



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 131 OF 2019**

**SILAS KIMATHI MUTONGA.....APPELLANT**

**VERSUS**

**SAMSON MURIUNGI MWIREBUA.....RESPONDENT**

***(Being an appeal from the Ruling of HON. E.M AYUKA, SRM dated 31<sup>st</sup> October 2019 in Nkubu PMCC No. 69 of 2019)***

**JUDGMENT**

1. The appellant being the defendant in the trial court was sued by the respondent vide a plaint dated 26/08/2019 seeking the following orders;

*a. A declaration that the defendant is legally estopped from reneging on the sale agreement dated 30/5/2014 as revised on 29/11/2014 and that the defendant remains registered as the owner of the suit land in trust for the plaintiff.*

*b. An order for immediate transfer of land parcel number NKUENE/L-MIKUMBUNE/1821 in favor of the plaintiff and in default, the executive officer of this court be empowered to sign all the necessary documents to facilitate the transfer.*

*c. An order of permanent injunction restraining the defendant, his agents and servants from interfering with the plaintiff's occupation and user of the suit land.*

*d. In the alternative, an order for immediate refund of the consideration price paid being Kshs. 799,000 together with interest at court rates from 30/5/2014 plus payment of the agreed liquidated damages assessed by the parties at Kshs. 1,598,000 plus interest.*

*e. Costs of the suit and interest.*

2. The suit before the trial court was filed contemporaneously with an application also dated 26.8.2019 where the respondent sought orders of inhibition and injunction against the appellant pending determination of the suit. The appellant opposed the application by filing a replying affidavit together with a preliminary objection on the grounds that the suit was res-judicata to Meru ELC Petition No. 2 of 2018. The trial court in its ruling dated 31.10.2019, held that the suit was not res-judicata to Meru petition 2 of 2019. The trial court also allowed the application for injunction and inhibition.

3. Being aggrieved by the said ruling, the appellant filed his memorandum of appeal dated 28/11/2019 based on six (6) grounds summarized as follows;- *That the learned magistrate erred in law and fact in failing to hold that the suit is res judicata to Meru ELC Petition No. 2 of 2018 and in granting injunctive orders restraining the appellant from accessing his parcel of land NKUENE/L-MIKUMBUNE/1821.*

4. The appeal was canvassed by way of written submissions. The appellant submitted that this suit was res judicata to Meru ELC Petition No. 2 of 2018 which was determined on merit, where the judge held that all the reliefs sought therein were unmerited. That instead of the respondent filing an appeal, he decided to institute the suit in the lower court which is still between the same parties, over the same subject matter and raising the same issues that have already been determined by a court of competent jurisdiction.

5. It was further submitted that while instituting Meru ELC Petition No. 2 of 2018, the respondent failed to plead that there was constructive trust in his favor and it is ill advised of him to institute another suit seeking similar reliefs and additionally pleading constructive trust which amounts to giving his former cause of action a minor face lift in order to defeat the doctrine of res judicata.

6. The appellant also submitted that the respondent did not meet the threshold of the reliefs sought in his application dated 26/8/2019 and his continued occupation of the suit land was illegal and contrary to Section 22 of the Land Control Act. That the respondent's position is based on an illegality which shows that he has not come to court with clean hands. The appellant has a constitutional right to enjoy his property and that right should not be infringed upon arbitrarily, which the lower court did. The respondent was not entitled to the interlocutory injunction

as he failed to tender evidence in support of his application.

7. In support of his arguments, the appellant relied on the following cases; **Bernard Mugo Ndegwa V James Nderitu Githae and 2 Others [2010]eKLR, Nancy Mwangi T/A Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014]eKLR, E.T V Attorney General & Another [2012]eKLR, Wilson Mwirigi Manyara & another V Moffat Gichuru Manyara [2020]eKLR, Paul Gitonga Wanjau V Gathuthi Tea Factory Company Limited & 2 Others [2016]eKLR.**

8. The Respondent submitted that the suit is not res judicata and the trial court properly held this to be so since the issues for determination in the two suits are very different and therefore the preliminary objection was unmeritorious. It was also submitted that the respondent had met the ingredients for the orders sought in his application, hence the trial court properly granted the same. That it was quite in order for the trial court to hold that the issues raised by the appellant required evidence to be adduced. And that from the ruling, it is clear that the trial magistrate made reference to both the appellant's and respondent's pleadings and submissions and analyzed the case giving reasons for the decisions arrived at.

