



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC APPLICATION NO. 938 OF 2012

IN THE MATTER OF THE ESTATE OF MUE KYAU (DECEASED)

AND

IN THE MATTER OF PRINCIPAL MAGISTRATES COURT AT KITUI

SUCCESSION CAUSE NO. 97 OF 1998

MAKAU MUE.....APPLICANT

VERSUS

KAISA MUE.....RESPONDENT

JUDGMENT

Introduction

1. The applicant is one of the beneficiaries of the deceased's estate and one of the four administrators of the Estate of the late Mue Kyau together with the respondent and two others representing each of the four houses of the Deceased. The applicant moved the court under certificate of urgency by a Notice of Summons under section 47 of the Law of Succession Act Cap 160 and Rules 49 and 73 of the Probate and Administration Rules seeking the following principal orders:

- i. An injunction order restraining any dealing on land parcel known as Matinyani/ Kalindilo/156 and Matinyani/Kalindilo/557.*
- ii. That Hon Court be pleased to call Title Deeds issued with respect to land parcel No. Matinyani/Kalindilo/156 and Matinyani/Kalindilo/557 with a view of examining the same alongside the grant which was confirmed on 16th September, 1999.*
- iii. That this Honourable court be pleased to distribute and Sub divide parcels known as Matinyani/Kalindilo/156 and Matinyani/Kalindilo/557 among the four households represented by the four Administrators in the confirmed grant.*
- iv. That this Honourable court be pleased to issue any such further orders and directions as the circumstances of the case may require.*
- v. That costs of this Application be borne by the Respondents.*

2. The application was supported by an affidavit by Makau Mue and further grounds stating that the deceased had four wives, one of whom is deceased. Letters of Administration were applied and the house of the deceased widow was represented by the applicant. A grant of representation to the estate of the deceased herein was issued and title to the property owned by the deceased was issued in the names of the Administrators. The applicant averred that the Grant had been issued in his name together with Kathuka Mue, Kaisa Mue and Syovata Kathiku was confirmed on 16/9/1999, and that the said Kathuka Mue and Syovata Kathiku had since passed. However, distribution of the Estate was yet to be done since the confirmation of the grant.

3. The application was served upon the respondent who through his advocate filed a notice of Preliminary Objection dated 15/5/14, on the ground that the issues raised for determination were *res judicata* and prayed that the Summons be dismissed with costs.

4. The respondent did not file a response to the preliminary application but the Parties agreed to canvass both the application and the preliminary objection together by way of written submissions.

SUBMISSIONS

Respondent's Submissions on the Preliminary Objection

5. In urging the Preliminary Objection, the respondent submitted that the applicant's application was similar to Machakos HCCA No. 89 of 2002 and the application was thus barred by section 7 of the Civil Procedure Act, Cap 21. It was contended that the same issue on distribution of property of the late Kyau is the same issue that was deliberated on in Machakos HCCA No. 89 of 2002 and that the subject matter in question relates to the Parcel Nos. **Matinyani/Kalindilo/156** and **Matiyani/Kalindilo/557** which had been the subject of various proceedings and decisions at different levels.

6. The matter had been determined by a court of concurrent jurisdiction and could not be reopened as the same High Court of Kenya had determined the case in HCCA No. 89 of 2002 and instead of appealing, the applicant had filed another suit. The applicant could not therefore raise the same matter in the same court. The decision in HCCA No. 89 of 2002 by Lenaola, J. delivered on 22.09.2008 and 28.05.2009 made a determination on the distribution of the Kitui Principal Magistrate's Court Succession Cause No. 97 of 1998 which had adopted the award made by Kitui Central Land Disputes Tribunal dated 29.05.2001. The court was referred to **Gedion Mike Mbuvi v. Registered Trustees of National Christian Council of Kenya & 3 others** [2014] eKLR and **Julius Odhiambo Ogina v. Andrew Horace Omondi** [2014] eKLR.

7. Finally, he urged that the applicant's summons dated 18/9/2012 be dismissed with costs.

Applicant's Submissions

8. The applicant urged that on 22/9/08, Lenaola, J. (as he then was) had ordered that the status quo to be maintained pending the final judgement in Machakos Civil Appeal No. 89 of 2002 pursuant to the provisions of section 78 of the Civil Procedure Act.

