deponed that the Plaintiffs have a title for the suit property and that there is no evidence to show that the Defendant's plot number 8 or plot number 1 as per the Sale Agreement is the same as their plot number 3, which is a sub-division of L.R. No. 25062.

8. The 1st Plaintiff finally deponed that this court will determine, *inter alia*, on which mother title the suit premises is situate and that the

Judgment in Machakos ELC. No. 366 of 2009 is not conclusive on the issue.

9. In his submissions, the Defendant's advocate submitted that the Machakos ELC No. 366 of 2009 was between Mavoko Land Development Company Limited and Kasina Housing Scheme Society; that the Defendant was a shareholder in Mavoko Land Development Company Limited which owned L.R. No. 25062 and that the Plaintiffs were members of Kasina Housing Scheme.

10. According to the Defendant, Machakos ELC. No. 366 of 2009 was decided in favour of Mavoko Land Development Company Limited; that this suit was stayed to await the outcome of Machakos ELC. No. 366 of 2009 and that the title held by Kasina Housing Scheme Society, L.R. No. 11895/27, was found to be fake.

11. Counsel for the Defendant submitted that the Leasehold title for Athi River/Athi River Block 9/19 is fake, null and void; that the Plaintiffs holds plot number 1 Phase IIC in the Leasehold Title L.R No. 25062 which is held by Mavoko Land Development Company and that the issues raised in this suit were determined by this court. The Plaintiffs' advocates submissions are not on record.

12. Section 7 of the Civil Procedure Act states that:

"...No court shall try any 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 issues has been subsequently raised and has been heard and finally decided by such Court."

13. In the case of **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another, (2017) eKLR**, the Court of Appeal extensively considered the principle of *res judicata* and held as follows:

"...The elements of res judicata have been held to be conjunctive rather than disjunctive. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2007) eKLR

"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 common-sensical 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 forces 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 and calumny The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

14. In the case of **Mburu Kinyua vs. Gachini Tutu (1978) KLR 69 Madan, J. quoting with approval William Koross vs. Hezekiah Kiptoo Komen & 4 others (2015) eKLR**, stated:

"Where a given matter becomes the subject of litigation in and of 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 in special circumstances) permit the same person to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea 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 judgment but to every point which properly belonged to the subject of litigation and which parties exercising reasonable diligence might have brought forward at the time."

15. The doctrine of *res judicata* is grounded on public interest and thus transcends the parties' interest in a suit. In the **Maina Kiai** case (*supra*), the court quoted with approval the Indian Supreme Court in the case of **Lal Chand vs. Radha Kisham, AIR 1977 SC 789** where it was stated:

"The principles of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

The practical effect of res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunction, from entertaining such suit."

16. Again in **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (2014) eKLR**, the Court of Appeal in determining another application by Benjoh stated thus:

"The general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle") and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal."

17. In the case of **John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport & Infrastructure & Others, Civil Appeal No. 42 of 2014 (2015) eKLR**, the Court likewise extensively considered the principle of *res judicata* and cited with approval the cases of **Handerson vs. Handerson (1843) 67 ER 313** and the case of **Kamunye & Others vs. Pioneer General Assurance Society Limited (1971) EA 263** and stated thus:

“Res judicata is a subject which is not all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Handerson vs. Handerson (1843) ER 313:

*“... where a given matter becomes the subject of litigation in and adjudication in 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 litigation in respect of 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 plea or *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by 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...”*

18. In the case of **James Njuguna Chui vs. John Njogu Kimani, Court of Appeal Nairobi Civil Appeal No. 322 of 2014 (2017) eKLR**, the Court in expounding a doctrine of *res judicata* cited with approval the decisions in **William Koross vs. Hezekia Kiptoo Komen & Others, Civil Appeal No. 223 of 2013** and also the case of **Lal Chand vs. Radha Kishan Air 1997 SC 789** and stated thus:

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the Courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated Courts but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue, courtesy of the repeat litigation.

*The philosophy behind the principle of *re judicata* is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too-human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”*

19. This suit was commenced by way of a Plaint dated 24th April, 2017. In the Plaint, the Plaintiffs stated that at all material times, they were the owners of land known as plot number 3, Kasina Housing Scheme Society (*the suit property*).

