



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 60 OF 2020

OMAR SALIM CHENGO & OTHERS.....PLAINTIFFS

VERSUS

PHILEMON MWAISAKA & 13 OTHERS.....DEFENDANTS

RULING

(Applications seeking to strike out the plaintiffs' suit; applicants claiming that the suit is res judicata and res sub judice and that it is time barred; the suit that is claimed to be the previous suit having been dismissed before it could be heard and determined; the suit said to be res sub judice being a suit filed by different people; this suit thus not captured by either the res judicata or res sub judice rule; issue of the suit being time barred being an issue that will be canvassed at the hearing; applications dismissed

1. What is before me are two applications dated 19 November 2020, and 3 December 2020, both of which seek to have this suit struck out. The applications are opposed by the plaintiffs.

2. To put matters into context, this suit was commenced through a plaint which was filed on 27 May 2020. The plaintiffs are acting in person. In the plaint, they pleaded inter alia that they are the bona fide owners of the Plots Nos. 324 and 334/III/MN Kilifi, Mtwapa having acquired the same "under Section 62 of the Constitution" and that the Government of Kenya is holding the said land in trust for them. They pleaded that they obtained a decree of the court on 30 March 2012 which was issued on 6 December 2012, and that no one has ever challenged it to date. They claim to have proceeded to subdivide the said parcels of land and that each plaintiff has been given a plot number but that the 3rd defendant (Registrar of Titles) has disobeyed orders which directed him to issue title to the plaintiffs. They allege that in the year 1971, the Government consolidated the Plots No. 324 and 334/III/MN, and subdivided the same into Plots Nos. 515 to 527/III/MN without the knowledge or consent of the registered owners and the process is a fraud. It is claimed that the 1st, 2nd, 9th, 11th, 12th, 13th, and 14th defendants are the ones behind the illegal subdivision. They have pleaded to an Originating Summons which they had filed and which was dismissed. In this suit, they seek the following orders (slightly paraphrased for brevity) :-

a. A permanent injunction restraining the 1st, 2nd, 9th, 11th, 12th, 13th, 14th defendants from trespassing or dealing, or demolishing buildings erected and being erected by the plaintiffs on the Plots Nos. 324 and 334/III/MN.

b. A declaration directed to the 3rd defendant to commence issuance of certificates of titles to the plaintiff as ordered by the court on 11 April 2017 in ELC No. 166 of 2015.

c. A declaration directing the 4th defendant to issue titles to the plaintiffs

d. A declaration directing the 5th and 6th defendants to investigate the fraud in the Plots Nos. 324 and 334/III/MN.

e. General Damages

f. Costs and interest.

g. Any further relief deemed fit.

3. Together with the suit, the plaintiffs filed an application for an interlocutory injunction. Before that application could be heard, objections were raised that this suit is a non-starter and the subject applications were subsequently filed.

4. The application dated 19 November 2020 is filed by the 12th and 13th defendants (Weisbaden Dream Villas Limited and Farid Faraj

Awadh Mamifтах). It is contended that this suit is *res judicata* in light of Mombasa Misc Application No. 560 of 2004 and is *sub judice* in light of Mombasa ELC Petition No. 48 of 2019 which is said to be pending. The applicants are of opinion that this suit offends Sections 6, 7 and 8 of the Civil Procedure Act, Cap 21, Laws of Kenya, and should be dismissed. The supporting affidavit is sworn by the 13th defendant who has mentioned that he is the registered proprietor of the land parcel Subdivision No. 4730 (Original No. 527/2) Section III Mainland North which was carved out of the land parcels MN/III/324 and 334. He avers that these Plots Nos. 324 and 334 were amalgamated and later subdivided into the plots No. 515 – 527 and allocated to various persons. He has stated that the amalgamation and subdivision was done by the Government after the two parcels of land were surrendered to the Government by the then lessees. He has deposed that the plaintiffs filed the suit *Mombasa Misc. Application No. 560 of 2004* against himself and other defendants seeking to have the Plots No. 324 and 334 registered in their names. He avers that this suit was struck out. He has deposed that *Mombasa ELC Petition No. 48 of 2019, Kilifi County Government & Others vs Registrar of Titles Mombasa*, has been brought on behalf of the occupants of the land parcels No. 324 and 334.

