



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO 7 OF 2004**

**MOHAMED SHEIKH ABUBAKAR.....PLAINTIFF**

**VERSUS**

**ZACHARIUS MWERI MBAYA.....DEFENDANT**

**RULING**

1. On 15<sup>th</sup> December 2020, this matter came up for mention to confirm whether Mr. Cheruiyot counsel for the plaintiff had been served with the Judgement of Court of Appeal Civil Appeal No 62 of 2018. Mr. Asige, counsel for the defendant submitted that the Judgement in Civil Appeal No. 62 of 2018 involved the same parties and same subject matter in this case making this instant suit res judicata. Mr Asige submitted that the matter before this court has been determined in the said Civil Appeal No 62 of 2018 and therefore the suit cannot proceed.
2. On 8<sup>th</sup> March 2021, the court noted that Civil Appeal No. 62 of 2018 was an appeal from the Judgement of Omollo J delivered on 18<sup>th</sup> July 2017. The court then directed that for it to make a substantive ruling on the issue as to whether the suit is res judicata or not, parties to file written submissions.
3. The defendant filed his written submission on 7<sup>th</sup> June 2021. Mr. Asige, counsel for the defendant gave a chronological description of the history of the suit herein to demonstrate to court why the suit is res judicata, and I have carefully considered them. The plaintiff's counsel Mr. Cheruiyot did not file his submissions.
4. I begin with the earliest suit that the plaintiff filed against the defendant in the Magistrate's court being **CMCC 1432 OF 1998**, to contest the ownership of CR. No. 5054/1463. The trial court found in favour of the defendant. The plaintiff was dissatisfied with the decision of the trial court. The plaintiff appealed to the High Court in **ELC Civil Appeal No. 6 of 2016** where Omollo J dismissed the appeal with costs. The plaintiff yet again was dissatisfied with the judgement of this court and appealed to the Court of Appeal in **Civil Appeal No. 62 of 2018**, where the Court of Appeal, also dismissed the appeal with costs.
5. The plaintiff then filed the suit herein on 14<sup>th</sup> January 2004 against the defendant over ownership of Plot No. 5054/1463 Kilifi. Before the suit was set down for hearing the plaintiff applied for summary judgement which was allowed by the court. Aggrieved by the decision, the defendant moved to the **Court of Appeal in Civil Appeal No. 231 of 2006 and on 12<sup>th</sup> March 2020**, the Court of Appeal allowed the appeal and set aside the summary judgement.
6. The effect of the Court of Appeal's judgement was that the matter to proceed to hearing before this court. Counsel for the defendant submitted that the plaintiff has never taken any step to set the matter down for hearing since the Court of Appeal delivered its judgement on 12<sup>th</sup> March 2020. Counsel further submitted that the non-prosecution of this suit triggered the court to issue a Notice to Show Cause dated 31<sup>st</sup> August 2020. Counsel also submitted that the despite being served with the notice to show cause, the plaintiff has not taken any action to have the suit proceed to hearing.
7. It's the defendant's case that the defendant could not and cannot proceed with this suit in this court involving the same subject matter and the same parties, for the reason that, the subject matter has finally been adjudicated by the Court of Appeal in Civil Appeal No. 26 of 2018. Counsel argued that the court cannot proceed to entertain and try this suit wherein the Court of Appeal has rendered a judgement over the same subject matter involving the same parties. Counsel submitted that the doctrine of res judicata bars the court from proceeding to try this suit which has been previously determined by a competent Court of superior jurisdiction.
8. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the Civil Procedure Act. In **Independent Electoral & Boundaries Commission vs MainaKiai & 5 Others [2017] eKLR**, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked.

“That is:

- 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.”**

9. The first issue to determine in order to conclude a matter is res judicata is whether the issue for determination is directly or substantially similar to that in the former issue. The issue in the Civil Appeal 62 of 2018 was the ownership of L.R No. 5054/1463 with both the appellant/plaintiff and the respondent/defendant claiming to be entitled to the suit property. In the instant suit, the plaintiff avers in his plaint filed on 14<sup>th</sup> January 2004, that he is the duly registered owner of Plot No. 5054/1463 Kilifi, while the defendant in his amended statement of defence and counterclaim, claims ownership of L.R 5054/1463. From the pleadings, it is clear to the court that the issue for determination before this court in this matter is the same with the issue that was before the Court of Appeal in Civil Appeal No. 62 of 2018.

10. The next issue for consideration is the parties in both suits. The plaintiff herein was the appellant, while the defendant herein was the respondent in Civil Appeal No 62 of 2018. The plaintiff and defendant have remained the same in both suits, fulfilling the second requirement for res judicata.

11. The other issue for consideration is the title under which the parties were litigating under. In this instant suit, the plaintiff avers that he is the registered owner of Plot No. 5054/1463 Kilifi, while in Civil Appeal No 62 of 2018, the issue for consideration is the competing interest over L.R 5054/1463. Without a shadow of doubt, the plaintiff’s claim both at the Court of Appeal and in this case is based on the same title.

12. The last issue for determination is whether the suit in which such issue has been subsequently raised, has been heard and finally decided by such court. The Court of Appeal in Civil Appeal No 62 of 2018, was a competent court sitting as an appellate court to hear and determine the plaintiff’s appeal. Consequently, the Court of Appeal reached its decision on 14<sup>th</sup> February 2019, where it dismissed the appeal with costs for lacking merit.

13. Expounding further on the essence of the doctrine the Court of Appeal in **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** pronounced itself as follows:

**“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”**

14. Being guided by the above decisions and Section 7 of the Civil Procedure Act, I have no doubt in my mind that this suit is res judicata to Civil Appeal No. 62 of 2018. I concur with the Counsel for the defendant that this suit is res judicata.

15. When the court finds a matter is res judicata, there is no remedy other than dismissing the suit. It cannot be cured by Article 159 of the Constitution of Kenya 2010, neither can the party at fault cure res judicata. Consequently I find the plaintiff’s suit that was instituted vide a plaint dated 13<sup>th</sup> January 2004 to be res judicata to Court of Appeal Civil Appeal No. 62 of 2018. I hereby strike out the suit in its entirety with costs to the defendant.

16. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 27<sup>th</sup> Day of July, 2021**

**C.K. YANO**

**JUDGE**