



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 10 OF 2020 (OS)

IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 221 LAWS OF KENYA

AND

IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION OF DIFINED PORTION OF LAND PARCEL
NO. UHOLO/MADUNGU/250 BY

PHILIP BRAINFIELD OTIENO

BETWEEN

PHILIP BRAINFIELD OTIENO.....APPLICANT/RESPONDENT

VERSUS

JACOB OCHIENG OTIENO.....1ST DEFENDANT/APPLICANT

JENNIFER W/O ADEDE.....2ND DEFENDANT/APPLICANT

RULING

Philip Branfield Otieno (hereinafter referred to as the applicant) has come to this court by way of originating summons against Jacob Ochieng Otieno and Jennifer W/O Adede claiming rights by way of adverse possession of the parcel of land known as Uholo/Madungu/250 having been in occupation for over 12 years. He claims that the respondent's rights have been extinguished. The respondent filed a Preliminary Objection on the basis that the applicants suit is res-judicata.

The respondent argues that this matter was exhaustively dealt with right from the trial court through the Court of Appeal and was determined. The Applicant filed a suit in the Magistrates court claiming fraud and trust but the claim was dismissed.

He appealed to the Environment and Land Court Kisumu Civil Appeal number 59 of 2013 which was also dismissed. He appealed to the Court of Appeal in Civil Appeal number 109 of 2016 which was also dismissed.

In the case of *Independent Electoral and Boundaries Commission Vs Maina Kiai and 5 others (2017) eKLR* the Court of Appeal has succinctly listed some elements that must be satisfied for the doctrine to apply thus;

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (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.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in *Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR* they rendered the elements as;

“(a) the former judgment or order must be final;

(b) the judgment or order must be on merits;

(c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and

(d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”

317. The Supreme Court in the case of *Tom Martins Kibisu v Republic [2014] eKLR* held

“Res judicata is a rule to restrain repetitive claims before Courts of concurrent jurisdiction. As a rule of finality to litigation, it bars a party from re-litigating concluded similar-issue claims, involving same parties and same subject matter, where a Court of competent jurisdiction has made a final determination. This rule is laid out in Section 7 of the Civil Procedure Act (Cap.21, Laws of Kenya), which thus provides:

“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.”

318. The Court in the case of **OKIYA OMTATAH OKOITI V COMMUNICATIONS AUTHORITY OF KENYA & 14 OTHERS, PETITION NO.59 OF 2015**, reiterated the rationale and underlying principles for res judicata to apply in the following terms;

[17] For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of *Karia and Another vs the Attorney General and Others (2005) 1EA 83*).

[18] The rationale behind the provisions of Section 7 above entrenching the doctrine of res judicata is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi vs National Bank of Kenya Ltd and Others (2001) EA 177*.

319. The purpose and rationale of the doctrine of *res judicata* is further captured well in the decision of *Accredo AG & 3 Others Vs Stefano Uccelli & Another (2019)eKLR* relied by the Interested Parties where the court held;

“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. See the Supreme Court's decision in the case of *Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR*.

30. Expounding further on the essence of the doctrine this Court 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.”

320. In *Maina Kia case (Supra)* the Court of Appeal expounded the purposes of the law as thus;

“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 fora, 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.

There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, *William Koross v. Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, it was stated;

“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 stated, and we agree;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”

The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit”

I have considered the Preliminary Objection and do find that the suit commenced by the plaintiff is premised on order 37 rule 7 of the Civil Procedure Rule that provides as follows thus: -

[Order 37, rule 7.] Adverse possession. 7. (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons. (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. (3) The court shall direct on whom and in what manner the summons shall be served.

The respondent has not satisfied this court that the issue of adverse possession was directly and substantially the issue in the former suits.

Moreover, the Magistrates’ Court has no jurisdiction to entertain a claim based on adverse possession, and therefore the issue could not have been raised in the Magistrates courts. Section 38 of the Limitation of Actions Act clothes the jurisdiction upon the Environment and Land Court. The section provides as follows: -

“38. Registration of title to land or easement acquired under Act (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act. (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before. (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.”

The upshot of the above is that the Preliminary Objection is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE