



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APPL. NO. 11 OF 2019

ABDU RASHID MUKHWANA.....1ST APPLICANT

SAMUEL SIMIYU WANGATIA.....2ND APPLICANT

JUDITH WANJIRO WACHIRA.....3RD APPLICANT

(Suing as office bearers of MULIRO MARKET KAMUKUNJI)

VERSUS

COUNTY GOVERNMENT OF TRANS-NZOIA....1ST RESPONDENT

G.H. TANNA & SONS LIMITED.....2ND RESPONDENT

RULING

1. The applicant filed a motion dated **29/4/2019** on **30/4/2019** seeking the following orders:

a. ...spent

b. ...spent

c. That this court be pleased to transfer Kitale CMCCC Land Case No. 75 of 2018 to the Environment and Land Court for hearing and final determination.

d. That costs of application be in the cause.

2. The grounds upon which that application is brought are that the property in issue involves title number **Kitale Municipality Block 4/439 - 442** belonging to the applicant and title number **Kitale Municipality Block 4/364** claimed by the 2nd respondent; that the 2nd respondent is laying claim to the said title; that the said property is a prime commercial property situated within CBD; that a valuation has been done and the value is ascertained at **Kshs.95 Million** and that the lower court lacks jurisdiction to hear and determine the same.

3. The application is supported by an affidavit of the 1st applicant sworn on **29/4/2019** which largely reiterates the same matters in the grounds.

4. The application is not opposed by the 1st respondent.

5. The application is opposed by the 2nd respondent vide an affidavit of **David Nyakango Onyancha** sworn on **9/5/2019** and filed in court on the same date. In that affidavit the response of the 2nd respondent is that the application is *res judicata* **Kitale ELC Misc. Civil Appl. No. 5 of 2019** whose ruling was not appealed; that the titles to the plot numbers cited by the applicants were cancelled for illegality in **Kitale ELC No. 64 of 2001** for being superimposed on **Kitale Municipality Block 3/364** now registered in the 2nd respondent's name; that the letters of allotment show that the land is subject to adjustment upon survey and therefore it is improper to attach any value to an unsurveyed plot; that the proposed transfer will interfere with orders of injunction issued against the plaintiff in **Kitale CMCC No. 75 of 2018** and that **Kitale ELC No. 4 of 2019** relating to the same subject matter is still pending in this court. No response was filed to the averments in David Nyakango Onyancha's replying affidavit.

6. The 2nd respondent filed submissions on 7/10/2019. The applicants filed submissions on 30/10/2019. I have considered the application, the response and the submissions.

Determination

Issues for determination

7. The main issues for determination in this application are as follows:

- (a) Whether the instant application is res judicata.**
- (b) Whether Kitale CMCC Land Case No. 75 of 2018 should be transferred to this court for hearing and final disposal.**
- (c) Who should bear the costs of the application?**

a. Whether the instant application is res judicata.

8. It is not in dispute that the applicants in the instant application were the same applicants in **Kitale ELC Misc. No. 5 of 2019** in which the respondents herein were also named as the respondents.

9. That application sought the transfer of **Kitale CMCC Land Case No. 75 of 2018** to this court for hearing and final disposal, the same prayer sought herein.

10. In that application, this court upon examining the documents filed observed that the value of the plot is not given and that no proper justification had been laid before court to warrant transfer of the suit to this court for hearing and final determination and dismissed the application.

11. Now the applicants have come up with a valuation report that places the approximate value of the suit property at **Kshs. 85,000,000/=**.

12. Section 7 of the Civil Procedure Act provides for the doctrine of *res judicata* with regard to suits and issues. It need not be gainsaid that the doctrine of *res judicata* also applies to applications. Is the instant application *res judicata* in the circumstances?

13. The doctrine of *res judicata* is captured in **Section 7** of the CPA which 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.”

14. In the case of **Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates -vs- Salama Beach Hotel Limited & 3 others [2017] eKLR** the court (Korir, J.), quoting a Court of Appeal decision, stated as follows:

“26. The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. I only need to cite one of those cases. In the recent case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)*, the Court of Appeal held that:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must 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.”**

27. The Court explained the role of the doctrine 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 commonsensical 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 or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

28. My understanding of the *res judicata* principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of the courts’ valuable time if there was no tool for arresting such mischief. This is the tool the Applicant has deployed through the instant application.”

15. In the Court of Appeal case of **Grace Waithera Muniu -vs- Teresia Wainaina & Another [2017] eKLR** the court (Koome, Okwengu & Kiage, JJ.A) stated as follows:

“The doctrine of *res judicata* which is indeed a principle of law has been applied in a number of cases including **Uhuru Highway Development Ltd -vs- Central Bank & 2 Others Civil Appeal No. 36 of 1996** where the three conditions were restated as thus;

- a. The matter must be directly or substantially in issue in the two suits.
- b. The parties must be the same or parties under whom any of the claim, litigating under the same side, and
- c. The matter must have been finally decided in the previous suit.”

16. It is noteworthy that **ELC Misc. Appl. No. 5 of 2019** was opposed by the 2nd respondent, and the decision thereon was given on the merits. This court ruled that no value of the land was indicated in the application and observed that the lower court is capable of hearing and determining the matter. It found that no justification for transfer had been given.

17. In the light of the foregoing, are the elements stated in the Court of Appeal decisions cited above applicable to the instant application in conjunctive terms? Following the analysis I made while beginning to address the instant issue, I find as follows:

- a. The issue of transfer of suit was directly and substantially in issue in the former application.
- b. The issue of value of the property was directly and substantially in issue in the former application.
- c. The former application was between the same parties and the parties herein were litigating under the same title in the former application.
- d. The issues of transfer and the value of the suit land were heard and finally determined in the former application.
- e. The court that formerly heard and determined the application is competent to try the subsequent application in which the issue is raised.

18. All the elements listed in the Court of Appeal decision cited are therefore applicable in respect of the instant application. If this application were to be heard to the fullest, for which there is no need given the findings above, the parties would be in effect re-litigating the same matters that were settled in the earlier application dated **27/2/2019**.

19. The upshot of the foregoing is that the instant application is therefore *res judicata* and I hereby dismiss the same.

20. Consequently, the only other issue I need to determine is issue **No. (c)**, which I dispose of by ordering that the costs of the application are hereby awarded to the respondents.

Dated, signed and delivered at Kitale on this 13th day of February, 2020.

MWANGI NJOROGI

JUDGE

13/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the applicants

N/A for the respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

13/2/2020