



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 37 OF 2020

MOSES MBATIA.....1ST APPLICANT

GEORGE WAKABA.....2ND APPLICANT

VERSUS

JOSEPH WAMBURU KIHARA.....RESPONDENT

RULING

1. On the 18/11/2020 the Applicants moved the Court vide an Originating Summons against the Respondent seeking interalia declaratory orders that they have acquired title by way of adverse possession of 2 acres out of the suit land, LOC3/GITURU/484.
2. In a quick rejoinder the Respondent on the 24/3/2021 raised a notice of Preliminary Objection on grounds that;
 - a. The instant suit offends the provision of section 7 of the Civil Procedure Rules 2010.
 - b. That the originating summons herein are *res judicata* as the matters before this Court have already been determined in ELC 89 of 2018 at the Environment and Land Court (ELC) at Murang'a.
 - c. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the Court process hence a good candidate for striking out with costs.
3. The Preliminary Objection is opposed. On 22/06/2021 directions were taken and parties agreed to canvass the objection by way of written submissions.
4. The Respondent filed his submissions dated 5/7/2021 through the firm of Mbiyu Kamau & Company Advocates. It is submitted that Applicants vide their Originating Summons dated 10/11/2020 seek a declaration that they are the rightful part owners of land parcel no. LOC3/GITURU/484 by way of adverse possession. That the same prayer was alternatively sought in Murang'a ELC No 89 of 2018 upon substitution of the Plaintiffs' late father namely Gakobo Mbutia who died on the 22/6/18.
5. The Respondent highlighted that the relevant test to determine whether a matter is *res judicata* was settled in the cases of **Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd & others [2014] eKLR** and **Bernard Mugo Ndegwa v James Nderitu Githae & 2others [2010] eKLR** that the matter in issue is identical in both suits; the parties in the suit are the same; the claim/title is the same; the Court has concurrent jurisdiction and finality of the previous decision. He maintained that claim in the instant suit was determined by this Honorable Court in ELC No. 89 of 2018 touching on the same subject matter with similar parties litigating under the same title. That ELC No. 89 of 2018 was dismissed on 12/10/2020 for want of prosecution hence the current suit is in direct contravention of Section 7 of the Civil Procedure Act.
6. The Respondent argued that after the dismissal of the said ELC 89 of 2018, the Applicants purport to hoodwink the course of justice by the fact that their Counsel Mr. Ashioya and Mr. Osundwa are alternating briefs for them in the former and instant suits. That this suit is an abuse of the Court process and an attempt of reviving ELC No 89 of 2018. He urged the Court to dismiss the suit with costs.
7. On the other hand, the firm of Osundwa & Company Advocates filed submissions dated 13/7/2021 on behalf of the plaintiffs. They contended that the threshold of what constitutes a Preliminary Objection was set out in the classical case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696** as cited in the case of **Hassan Nyanje Charo v. Khatib Mwashetani & 3 others, Civil Application No. 14 of 2014, [2014] eKLR**. That a preliminary objection must be raised on a pure point of law and that its application to undisputed facts leading to only one conclusion.

8. They pointed out that parties are bound by their pleadings and faulted the obscurity in the cited provision as to whether it is section 7 of the Civil Procedure Act or Civil Procedure Rules. Further they added that for matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. Reliance was placed on the English case of **Henderson vs Henderson (1843-60) ALL E.R 378**.

9. It is their contention that ELC No. 89 of 2018 was not a dispute between the same parties as herein and that indeed the Applicants had made an undetermined application to substitute their deceased father. Moreover, that the issues in both suits are fundamentally different though they relate to the same subject matter. That in any event the impugned suit was not heard and determined on merits as provided for under Section 7 of the Civil Procedure Act. That to hold that the suit is *res judicata* would be contrary to the right to fair hearing Article 50(1) of the Constitution and referred to provisions of Article 159(2) Constitution of Kenya and Section 19 of the Environment and Land Act on procedural technicalities.

