



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 107 OF 2012.

(formerly BUNGOMA H.C.C. No 146 of 1999)

CLEOPHAS WAFULA PLAINTIFF

VERSUS

ASMIN NASAMBU 1ST DEFENDANT

DISTRICT LAND REGISTRAR BUNGOMA 2ND DEFENDANT

R U L I N G

When this matter came up for hearing on 15th February 2021, **MS NANZUSHI** Counsel for the defendant raised a Preliminary Objection that this suit is res – judicata and should be dismissed with costs. The basis being that the dispute was heard and determined in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No 1109 of 1993** involving the same parties and Judgment was delivered on 24th April 1998 from which no appeal was filed.

In response however, Counsel for the plaintiff **MS RATEMO** submitted that the trial in the subordinate Court involved the sub – division of the land parcel **NO EAST BUKUSU/WEST SANG’ALO/208** while the issues before this Court are a claim for a declaration and an order for injunction with respect to the land parcel **NO EAST BUKUSU/WEST SANG’ALO/1789**. Therefore, the issues raised in the subordinate Court are different from those being raised in this suit. This suit is therefore not res – judicata.

MS NANZUSHI however added that all the parcels of land in dispute emanated from the land parcel **NO EAST BUKUSU/WEST SANG’ALO/208**.

I have considered the brief oral submissions by Counsel on the Preliminary Objection.

The doctrine of res – judicata is provided for under **Section 7** of the **Civil Procedure Rules** 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.”

It is clear from the above that for a plea of res – judicata to be successfully invoked as a bar to a suit, the following conditions must be met: -

- 1. The issue in dispute in the former suit between the parties must be directly and substantially in dispute in the suit where the doctrine of res – judicata is pleaded.**
- 2. The former suit must have been between the same parties or those under whom they or any of them claim litigating under the same title.**
- 3. The former suit must have been heard and finally decided.**
- 4. The Court or Tribunal which heard the former suit must have been competent.**

The term res – judicata is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as follows: -

“An issue that has been definitively settled by judicial decision. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been – but was not – raised in the first suit. These essential elements are (1) an earlier decision on the issue, (2) a final Judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.” Emphasis added.

The rationale behind the doctrine of res – judicata is that litigation must come to an end. Parties who have litigated over a matter in a previous suit should not live in fear that the sword of that previous litigation which was heard and determined will continue to hang over their heads in perpetuity. In **JAMES NJUGUNA CHUI .V. JOHN NJOGU KIMANI C.A CIVIL APPEAL No 322 of 2014 [2017 eKLR]**, the Court of Appeal described the doctrine as follows: -

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has had his dispute decided must learn to live with it. It is not open to him to re – litigate or re – agitate 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 specter 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.”

In **HENDERSON .V. HENDERSON 1843 3 HARE 100 [1843 67 E.R 313]**, **WIGRAM V.C** stated thus: -

“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 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.” Emphasis added.

My understanding of the above therefore, is that in a dispute there may be several issues or points which a party may raise to secure a Judgment in his favour. All those issues or points which are germane to the dispute must be raised for the Court's determination. Failure to do so either through negligence or inadvertence may, except in special circumstances, act as a bar and the party may not raise those issues in subsequent proceedings. That is my understanding of the dictum in **HENDERSON .V. HENDERSON** (supra). The onus is on the party raising the plea of res – judicata to place before the Court sufficient material to demonstrate that the plea of res – judicata is well taken.

I have looked at the amended plaint in this case dated 11th March 2004 and the Judgment in **BUNGOMA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No 1109 of 1993**. The parties herein were the same parties litigating in the subordinate Court except that the plaintiff in this case was the defendant in the previous case. Their roles have now changed.

In this case, the plaintiff seeks the following substantive remedies: -

1. A declaration that the defendant's registration as the proprietor of the land parcel NO EAST BUKUSU/WEST SANG'ALO/891 was fraudulent and should be rectified so that the acreage reads 1.6 Hectares instead of 2.4 Hectares.
2. An injunction restraining the defendant by herself, her agents, servants, workmen or otherwise from carrying on any cultivation or having any deals in land parcel NO EAST BUKUSU/WEST SANG'ALO/1789 comprised in the titles NO EAST BUKUSU/WEST SANG'ALO/2605 AND EAST BUKUSU WEST SANG'ALO/2606.
3. Costs of this suit.

In his defence, the defendant has at paragraph 13 pleaded that this suit is mischievous, frivolous and constitutes an outright abuse of the Court process for being res – judicata as it raises issues which are substantially the same issues that were raised in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No 1109 of 1993** and which were determined in favour of the defendant and from which no appeal was preferred.