9. It was further urged that a preliminary objection is a point of law if allowed disposes of a suit and that the respondent's Preliminary Objection did not fit the threshold that was established in **Mukisa Biscuits Manufacturing Co. Ltd v West End Wanjala Lukoye v Benard Alfred Wekesa Sambu & 3 others** [2013] eKLR in that the allegations raised needed a factual evidence to substantiate the claims raised by the respondent.

10. It was further urged that section 7 of the Civil Procedure Act provides for the doctrine on *res judicata* as follows:

"7. 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 their claim, litigating under same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequent raised, and has been heard and finally decided by such court"

It was urged, therefore, *res judicata* did not apply that there had been no suit between the same parties. The previous suit was between Mue Kyau's family land dispute through Charles Mue v. Makau Mue which is not the same as this instant application and that the issue raised in the applicant's Summons is on distribution of the suit property in accordance with the Grant as confirmed in **HC Succession cause No. 97 of 1998** into four equal portions representing the respective houses of the deceased.

11. Further, it was submitted, the matter in the previous suit has to have been finally decided for the doctrine to succeed and the matter must be directly and substantially be the same and the parties under whom any of them claim litigating under the same title must be the same as was held in **Kenya Hotel Properties Limited v. Willesden Investments Limited & 6 others** [2013] eKLR.

12. Finally, the applicant urged that the respondent had not availed to the court the various pleadings filed in court to show the issues raised are the same as those in the instant application. In **Japhet Angila v. Isaya Arnold Owala & Anor** [2011] eKLR where the defendant did not avail pleadings of the matter he was saying are the same and the decision there on. It was held by the court that one who alleges had to prove the suit was *res judicata*. He urged the Preliminary Objection be dismissed and his application dated 18/9/2012 be heard.

Issues for Determination

13. The only issue for determination in the matter is whether the application was barred by the principle of *res judicata* having raised issues which have already been determined by a competent court.

Determination

14. The applicant herein is one of the administrators' of the estate of the late Mue Kyau. The applicant's application relates to two parcels of land known as Matiyani/Kalindilo/156 and Matinyani/Kalindilo/557. There is a certificate of grant which was annexed as 'MMI' by the applicant which confirmed the grant to Makau Mue, Kathuka Mue, Kaisa Mue and Syovata Kathuku. Further, Confirmed Grant indicates that the named parcels described above were decreed to be registered in the administrator's names. This grant was issued on 22/09/1999. The applicant urged the court to issue injunction orders in regards to the land.

15. As held in **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd** (1969) EA 696 per Sir Charles Newbold, P:

"A Preliminary Objection is in the nature of what used to be 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but

unnecessarily increase costs and on occasion, confuse the issue. The improper practice should stop.”

16. The court has now to determine whether the application is *res judicata*. The applicants have strongly opposed the Preliminary Objection urging that the respondent did not file any response to the application and that the issues raised in the application could only be addressed by way of evidence and through a substantive hearing.

17. Upon considering the matter, the court notes that there was an award made by the Land Dispute Tribunal which was forwarded to the Kitui Law Courts on 10.07.2001. It showed that members of the late Mue Kyau's family had been invited and the tribunal was to arbitrate over the dispute the judgment read as follows:

“After hearing and going through the statements and evidence produced, this Board concurs with the clan’s decision of 24th and 25th November 2000 which a copy is hereby attached. We also attach a map showing the parcels of land and a letter appealing for tough measures against Mr. Makau Mue who had uprooted the sisals planted to mark the boundaries.

This tribunal, therefore, recommends that the clan’s ruling be followed as follows:

i. Makau Mue vacates land parcel No. 156 and goes to land parcel No. 560 or 574 whichever suits him. This should be done before or on September 2001.

ii. That Makau Mue replants the sisals boundaries he had uprooted.

iii. That Makau Mue stops threatening other family members.

iv. That the Mue family calls the land Registrar to sub-divide parcel 156 and transfer the portions to the two wives as earlier mentioned. Parcel No. 557 be transferred to Kathuka Mue, one of the two wives”

Issue previously determined

18. Makau Mue, the applicant has been mentioned severally in the above judgment by the tribunal. This was adopted in Kitui PM Succession Cause No. 97 of 1998. This same order was adopted by the Machakos High Court in Civil Appeal No. 89 of 2002, where the court (Lenaola, J.) stated as follows:

1. “On 22/9/2008, I delivered a preliminary judgment in this matter and left two issues to be addressed in this final judgment viz;

i. The outcome of the Appeal to the provincial Appeals Committee by the Respondent in this Appeal.

ii. The status of PM’S Succ. Cause No. 97/1998 (Kitui).

