



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. E001 OF 2021

RICHARD MAKAU NZYIMI.....1ST PLAINTIFF

MUENI KIKETI [suing as the administrator of the estate of the late

KIKETI NZYIMI alias KIKETI]2ND PLAINTIFF

VERSUS

WILFRED NG'ANG'A NGARUIYA.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

PAUL MUSILA KIMEU[the administrator,

Syokimau Farm LTD]INTERESTED PARTY

AND

REGISTERED TRUSTEES OF FAITH

MISSION CHURCH.....1ST PROPOSED INTERESTED PARTY

IBRAHIM SAKWA MZEE.....2ND PROPOSED INTERESTED PARTY

HARUN NGUGI NDUNG'U.....3RD PROPOSED INTERESTED PARTY

ISAAC MUSILA MUTUA.....4TH PROPOSED INTERESTED PARTY

FIBIAN CHIMAKATI.....5TH PROPOSED INTERESTED PARTY

JOSEPH MUTINDA MUTUKU.....6TH PROPOSED INTERESTED PARTY

MATHEW MULI MUTISO.....7TH PROPOSED INTERESTED PARTY

MAGDALINE WANJIRU KINYANJUI.....8TH PROPOSED INTERESTED PARTY

BEATRICE ANYANGO MACHIO.....9TH PROPOSED INTERESTED PARTY

JOEL MULI.....10TH PROPOSED INTERESTED PARTY

STANLUS NDETI MWANIA.....11TH PROPOSED INTERESTED PARTY

GIDEON OMARE.....12TH PROPOSED INTERESTED PARTY

FRANCIS MUOKI.....13TH PROPOSED INTERESTED PARTY

AMBROSE WAMBUA MUTUA.....14TH PROPOSED INTERESTED PARTY

RULING

1. This Ruling is in respect to the 1st Defendant's Notice of Preliminary Objection dated 14th April 2021 in which the 1st Defendant has averred that this matter is Res Judicata and should be dismissed with costs. The Notice of Preliminary Objection proceeded by way of written submissions. The 1st Defendant's submissions are not on record.

2. The Plaintiff's advocate's submissions are not related at all with the Notice of Preliminary objection, and are in respect to a totally different suit.

3. The proposed Interested Parties' submitted that the 1st Defendant's preliminary objection is predicated upon section 7 of the Civil Procedure Act; that in Machakos ELC NO. 226 of 2016, the Interested Parties had made an application to be joined as interested parties and the said application was dismissed and that the said decision was appealed against and the same is still pending in the Court of Appeal.

4. It was submitted that during the pendency of the matter in the Court of Appeal, the Interested Parties have also learned of this suit which involves the same parcel of land and that save for the subject matter of the dispute, which is the parcel of land known as LR No. 12715/15, there is absolutely no nexus between Machakos ELC NO. 226 of 2016 and Machakos ELC NO. 1 of 2021.

5. It was submitted by counsel for the Interested Parties that save for one Wilfred Ng'ang'a Ngaruiya, who happens to be in both the suits, the other parties are totally different in the two suits and that the Interested Parties' respective claims are not at the behest of any of the parties in ELC NO. 1 of 2021.

6. In the Notice of Preliminary Objection, it is the 1st Defendant's contention that this suit is *Res Judicata* Machakos ELC No. 226 of 2016 and should be dismissed on that ground alone.

7. 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."

8. 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."

9. For the court to determine if a matter is *res judicata*, it will have to examine if indeed the matter 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 have been subsequently raised and have been heard and finally decided by such Court.

10. The 1st Defendant is asking this court to make a determination that this matter is *res judicata* by way of a Preliminary Objection. In the case of ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696***, Law J A stated as follows:

"So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit...A preliminary objection 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".

11. In ***Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another (2014) eKLR***, the court held as follows:

"That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary

Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”

12. Further, in the case of George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR, the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

13. The above decisions show that for one to successfully argue that a suit is *res judicata*, a formal application must be filed to enable the court ascertain the facts of the two suits and the decision of the court in the former suit. Considering that the court must ascertain the facts in respect to this suit and Machakos ECL No. 226 of 2016, it is my finding that the Notice of Preliminary Objection dated 14th April, 2021 is not meritorious.

14. For those reasons, the Notice of Preliminary Objection dated 14th April, 2021 is struck out with costs.

Dated, signed and delivered virtually in Machakos this 1st day of November, 2021.

O. A. ANGOTE

JUDGE

In the presence of;

N/A for the Plaintiffs

N/A for the Defendants

N/A for the Interested Party

Mr. Omondi for the proposed interested party

Court Assistant – John Okumu