



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 115 OF 2019

**JOSHUA MASILA MALOMBE.....PLAINTIFF**

**VERSUS**

**COSMUS W. MALOMBE.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect to the 1<sup>st</sup> Defendant's Notice of Preliminary Objection dated 20<sup>th</sup> August, 2020. In the said Notice of Preliminary Objection, the 1<sup>st</sup> Defendant has averred that this suit is *res judicata* having been heard and determined by a court of competent jurisdiction and that this court does not have jurisdiction to hear the matter because the value of the suit property is less than Kshs. 20,000,000.
2. The Notice of Preliminary Objection proceeded by way of written submissions. The 1<sup>st</sup> Defendant's counsel submitted that the subject matter in this suit concerns land known as Kyangwithya/Mulutu/1078 (*the suit land*) and that the suit land was obtained fraudulently and unlawfully after the sub-division of Kyangwithya/Mulutu/41 which was registered in the name of the late Malombe Mwaniki Ilumbi.
3. According to the 1<sup>st</sup> Defendant's counsel, the 1<sup>st</sup> Defendant and 17 other people filed a suit in Kitui PMCC No. 296 of 2006, Benson M. Muthiani & 16 Others vs. Boniface Kasee Malombe and 2 Others; that the Plaintiff was the 2<sup>nd</sup> Defendant in the Kitui case and that in the said suit, a consent was entered into settling the suit.
4. After the execution of the consent in Kitui PMCC No. 296 of 2006, it was submitted that parcel of land number Kyangwithya/Mulutu/41 was sub-divided into several plots; that one of the sub-divisions was Kyangwithya/Mulutu/1078 (*the suit property herein*) and that the land belongs to the 1<sup>st</sup> Defendant.
5. The 1<sup>st</sup> Defendant's counsel submitted that the Plaintiff has never filed an Appeal challenging the decision in PMCC No. 296 of 2006 and that the filing of the current suit is *res judicata*.
6. The 1<sup>st</sup> Defendant's counsel lastly submitted that the Magistrates' Courts have the jurisdiction to hear disputes relating to land whose value does not exceed Kshs. 20,000,000; that the suit property is a piece of land measuring 50ft by 100ft situated in Kitui and that this suit should be dismissed for want of jurisdiction. Counsel relied on numerous decisions which I have considered.
7. On his part, the Plaintiff's counsel submitted that the parties in this suit are different from the parties in Kitui PMCC No. 296 of 2006; that the prayers in this suit are different from the prayers that were sought in Kitui PMCC No. 296 of 2006 and that the two cases are distinct.
8. On the issue of jurisdiction, the Plaintiff's counsel submitted that the acreage of land known as Kyangwithya/Mulutu/41 is over ten (10) acres; that the value of a plot measuring 50ft x 100ft in that area is about Kshs. 700,000 and that the value of the entire parcel of land is approximately Kshs. 50,000,000.
9. A Preliminary Objection was defined in the case of ***Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Limited (1969) EA 696*** as follows:

“So far I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises a clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to

arbitration.”

10. The 1<sup>st</sup> Defendant has averred that this suit is *res judicata* Kitui PMCC No. 296 of 2006 and should therefore be dismissed with costs. The Black Law Dictionary defines “*res judicata*” as “*an issue that has been definitely settled by judicial decision, where a final Judgment was given on merit and the parties were the same or privy to the original parties.*”

11. Section 7 of the Civil Procedure Act gives a clear definition of *res judicata* 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.”

12. Indeed, Section 7 of the Civil Procedure Act forbids the court from entertaining an action in which the matters directly or substantially had been directly and substantially in issue in a former suit which had been heard and finally determined by a competent court.

13. As was held by the court in *Mburu Kinyua vs. Gachini Tutu (1978) KLR 69*, where a given matter becomes the subject of litigation in a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not permit the same person to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in context.

14. For the plea of *res judicata* to succeed, the Applicant has to show that the issues in 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.

15. Although the 1<sup>st</sup> Defendant has averred that the parties in this suit and Kitui PMCC No. 296 of 2006 are the same, and that the issues raised in this matter were determined by a competent court in Kitui PMCC No. 296 of 2006, the pleadings and the decision in Kitui PMCC No. 296 of 2006 are not before this court.

16. Indeed, the most prudent thing the 1<sup>st</sup> Defendant should have done was to file an Application annexing the pleadings in Kitui PMCC No. 296 of 2006 and the consent order. It is only upon perusing the pleadings and the consent order that this court would be in a position to determine if indeed this suit is *res judicata* or not.

17. Having not annexed the pleadings in Kitui PMCC No. 296 of 2006, and a copy of the Valuation Report showing the value of the suit property, it is my finding that the Notice of Preliminary Objection dated 20<sup>th</sup> August, 2020 is incompetent.

18. For those reasons, the Notice of Preliminary Objection dated 20<sup>th</sup> August, 2020 is struck out with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 30<sup>TH</sup> DAY OF JULY, 2021**

**O. A. ANGOTE**

**JUDGE**