The pleadings in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No 1109 of 1993** were not availed for my perusal. However, from the Judgment delivered by the late **I. INDECHE (SPM)** on 24th April 1998, in which the defendant herein was the plaintiff, it is clear from the first two paragraphs of the three paragraphs Judgment that what was at stake was also the ownerships of the land parcels **NO EAST BUKUSU/WEST SANG'ALO/891** and **EAST BUKUSU/WEST SANG'ALO/1789**. For completeness, I shall reproduce the first two paragraphs of the said Judgment.

“JUDGMENT:

In the year 1969 the plaintiff bought a parcel of land measuring 2.4 Hectares from DONISIO KIMASHO WAFULA who was then the registered owner of land parcel EAST BUKUSU/WEST SANG'ALO/206. This parcel of land was sub – divided and it created numbers 890 and 891. Land parcel NO 891 was then transferred to the plaintiff. The two lands were clearly demarcated with a sisal fence. This was in 1983 – 17th September. In 1960, the defendant with people from the survey office carried out purportedly another survey over plot 208 into 5 other parcels which survey interfered with the plaintiff's land on the ground. The new parcels were created out of 891 instead of 890. The plaintiff therefore prays for the nullification of the mutation registered on 15.6.90 creating the new parcels out of land parcel 891 which belongs to her and the land Registrar to be ordered to

cancel the same. The Court is also being ordered (sic) to confirm the earlier registered mutation i.e. registered on 11.82.

The defendant on the other hand has in the defence stated that the plaintiff bought 3 ½ acres which land is EAST BUKUSU/WEST SANG'ALO/891 and that he has no claims over EAST BUKUSU/SOUTH SANG'ALO (sic)/1789. The suit by the plaintiff should therefore be dismissed."

The trial Magistrate then proceeded to order that any mutation forms sub – dividing the plot No 208 after it had already been sub – divided from 890 and 891 was null and void and should be cancelled. He awarded the plaintiff (who is the defendant in this suit) costs.

It is clear from paragraphs 11, 12 and 14 of the amended plaint herein that this dispute involves the ownership of land parcels **NO EAST BUKUSU/WEST SANG'ALO/891** and **1789**. Those same parcels of land were also in dispute in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE No 1109 of 1993** as is clear from the above two paragraphs of the Judgment which I have referred to above. In her oral submissions challenging the plea of res – judicata, **MS RATEMO** has stated that the claim in the subordinate Court involved the sub – division of land while the issue in this case is a claim for a declaration and injunction which are therefore different issue. As is clear from the decision in **HENDERSON .V. HENDERSON** (supra), the plea of res – judicata applies not only to points that the Court was required to form an opinion but also *"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."* Similarly, under explanation No 4 of **Section 7 of the Civil Procedure Act**, it is stated that: -

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

I have no doubt in my mind that the remedies being sought by the plaintiff in this case could, with due diligence, have been raised in the subordinate Court which heard and determined the previous suit involving the parties herein. Nothing stopped the plaintiff herein from seeking, by way of a Counter – Claim, the injunctive relief that he now seeks with respect to the land parcel **NO EAST BUKUSU/SOUTH SANG'ALO/1789**. The Judgment of the late **HON INDECHE** shows clearly in paragraph two that the plaintiff who was the defendant in the subordinate Court specifically pleaded that the defendant herein who was the plaintiff in that Court had no claim over the land parcel **NO EAST BUKUSU/SOUTH SANG'ALO/1789**. In the same vein, he could have sought injunctive reliefs in relation to that land. Citing with approval the decision in **HENDERSON .V. HENDERSON** (supra), the Court of Appeal in **THOMAS OWEN ONDIEK & ANOTHER .V. NATIONAL BANK OF KENYA LTD & ANOTHER 2015 eKLR** said: -

"It is trite law that an issue or claim that should have been raised in an earlier case cannot be raised in a subsequent suit between the same parties."

It has not been suggested that the subordinate Court had no jurisdiction to determine in the previous suit, the remedies being sought in this suit. In her defence herein, the defendant has pleaded that this suit is mischievous, frivolous and constitutes an outright abuse of the process of the Court for being res – judicata. Having considered all the issues raised by the defendant's Counsel in the Preliminary Objection, I am satisfied that this suit res – judicata and amounts to an abuse of the process of this Court.

The up – shot of the above is that the suit is struck out with costs to the defendant.

Boaz N. Olao.

JUDGE

27th May 2021.

Ruling dated, signed and delivered at **BUNGOMA** on this 27th day of May 2021 by way of electronic mail in keeping with the **COVID – 19** guidelines.

Boaz N. Olao.

JUDGE

27th May 2021.