Karanja v Railway Housing Co-operative Society Limited & 3 others (Environment & Land Case 150 of 2017) [2022] KEELC 13494 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13494 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 150 OF 2017

A NYUKURI, J

OCTOBER 5, 2022

BETWEEN

DANIEL MWANGI KARANJA .... PLAINTIFF

AND

RAILWAY HOUSING CO-OPERATIVE SOCIETY LIMITED ... 1ST DEFENDANT

NDATANI ENTERPRISES COMPANY LIMITED .... 2ND DEFENDANT

FUTURE PROPERTY AGENCY LIMITED .... 3RD DEFENDANT

HENRY NYABUTO BORURA .... 4TH DEFENDANT

RULING

1. What is before court is the application dated April 2, 2019 filed by the 2nd and 3rd Defendants in this suit seeking the following orders;

   a. That this honourable court be pleased to dismiss this suit for being res judicata.

   b. That costs of the application be granted to the Applicant.

2. The application is supported by the affidavit of Alexander Muema Muthengi sworn on April 2, 2019. The Applicant's case is that the issues in dispute in this case were directly and substantially in issue in ELC case No. 224 of 2009 as consolidated with ELC No. 353 of 2009 and ELC 353 of 2009 (hereinafter referred to as the former suit). They further contend that the former suit was heard and conclusively determined by a competent court of the same jurisdiction.

3. The Applicants further stated that on November 7, 2017, a consent order was issued in the former suit and subsequently a decree issued on November 13, 2017.

4. According to the Applicants, the two parcels of land, namely Plot Number Mavoko Town Block 52/89 (previously known as plot No. 100) and plot No. 245, which are in issue in this suit were substantially

and directly in issue in the former suit; and the dispute in respect of the two parcels of land was conclusively determined vide a decree dated November 13, 2017.

5. That the court in the former suit determined that plot No. Mavoko Town Block 52/89 (previously known as plot No. 100) belongs to the Plaintiff, while plot No. 245 belongs to the 2nd Defendant. Further, that the prayers sought in the instant suit are similar to those sought in the former suit and that the issues raised in the instant suit are substantially and directly the same issues raised in the former suit. And finally, that the court that tried the former suit was competent to try the current suit.

6. The application was opposed. On April 29, 2019 the Plaintiff/Respondent filed grounds of opposition and a replying affidavit sworn by Charles Oyoo Kanyangi, counsel for the Plaintiff, which documents were both dated April 24, 2019. The Respondent's case was that the Applicants had misrepresented the real facts to the court and misinterpreted the court's decision in the former suit.

7. It was the Respondent's position that the Plaintiff's prayers in the instant suit are;

   a. An order declaring that the Plaintiff is the lawful owner of plot No. Mavoko Town Block 52/89 and that the sale of the same to the 4th Defendant is unlawful, null and void.

   b. An order directing the 1st, 2nd, and 3rd, Defendants to issue the Plaintiff with the title deed in respect of the two plots.

   c. A permanent order restraining the 4th Defendant from interfering or erecting any kind of structure whatsoever on plot No. Mavoko Town Block 52/89.

8. The Respondent further contended that the application, the grounds thereon and the supporting affidavit and annexures thereof clearly show that the dispute raised by the Plaintiff was not directly and conclusively adjudicated upon. According to the Respondent, the ends of justice would be better served by determining this suit after hearing the suit on merit instead of dismissing it on a technicality.

9. In a rejoinder to the Respondent's replying affidavit, Alexander Muema Mathenge filed a supplementary affidavit in which he deposed on behalf of the 2nd and 3rd Defendants that the parties in the instant suit and in the former suit were substantially the same since the Plaintiff herein was one of the persons on whose behalf the 1st Defendant herein litigated for. The 2nd and 3rd Defendants' position was that it was the duty of the Plaintiff herein to execute the decree issued in the former suit. They further argued that should the court proceed to hear this matter, there are chances of conflicting judgements over the same subject matter.

10. On February 23, 2022, the court granted the parties leave to file submissions in respect to the instant application. On record are the Applicants' submissions filed on July 18, 2022.

Submissions

11. Counsel for the Applicants submitted that the defence filed in the former suit had a counterclaim wherein Ndatani Enterprises Company Limited (hereinafter referred to as Ndatani Enterprises) who were the 1st Defendant in that suit, sought to have the plots in dispute transferred to the list of beneficiaries, among whom the name of the Plaintiff was included on page 5 of the defence and counterclaim in respect of plot No. 100 and at page 8 in respect of plot number 245.

12. They further pointed out that although the Plaintiff herein had counterclaimed to be allocated plot No. 100 and plot No. 245, in the decree, he was allocated plot Nos. 210 and 100. They further argued that the said decree has never been challenged or appealed against. Counsel therefore argued that what

was in dispute in the former suit were plot numbers 100 and 245, which are the same properties in issue in this suit as reflected in paragraphs 6,7,8 and 9 of the plaint in the instant suit.

13. Counsel concluded that this suit was res judicata. It was their contention that plot No.245 was not decided upon and since the court was silent on the same, it is assumed that the same was denied, which fell within explanation 5 of section 7 of the *Civil Procedure Act*.

Analysis and determination

14. The court has carefully considered the application, the supporting and supplementary affidavits and annexures thereto as well as the grounds of opposition, replying affidavit and the submissions. The sole issue that arise for determination therefore is whether this suit is *res judicata*.

15. Section 7 of the *Civil Procedure Act* is the legal basis for the doctrine of *res judicata*. That section 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 the 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.

16. Essentially therefore, where a dispute has been determined with finality by a competent court, another suit raising substantially similar issues as those in the previous suit and involving the same parties or their privies cannot be entertained by the court.