9. The allegation that the ruling was partisan has not been substantiated and he urges the court to find the appeal unmeritorious. The respondent relied on the cases of ; **Lucky Summer Estate Ltd V Kariuki Gatheca & Resources Ltd & Another [2015]eKLR, Jeremiah Thuku Ng'ang'a & Another V John Waithaka Aidan (suing on behalf of the estate of Aida Wangui Waithaka [2020]eKLR.**

#### **Analysis and determination**

10. Having considered the record, submissions by counsels and the law, I find that the appeal turns on whether the suit in the trial court is res judicata and whether the respondent's application dated 26.8.2019 was merited.

11. The question as to what constitutes a preliminary objection has been the subject of several judicial pronouncements and is well settled. The Court addressed its mind on this issue in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** and stated as follows:

***“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”***

12. Was the preliminary objections raised by the respondent founded on pure points of law. Was the assertion by the appellant that the suit was res-judicata justified?. The doctrine of res-judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation.

13. 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. 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 Maina Kiai & 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.”***

15. Having read through the judgment delivered in Meru ELC Petition No. 2 of 2018 by this court, the issues before it as framed on page 10 point 14 thereof were;

***a. “Whether failure to enjoin the AG in these proceedings is fatal;***

***b. Whether this petition meets the threshold of a constitutional petition.***

c. *Whether section 8(1) of the Land Control Board should be declared unconstitutional.*

d. *Whether the relief sought herein can be granted.”*

16. The court proceeded to pronounce itself on the aforementioned issues as follows;

**“Having failed to enjoin the AG in the proceedings, then the petition must fail, that the removal of a caution was not a constitutional issue, that the petitioner had not stated with reasonable precision the manner in which his rights had been violated in line with the threshold set out in the case of Anarita Karimi Njeru vs. The Republic (1976-1980)KLR 1272, and that the onus was on the petitioner to demonstrate to the court that Section 8 (1) of the Land Control Act is unconstitutional an obligation he failed to discharge”.**

In light of those findings, the petition which had been filed by the current respondent was dismissed.

17. On the other hand, the issues in the primary suit no 69 of 2019 at Nkubu court were correctly captured by the trial court on page 4 of the ruling at hand as follows;

**“Whether there was a valid land sale agreement/contract between the parties and if so, whether the plaintiff is in breach thereof. Who between the parties is the rightful owner of the piece of land in question?”**

18. It is abundantly clear that the issues determined in Meru petition 2 of 2018 and those before the trial court are distinct even though the parties are the same and so is the suit land.

19. In the case of Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR, it was held that;

**“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”**

20. Going back to the judgment in Meru ELC Petition 2 OF 2018, I find that on page 19 point 29 thereof, this court stated that;

**“Petitioner’s rights over the suit land are yet to be ascertained. In the process of such ascertainment, evidence needs to be adduced as to how the parties entered into the contract, who and how was the contract breached and whether the contract is still enforceable. These are not constitutional issues”**

21. What resonates from the above analysis is that not only was the dispute on ownership not dealt with in the Meru petition no.2 of 2018, but the court gave guidance on the route to be taken, such that parties needed to present their case in a forum where evidence would be adduced. What better place to do so than in an ordinary suit? I conclude that the trial court arrived at a correct determination in holding that the doctrine of res-judicata was not applicable.

22. The next issue for consideration is whether the trial court’s decision relating to the respondent’s application was erroneous. The trial magistrate in his ruling held that;

**“I find that the validity or otherwise of the agreement can only be tested by the calling of evidence at the hearing of the main suit herein. To this end, I am of the considered view and I hold that it would be prudent to preserve the subject matter pending the hearing and determination of the main suit.”**

23. The purpose of injunctive orders is the preservation of property as was held by the Court of Appeal in Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, that;

**“Upon applying these principles, we find that the High Court misdirected itself, in declining to grant the injunction, as to begin with, the learned judge reached the wrong conclusion that the appellant had not established a prima facie case. Yet, clearly, the dispute concerned the competing interests of the appellant and the 1st respondent over the suit property, and whose claim superseded the other in the light of the existing documentation. ....”**

24. In Exclusive Estates Ltd...Vs.... Kenya Posts & Telecommunications Corporation & Another, Civil Appeal No.62 of 2004 the court held that:-

**‘A temporary injunction is issued in a suit to preserve the property in dispute in the suit .....’**

25. The appellant has submitted that respondent’s continued occupation of the suit land is illegal. However, the question of how the respondent came to be on the suit land is one to be determined in a full trial. The trial magistrate was certainly correct in holding that what was prudent was to preserve the suit land.

26. I must conclude by stating that nothing has been placed before this court to warrant a finding that the learned trial magistrate did not properly exercise his discretion in arriving at the ruling of 31.10.2019. Nor is there any evidence that the trial court was biased in its decision.

27. From the foregoing I do opine that the appeal herein lacks merit and is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21<sup>ST</sup> DAY OF JULY, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 20.4.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**