20. The Plaintiffs further averred in the Plaint that they are in the process of security a Certificate of Title over the suit premises “*which will be known as Land Reference Number 11895/35.*” The Plaintiffs have sought for a declaration that they are the legal owners of the suit premises.

21. The Defendant’s claim is that this suit is *res judicata* and that the same should be dismissed with costs on that ground. The Defendant has annexed on his Affidavit a copy of the Judgment of this court in Machakos ELC. No. 366 of 2009. In the said Judgment, the Plaintiff is indicated as Mavoko Land Development Company Limited while Kasina Housing Scheme Society was the 1st Defendant.

22. The issues in Machakos ELC. No. 366 of 2009 were that Mavoko Development Company Limited, the Plaintiff therein, purchased L.R. No. 25062, which land was sub-divided as allocated to the Plaintiff’s members. The Plaintiff in Machakos ELC. 366 of 2009 sought to have the title held by Kasina Housing for L.R. No. 11895/27 declared fake, null and void. According to the Plaintiff in Machakos ELC. No. 366 of 2009, Kasina Housing, in collusion with the Director of Surveys, caused L.R. No. 25062 to be sub-divided and created L.R. Nos. 11895/33, L.R. No. 11895/34 and L.R. No. 11895/35.

23. The issue that the court framed in Machakos ELC. No. 366 of 2009 were as follows:

- a. *Whether the title for L.R. No. 11895/27 previously held by the 1st Defendant (Kasina Housing Scheme Society) is null and void.*
- b. *Whether Kasina Housing had encroached on the Plaintiff’s land.*

24. In its findings in Machakos ELC. No. 366 of 2009, this court held as follows:

“40. The evidence before this court shows that after the re-survey that was done by the Director of Surveys in the year 2006, three new parcels with different acreage emerged as follows:

- a. *L.R. No. 25062 measuring 17.58 Ha changed to L.R. No. 11895/33 measuring 8.6 Ha.*
- b. *L.R. No. 11895/27 measuring 17.9 Ha changed to L.R. No. 11895/35 measuring 14.2 Ha.*

c. L.R. No. 11895/R changed to L.R. No. 11895/34.

54. *The analysis of the evidence leads me to the conclusion that the re-survey of L.R No. 25062 by the Director of Surveys was unlawful, null and void. Furthermore, the purported creation of L.R Nos. 11895/27, 11895/33, 11895/34 and 11895/35 was a nullity ab initio.*”

25. In the current suit, the Plaintiffs have stated that they own a portion of land which is a sub-division of Land Reference number 11895/35, whose title the court found to be null and void. Indeed, from the statement filed by the Plaintiffs herein, they bought the said plot from Kasina Housing Scheme Society, the Defendant in Machakos ELC. No. 366 of 2009.

26. The doctrine of *res judicata* serves the salutary aim of bringing finality to litigation. Without it, there would be no end to litigation. This court has already found that the title document that is held by Kasina Housing, a Defendant in Machakos ELC. No. 366 of 2009, is null and void. To the extent that the Plaintiffs’ title or land is a portion of L.R. No. 11895/33, the same suffers the same fate.

27. Indeed, the Plaintiffs and the Defendant herein were members of Kasina Housing Scheme Society and Mavoko Land Development Company Limited respectively. The two Companies were parties in Machakos ELC. No 366 of 2009.

28. Consequently, it is my finding that the issues in this suit have been directly and substantially been in issue in Machakos ELC. No. 366 of 2009 between the same parties although under different capacities. In Machakos ELC No. 366 of 2009, the parties were a limited liability company and a Society while in the current suit, the parties are the members of the said limited liability company and the Society respectively.

29. Having found that the parties herein are litigating under the same title as the parties in Machakos ELC. No. 366 of 2009, and having found that the issue of the validity of the title held by the Plaintiff herein was declared null and void, it is my finding that indeed this suit is *res judicata*.

30. For those reasons, I allow the Defendant’s Application dated 15th August, 2019 as follows:

a. This suit is dismissed for being *res judicata* Machakos ELC. No. 366 of 2009.

b. The Plaintiffs to pay to the Defendant the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 28TH DAY OF MAY, 2021.

O. A. ANGOTE

JUDGE