17. The purpose of the principle of res judicata is to bring finality and certainty to litigation. In the case of The *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others* [2017]e KLR, the Court of Appeal succinctly captured the goal of the doctrine of *res judicata* in the following terms;

> 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 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.

18. The elements constituting the doctrine of res judicata are well settled, having been distilled from section 7 of the *Civil Procedure Act*. In the case of *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd* [2017]e KLR, the court stated as follows;

> The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;
>
> 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.

19. Having considered the pleadings in the former suit which are annexed to the affidavits of Alexander Muema Muthengi, it is not in dispute that Ndatani Enterprises were the Plaintiffs in the former suit having sued Railway Housing Cooperative Society Ltd (hereinafter referred to as Railway Housing). I note from the plaint that Ndatani Enterprises had entered into an agency relationship with Railway Housing, for sale of several plots belonging to Ndatani Enterprises within a specified period of time. Further, that there was default on the part of Railway Housing, whereof they were required by Ndatani Enterprises to furnish them with particulars of all the purchasers and disclose the extend of each purchaser's payment of the consideration, which purchasers included Daniel Mwangi Karanja, the Plaintiff in the current suit. They therefore sought for several orders including; orders of permanent injunction to bar Railway Housing from dealing in any manner with the suit property; declaration that the agency agreements between the parties were repudiated; a declaration that only fully paid up *bona fide* purchasers were entitled to their respective plots and a declaration that Railway Housing was merely an agent and not entitled to any of the plots.

20. In addition, I note that in the former suit, Railway Housing filed a defence and counterclaim wherein they sought for orders *inter alia*, that Ndatani Enterprises do transfer plot Nos. 100 and 245 to Daniel Mwangi Karanja.

21. On the other hand, having considered pleadings in the current suit, I note that the Plaintiff states that in 2004, Railway Housing sold him Plot Nos. 100 and 245, but later on the property was registered in the name of the 3rd Defendant and later sold to the 4th Defendant. He therefore sought for a permanent injunction against the 1st, 2nd, 3rd and 4th Defendants; an order declaring him as the lawful owner of Plot Nos. 100 and 245 and an order compelling Railway Housing, Ndatani Enterprises and the 3rd Defendant herein to issue him with the titles of the two properties.

22. Having subjected the claim in the former suit and the current suit against the elements of *res judicata* as spelt out in section 7 of the *Civil Procedure Rules*, it is clear that in both suits, the claim is about the ownership of plot Nos. 100 and 245.

23. Moreover, the main parties in the former suit being Ndatani Enterprises and Railway Housing are the same parties in the current suit, save that there was an addition of the 3rd and 4th Defendants in the current suit. It will however be noted that an addition of parties to a suit cannot salvage a suit barred by the doctrine of res judicata. (see *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] e KLR). Although the Plaintiff in the current suit was not named as the Plaintiff in the former suit, my view is that the counterclaim in the former suit by Railway Housing on behalf the Plaintiff in the current suit, demonstrate that Railway Housing was a party under whom the Plaintiff in the current suit made his claim.

24. The Plaintiff being aware of the former suit and the claim therein made on his behalf, did not seek to be joined in that suit but watched as Railway Housing fought his battle. In my considered view, a party, who knowing he has a stake in proceedings that affect his interests, being aware of such proceedings, but stands by and watches another party fight his battle cannot disown the outcome of such battle waged on his behalf. I associate with the reasoning in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, where the Court

of Appeal quoted with approval Lord Denning, in the case of *Nana Ofori Atta II v Nana Abu Bosra II* (1957) 3 AII ER 559 at 243 in which he stated that;

> There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else- in the same interest, he should be bound by the result, and not be allowed to re-open the case.

25. It is the finding of this court therefore, that the Plaintiff herein, having watched the 2st Defendant fight his battle in the former suit, is bound by the decree therein. As the former suit was filed by his privy, he is bound by the determination of that suit. In the event he is unhappy with that decision, his recourse is in challenging the said decision within the bounds of the law and not filing a fresh suit.

26. The requirement under section 7 of the *Civil Procedure Act* is that the issue in dispute needs to be directly and substantially the same in both the former and current suit. The *Black's Law Dictionary* 11th Edition defines "directly" as "in a straightforward manner." It also defines "substantial" as "important, essential, and material; of real worth and importance; considerable in extent, amount or value; containing the essence of a thing." It is therefore my understanding that an issue in controversy in the current suit need not be couched in the same terms with the issue in the former suit. It is sufficient if, on the whole, the issue in contention in both the former and current suits is significantly the same. Having placed the issue in the former suit and in the current suit on a scale of significance, it is abundantly clear from the pleadings in both the former and current suits that the issue is one and the same, and that is, whether Daniel Mwangi Karanja is entitled to Plot Nos. 100 and 245. It is therefore my finding that the issues in the former suit and in the current suit are directly and substantially the same.

27. It is also not in dispute that the former suit was determined by way of a consent judgment wherein Daniel Mwangi Karanja was awarded plot Nos. 100 and 210. Further, it is not in dispute that the decree in the former suit has not been appealed against, reviewed or set aside and therefore that determination was final and conclusive. In addition, it is not in dispute that the matter was determined by the Environment and Land Court, which had jurisdiction to determine the issue in both the current and former suits. I therefore find that the former suit was determined by a court of competent jurisdiction and its determination was final.

28. In the end, I find and hold that this suit is res judicata. I allow the application dated 2nd April 2019 and dismiss this suit with costs to the 2nd and 3rd Defendants.

29. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the Presence of;

Ms. Warau for the 1st Defendant.

No appearance for the 2nd to 4th Defendants.

No appearance for the Plaintiff.

Court Assistant - Ashley