2. I called for evidence on the two issues before I could conclude the judgment and I now have two documents before me;

a. Certificate of confirmation of Grant issued in H.C cause No. 97/1998 (NBI) relating to the estate of Mue Kyau (decease). The earlier reference to PM’S Succ. cause 97/1998 (Kitui) was therefore in error. The estate of the deceased was distributed in that cause and one of the properties was distributed in that cause and one of the properties to be distributed was title no. Matiyani/Kalindilo/156 which was partly the subject of the appeal before me. Amongst the individuals to inherit that parcel of land was one Makau Mue, the present respondent.” [Emphasis added]

The present respondent was Makau Mue who is the applicant in this instant application but he has denied knowing any other suit that touches on him and or any of the parcels of land he is asking this court to issue injunctive orders.

19. Section 7 of the Civil Procedure Act, Cap 21, provides the conditions for application of the principle of *res judicata* as follows:

1. Matter in issue is the same in the former and the current case.

2. The parties have to be the same

3. The subject matter (title) has to be the same

4. The same court tried the same case.

5. The case has been heard and finally decided.

20. The judgment of the court (Lenaola, J.) in Machakos HCCA No. 89 of 2002 indicates that the applicant was the respondent therein and the court proceeded to issue final orders in regard to the dispute in the late Mue Kyau's estate. In this judgment the court was alive to the fact that there had been other two different proceedings in relation to the deceased's estate on its distribution. The applicant cannot deny all these facts when his name is mentioned severally. In fact the applicant herein had appealed to the Provincial Appeals Committee and he never brought a feedback of the same to be adduced as evidence as ordered by the Court on 22.09.2008.

21. This court further finds that the subject matter in this suit - parcels **no. Matiyani/Kalindilo/156 and 557** are the same in previously determined appeal Machakos HCCA No. 89 of 2002 and its antecedent proceedings. The award by the tribunal had been adopted and the applicant herein had been asked to vacate parcel No. 156 and move to parcel no. 560 or 574. The applicant had been asked to move out which he declined and he moved the court by an application to have the court review its order which was declined by the court on 22.09.08. This instant application was made on 18.09.12. The applicant was asking for distribution of property which issue had already been determined by the same court in Machakos. The applicant's avenue was to appeal against the judgment in Machakos HCCA No. 89/02.

22. By a further application dated 29.10.2013, it was alleged that some beneficiaries of the estate had commenced destruction of trees and construction on the property. This court shall not dwell on this since by order issued on 22.09.08 the applicant had been ordered to move. In **Gideon Mike Mbuvi** (supra), the court found that the objections by the 1st and 2nd defendant arose from previous cases filed and some of the issues had been heard and determined. I respectfully agree as held in that case that the interventions by the court is sanctioned by section 3 A of the Civil Procedure Act which provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Conclusion

23. This court is bound by the wisdom of the Court of Appeal decision in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others** Civil Appeal No. 36 of 1996 that:

*“There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. **This shows only one intention on the part of the legislature, that is to say, there must be an end to applications of similar nature;** that is to say further, wider principles of res judicata apply to applications within the suit”.*

For the reasons set out above, this court finds that the issues raised in the application dated 18th September, 2012 had been determined in the previous proceedings, the parties were the same and the same competent court had heard and made a final determination.

Orders

24. Accordingly, for the reasons set out above, the court makes the following orders:

1. The preliminary objection dated 15.05.14 is allowed.
2. The application dated 18.09.2012 is dismissed.
3. There shall be no order as to costs.

Order Accordingly.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY 2019.

G.V. ODUNGA

JUDGE

Appearances:

M/S Nyamu & Nyamu Co. Advocates for the Applicant.

M/S MM. Kimuli Co. Advocates for the Respondent.