10. Lastly they argued that terming the suit as frivolous and vexatious is a question of facts that can be ascertained through a hearing hence not a pure point of law. In conclusion the opined that the objection is unmerited and ought to be dismissed with costs.

11. The main issue for determination is whether the preliminary objection is merited.

12. The starting point is to evaluate what constitutes a preliminary objection. The Applicants cited the celebrated case of **Mukisa Biscuits** supra which defined a preliminary objection as; -

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or 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 ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

13. This decision has been affirmed and reiterated severally in our Courts including the Supreme Court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR** that a preliminary objection should be founded upon a settled and crisp point of law.

14. The test to be applied in determining a proper preliminary objection can be deduced as follows; -

(i) A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.

ii) A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.

iii) A Preliminary Objection cannot be entertained where;

a. The facts are disputed/contested.

b. The facts are liable to be contested.

c. Facts are to be proved through process of evidence.

d. What is sought is an exercise of judicial discretion.

15. The preliminary objection is hinged on *res judicata* which is anchored Section 7 of the Civil Procedure Act. It provides that; -

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.

16. 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 the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of **Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR**.

17. It is my view that all the relevant facts as summarized above are not in dispute and the matter did not call for the exercise of the trial Court's discretion. Resultantly therefore the objection is a pure point of law.

18. From the foregoing, it is clear that for *res judicata* to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

19. Firstly, the matter in issue should be directly and substantially the same as in the former suit. A close look at the Originating Summons filed herein dated 10/11/2020, the Applicants claim is for proprietorship of LOC3/GITURU/484 by way of adverse possession. It is common place between the parties that the applicants in Murang'a ELC No. 89 of 2018 (formerly Nairobi HCCC No. 484 of 2008) sought a similar prayer in the alternative for the same parcel of land.

20. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in Murang'a ELC 89 of 2018 were the late Gakobo Mbatia versus Joseph Wamburu Kihara. Gakobo Mbatia was the father to the Applicants herein whereas Joseph Wamburu Kihara remains the Respondent in both suits. The Applicants herein opposed the objection on basis that Moses and George herein had not been admitted as Applicants in ELC 89 of 2018 (in place of their deceased father) and as such cannot be said to be same parties in both suits for a plea of res judicata to arise. In fact, at paragraphs 16 & 17 of their submissions, they are emphatic that their application to substitute their late father is pending determination. The Applicants position cannot be taken to be a correct one because the Court record shows that the Ruling of the application for revival of suit and substitution was delivered electronically on 7/5/2020 by consent of both counsels. It goes without saying that the parties in both cases are similar and indeed litigating under the same titles.

21. Lastly for res judicata to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided. It is not in dispute that the Court seized with Murang'a ELC 89 of 2018 had the requisite jurisdiction to determine the dispute therein. See Article 162 of COK and Section 13 ELC Act.

22. The gist of the Preliminary Objection is whether a suit that has been dismissed for want of prosecution can be said to have been heard and finally decided by the Court.

23. The gist of Section 7 of the Civil Procedure Act defines the principle of res – judicata to apply where the issues in the previous suit ought to have been “heard and finally decided.”

24. BLACK'S LAW DICTIONARY 10TH EDITION defines the terms “heard and determined” as follows: -

“of a case, having been presented to a Court that rendered Judgment.”.

The term “hearing” is defined in the same dictionary as follows: -

“A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”

25. In the case of **Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97** the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.

26. A suit that was dismissed or struck out for nonattendance or want of prosecution in my view is not synonymous with a suit that has been heard and determined. In the circumstances of this case I am guided by Art 50 (1) of the Constitution which provide for fair hearing as well as Art 159 (2)(d) of the Constitution which direct this Court to tend to the substance of the case and its attendant justice. In the instant suit the previous suit was dismissed for want of prosecution.

27. For those reasons I find the Objection unmerited and I dismiss it with no orders as to costs.

28. **It is so ordered.**

DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 14TH DAY OF SEPTEMBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Ms Gachago HB for Ms Osundwa for the 1st & 2nd Applicants

Kiragu HB for Mbuyu Kamau for the Respondent

