



**Wainaina v Mungai & another (Environment & Land Case  
382 of 2017) [2022] KEELC 13309 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13309 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 382 OF 2017  
CA OCHIENG, J  
OCTOBER 6, 2022**

**BETWEEN**

**JOSEPH NJUGUNA WAINAINA ..... PLAINTIFF**

**AND**

**FRANCIS MWAURA MUNGAI ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the 1<sup>st</sup> Defendant's Notice of Preliminary Objection dated the 27<sup>th</sup> April, 2021 seeking the dismissal of the Plaintiff's suit on the following grounds:
  1. That the matter was heard and determined on merit by the Minister in Appeal No. 230 of 2007 and the suit herein is thus res judicata.
  2. That this suit is incompetent, bad in law as it offends the mandatory provisions of Section 30 of the *Land Adjudication Act* Cap. 284 since no consent was sought prior to filing the instant suit.
  3. That the said suit is frivolous, vexatious and an abuse of this Honourable Court's process and hence ought to be struck out with costs.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

**Submissions**

**1st Defendant's Submissions**

3. The 1<sup>st</sup> Defendant in his submissions gave a background of the dispute herein and contends that this suit violates the provisions of Section 7 of the *Civil Procedure Act*. He claims that the parties herein had already undergone the land adjudication processes and that an Appeal to the Minister was heard



as well as determined. He avers that following the Minister's Appeal being heard and determined, the Plaintiff's claim is hence *res judicata* and the same ought to be dismissed. He argues that if the Plaintiff had been dissatisfied with the decision of the Honourable Minister as provided under the [Land Adjudication Act](#), then he ought to have filed an Appeal or take out writ(s) of Judicial Review before this Honourable Court but not file the present suit. He states that prior to filing the present claim, the Plaintiff ought to have sought consent from the Land Adjudication Officer as provided for under Section 30 of the [Land Adjudication Act](#). To buttress his averments, he relied on the decision of [Benjamin Mwanzia Wambua v Stephen Kimeu Kimanga](#) [2020] eKLR.

#### Plaintiff's Submissions

4. The Plaintiff in his submissions insists this suit is not *res judicata*. He argues that he has brought before the court a cause of action that is post-determination of the Minister. Further, that the court recognized that where the claim was on how the decision of the Minister was implemented it could not be *res-judicata*. He argues that the 2<sup>nd</sup> Defendant was not a party to the proceedings before the Minister. He proceeded to highlight paragraph 8 of the Amended Plaint. He contends that Section 30(1) of the [Land Adjudication Act](#) only requires obtaining consent from a Land Adjudication Officer until the adjudication register for the adjudication section has become final. Further, that in this case, the Title Deed had already been issued and this signifies the closure of the adjudication process.
5. To support his arguments, he relied on the following decisions: [Qayrat Foods Limited v Safiya Ahmed Mohammed & 6 Others](#) [2020] eKLR; [Estate of James Karanja alias James Kioi \(Deceased\)](#) [2014] eKLR; [Kyumwa Malii & another v Jackson Nyamai & 2 others](#) [2019] eKLR and [Agnes Kivindu Kisilu & 2 others v Steven Kivevo & 3 others](#) [2020] eKLR.

#### Analysis and Determination

6. Upon consideration of the 1<sup>st</sup> Defendant's Notice of Preliminary Objection dated the 27<sup>th</sup> April, 2021 including the rivalling submissions, the only issue for determination is whether this suit should be struck out for being *res judicata* and failing to comply with the provisions of Section 30 of the [Land Adjudication Act](#).
7. The 1<sup>st</sup> Defendant has claimed this suit is *res judicata* by virtue of the fact that this matter including Appeal to the Minister was heard and determined.
8. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at Section 7 which stipulates inter alia:

“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 can 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.”
9. The [Civil Procedure Act](#) provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:

“Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.



Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) 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.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

10. In the case of *Uburu Highway Development Ltd v Central Bank & Others*, CA No. 36 of 1996 the Court of Appeal stated that: -

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

11. I wish to highlight the prayers the Plaintiff sought in the Amended Plaintiff dated the 26<sup>th</sup> February, 2020 which were:

- a) General Damages.
- b) An order directing the Lands Registrar Machakos to cancel and/or delete the registration of LR No. Masinga/Masinga/ 5863.
- c) An order directing the County Surveyor Machakos to remove from the area map of Masinga LR No. Masinga/Masinga/5863 and consolidate the same in LR No. Masinga/Masinga/130.
- d) Any other or further relief that this Honourable Court may deem fit to grant.
- e) Costs of this suit.

12. From a reading of the legal provisions cited above including the prayers sought in the Plaintiff, I note the doctrine of *res judicata* can only apply where a matter has been heard and determined by a court of competent jurisdiction. Further, from the perusal of the [Land Adjudication Act](#), I note the forum including Appeal to the Minister is not deemed to be a court of competent jurisdiction.

13. In the case of *Agnes Kivindu Kisilu & 2 others v Steven Kivevo & 3 others* [2020] eKLR, my brother Justice Mbogo C. G while considering the question whether a Minister sitting on an Appeal can be deemed to be a court of competent jurisdiction held that:

“My reading of the aforementioned sections which define what a court is, a Minister sitting in appeal under section 29 of the [Land Adjudication Act](#) cannot be a court of competent jurisdiction and as such, the instant suit cannot be said to be res judicata.”

14. In the circumstance while relying on the legal provisions cited above as well as associating myself with the decisions quoted, I do not find this suit to be res judicata as claimed.



15. As to whether this suit is incompetent, bad in law as it offends the mandatory provisions of Section 30 of the *Land Adjudication Act* Cap. 284 since no consent was sought prior to filing it. Section 30(1) of the *Land Adjudication Act* provides *inter alia*:

(1)

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.”

16. From a perusal of the pleadings herein, I note in this instance the 1<sup>st</sup> Defendant already acquired a title to the suit land and this in essence means the Adjudication Register for that section had become final. Further, under Section 80 of the Land Registration it is only the court that is mandated to order for a rectification of a register or cancellation of a title and this is one of the prayers sought by the Plaintiff as the 1<sup>st</sup> Defendant already has a title to the suit land.

17. Further, in the case of *Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited* [1969] EA 696; the Court held that:

“A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

18. In applying the standards to the circumstances at hand, I note the Plaintiff’s suit has raised different issues which can only be determined once viva voce evidence is adduced. To my mind, I find that the issues raised in the notice of Preliminary Objection require facts to be ascertained and are not on pure points of law as claimed by the 1<sup>st</sup> Defendant. Further, the Plaintiff did not need consent of the Land Adjudication Officer to institute this suit. In the circumstances, I find that this court indeed has jurisdiction to deal with all the issues raised in this suit.

19. In the foregoing, I find the instant Notice of Preliminary Objection premature and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