5. In the application dated 3 December 2020, the 9th defendant, Sergio Lieman, wishes to have this suit struck out on the grounds that the Plot numbers 324 and 334 Section III Mainland North do not exist as they were consolidated and subdivided in 1971. It is further contended that the plaintiffs' suit is hopelessly time barred. He himself is the owner of the plots MN/III/3649, 3742 and 1428. There is the additional ground that this suit is *res judicata* the suit *Mombasa High Court Miscellaneous Application No. 560 of 2004*.

6. I am not quite sure whether the plaintiffs filed any grounds of opposition or replying affidavit for I have seen none in the file, but they did file submissions to oppose the two applications, and I have considered them alongside the submissions filed by Mr. Khalid Salim, learned counsel for the 12th and 13th defendant, and Mr. Omollo, learned counsel for the 9th defendant.

7. There are three issues raised. Firstly, whether the suit is *res judicata* and/or *res sub judice*, secondly, whether the suit should be struck out because it is said that the titles LR Nos. 324 and 334 do not exist, and thirdly, whether the suit is time barred.

8. On the first issue, whether the suit is *res judicata* or *res sub judice*, two cases have been cited being *Mombasa HCCC Miscellaneous Suit No. 560 of 2004 (OS)* and *Mombasa ELC Petition No. 48 of 2019*. I have looked at the material supplied by the applicants. The suit *Mombasa HCCC Miscellaneous Suit No. 560 of 2004 (OS)* has quite a chequered history. It was filed by one person, Jumaa Chengo Kashaha (as administrator of the estate of Chengo Kashaha Mangi), against six respondents being, The Registrar of Titles Mombasa, Percy Dalryple Townsend, Robert Lunan, Gwendolen Agnes Brady, George Taylor and Joseph Stewart Torr. Apart from the Registrar of Titles, through the Attorney General, the other respondents did not file any appearance. In that suit, the claimant contended that he is entitled to the land parcels No.324 and 334 of Section III Mainland North (Plots Nos. 324 and 334 which are the suit properties herein) which were said to be registered in the names of the 2nd to 6th respondents. The claimant alleged that these parcels of land had been left to his late father (Chengo Kashaha Mangi) by the registered colonial owners who moved to their countries of origin. He thus sought orders that he be declared the rightful and exclusive owner of the said Plots Nos. 324 and 334. Jumaa Chengo Kashaha died before the case was heard and he was substituted by Omar Salim Chengo (who appears to be the first plaintiff in this case) who continued the suit. That case was heard by Mureithi J, who delivered judgment on 3 March 2012. He was not persuaded that the claimant had demonstrated entitlement to the two plots through a grant by the registered owners and neither could he sustain a suit for adverse possession for the parcels of land had been surrendered to the Government. He dismissed the suit but within the judgment he stated that parcels of land “*be held by the Government upon trust for the applicant and other residents in possession of the land in accordance with Article 62 of the Constitution.*” The basis of this was the view of the judge that the evidence tabled showed that the parcels of land had been surrendered to the Government and were thus owned by the Government.

9. What followed was an application to set aside that judgment by persons who claimed to be having titles to the said land including the 12th defendant herein. Within his application, the 12th defendant provided material to show that the Plots Nos. 324 and 334 did not exist. It was averred that these two plots were surrendered to the Government which amalgamated them and subdivided them (into the Plots Nos. 515 to 527) and subsequently allocated them to various persons who were issued with titles bearing the numbers Mainland North/III/515 – 527. It was submitted that the court proceeded to hear the case without this crucial evidence and would have come to a different position if the evidence was available. Pursuant to this application, the whole of the judgment was set aside through a ruling dated 5 July 2018 by Omollo J.

10. After the judgment had been set aside, meaning that the matter was to proceed afresh, another application was filed, now seeking to strike out the entire suit. The basis of that application was that the suit was a nullity as it was filed against persons who were deceased. It was demonstrated that the 2nd – 6th respondents had died a long time ago before the suit was instituted. The court found merit in this application and proceeded to strike out the case. That was the end of that suit as far as I can tell from the material before me.

11. It will be observed that the judgment was set aside and the case was to start afresh. The case was never heard afresh as it was struck out. There is therefore no judgment that can be said to exist that emanated from the said suit and neither can it be argued that the case was heard. It was struck out as a nullity before it could be heard and a determination made. The effect therefore is that the issues that were sought to be raised in that case were in fact never raised and never considered. *Res judicata* will only apply where the issues have been heard and determined. That is the import of Section 7 of the Civil Procedure Act which has been drawn as follows :-

7. 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.

12. The case *Mombasa HCCC Miscellaneous Suit No. 560 of 2004*, as I have explained, was in effect never heard, and no decision rendered on the issues, for the reason that it was struck out. I am not therefore persuaded that the applicants have demonstrated that this suit is *res judicata* by dint of the said suit.

13. Let me now turn on to whether this suit is *res sub judice* the suit *Mombasa ELC Petition No. 48 of 2019*. I have looked at the petition annexed by the applicants. There are two petitioners, namely The County Government of Kilifi and George Chondo Wanje. The respondents are several and include the defendants in this suit. In that petition, the petitioners' case is that there was a constitutional infringement in the process that led to the amalgamation of Plots No. 324 and 334 and the subsequent subdivision and allotment to various individuals in

exclusion of the persons actually occupying the land. In that case the petitioners seek orders inter alia for the land to be declared a settlement scheme and be allocated to the individuals in occupation. It has not been shown to me that the plaintiffs herein are party to that case or that they are even aware of it. It is also not clear from what has been supplied to me, whether the persons, said in that petition to be occupying the land, are the same persons who have filed this suit. I agree that the issues raised in this case also touch on an alleged illegal consolidation and subsequent subdivision and issuance of titles to non-deserving individuals. But the parties are not the same and it cannot be said that the plaintiffs herein have two parallel continuing cases over the same cause of action.

14. The *res sub judice* principle is captured in Section 6 of the Civil Procedure Act, which provides as follows :-

6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

15. It will be seen from the above, that a court is barred from proceeding with a subsequent suit where the issues are the same in a previously instituted suit, between the same parties, or between parties under whom they or any of them claim, and litigating under the same title. I have not been persuaded that the parties herein are the parties in *Mombasa ELC Petition No. 48 of 2019* and indeed, from what I can see from the material before me, they are not the same parties. I have also not been shown that the plaintiffs herein are the same persons that the petition also seeks to protect so that it can be said that the plaintiffs herein also claim under the same title as the petitioners in *Mombasa ELC Petition No. 48 of 2019*. What I can say is that the issues raised may be the same, but what I am not certain of, is that the issues have been raised by the same persons and seek to benefit the same people. You never know, the petitioners may disown the plaintiffs herein and say that it is not them in occupation and vice versa. I am not therefore persuaded to strike out this suit as being *res sub judice* the suit *Mombasa ELC Petition No. 48 of 2019*. It is probable that it may be prudent to hear the two suits together but that is a bridge to be crossed at a later stage.

16. On whether the suit is time barred, I would not want to delve into that issue without first receiving evidence. It is not obvious that the claim herein as drawn is time barred and I hesitate to dismiss the suit on that ground.

17. The last point is whether the suit should be dismissed because the titles No. 324 and 334 do not exist. I am not persuaded. I am aware that the plaintiffs mention the two plots No. 324 and 334. However, they continue to say that there was fraud in their subsequent amalgamation, subdivision, and allocation. There is indeed mention of the subject subdivisions within this suit and the defendants have been sued in their capacity as registered owners of the subdivided portions. True, the plaint could certainly have been drawn more tastefully, but the plaintiffs are acting in person, and it is apparent that they are not savvy in drawing pleadings. But what they want is discernible such that it will be drastic to strike out the suit based on the unsophisticated drafting of the pleadings. I think the plaintiffs can be protected by Article 159 (2) (d) of the Constitution.

18. I believe I have said enough to demonstrate that I am not persuaded to allow the two applications. They are dismissed with costs to the plaintiffs.

19. Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF JUNE 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA