



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 68 OF 2017**

**TEDDY DAVIS NGALA.....PLAINTIFF**

**VERSUS**

**POLA CHARO KANIKI alias POLA NGALA.....DEFENDANT**

**RULING**

1. I have before me for determination a Notice of Motion application dated 6<sup>th</sup> July 2017. By the said application filed herein on 7<sup>th</sup> July 2017, Pola Charo Kaniki alias Pola Ngala (the Defendant) prays for an order that the Plaintiff's suit be struck out for being an abuse of the process of the Court.

2. The application which is supported by an affidavit sworn by the Defendant is premised on the grounds inter alia:-

***a) That in Malindi ELC No. 36 of 2013, the Plaintiff filed a similar suit against the Defendant and that the said suit has been fully heard and determined;***

***b) That the issues being raised by the Plaintiff herein were directly and substantially in issue in the former suit which has been heard and determined; and***

***c) That this present suit is res judicata and amounts to an abuse of the Court process.***

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 30<sup>th</sup> October 2018, Teddy Davis Ngala (the Plaintiff) avers that the substantive prayer in the former suit was a declaration that the Plaintiff's name be included as one of the owners of Plot No. 2390 Kilifi/Mtondia since he is the administrator and the beneficiary of the estate of Davis Ngala. He further avers that that prayer is different from the one in the present suit where he is seeking that three acres of land be carved off Kilifi/Mtondia/1983.

4. I have perused and considered the application by the Defendant and the response thereto by the Plaintiff. I have similarly perused and considered the written submissions as placed before me by the Learned Advocates for the parties.

5. In his Complaint dated and filed herein on 28<sup>th</sup> March 2017, the Plaintiff prays for:-

***i) A declaration that the Plaintiff's name be included in the Plot No. 2390 Kilifi/Mtondia since he is the Administrator of the Estate of Davis Ngala and the beneficiary of all the estates; and***

***ii) Costs of the suit.***

6. The Defendant/Applicant on her part contends that this suit as filed is similar to the subject matter in Malindi ELC No. 36 of 2013 which was earlier on filed by the Plaintiff and has since been fully heard and determined. The Defendant further asserts that the issues raised herein were directly and substantially in issue in the former suit and urges the Court to strike out this present suit as being res judicata and an abuse of the Court process.

7. In his brief response to the application, the Plaintiff avers that the substantive prayers are different as in the previous suit he sought three acres of land to be carved out of LR No Kilifi/Mtondia/1893 while in the present matter he is seeking a declaration that he is one of the owners of LR No. Kilifi/Mtondia/2390.

8. While the Plaintiff contends that the two suits relate two different subjects, a perusal of the record herein reveals that the two disputes are

about the same parcel of land. At paragraph 4,5,6,7,13 and 17 of his long Plaintiff, the Plaintiff himself gives the history of the disputed parcel of land in his own words as follows:-

**4. That between the years 1994 and 2007, the defendant was married to my late father who was my biological father who passed away on 23<sup>rd</sup> April 2007;**

**5. That sometimes in 1995, my father and the Defendant were sued by one Moses Mukolwe that is the civil suit No. 621 of 19954 at Mombasa High Court of Kenya;**

**6. That sometimes on 25<sup>th</sup> day of August 1995 an order was issued restraining the defendant from continuing or remaining in occupation of the perceive (sic) land known as Kilifi/Mtondia/60 together with the buildings erected thereon pending the hearing of the application inter-partes;**

**7. That on 13<sup>th</sup> October 1995 by the consent, ordered the Plaintiff (one Moses Mike Mukolwe) to go back and occupy his house in the Plot No. Kilifi/Mtondia/60 and continue to cultivate the said parcel of land without putting up any more or further permanent development. The Defendants Pola Ngala and Davis Ngala were permitted to live on the disputed land but to continue living in their small house/structure in the land and do nothing more.**

**13. That on 11<sup>th</sup> July 2014 Hon Justice Angote ordered and declared that the Kilifi County Surveyor to curve out (sic) three acres of land and Kilifi Land Registrar to register the same in my name; and**

***That the said Plot was No. 60 Kilifi Mtondia which changed to No. 63 Kilifi Mtondia and later No. 1893 Kilifi Mtondia after the defendant sold one acre and now changed to No. 2390 Kilifi Mtondia when the three acres were curved for the same by the County Surveyor in my favour.***

9. Arising from the above and the other material placed before me, it is clear that the Plaintiff herein had previously filed Malindi ELC No. 36 of 2013 aforesaid against the Defendant seeking the excision of three acres of land in his name from all that parcel of land known as LR No. Kilifi/Mtondia/1893. That is the same parcel of land that came to be known as Kilifi/Mtondia/2390 after the three acres sought by the Plaintiff were sub-divided therefrom in accordance with the Judgment of the Honourable Angote J delivered herein on 11<sup>th</sup> July 2014.

10. The doctrine of res judicata is captured at Section 7 of the Civil Procedure Act as follows:-

***“No Court shall try any suit 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.”***

11. Explaining the rationale for the doctrine of res judicata in the ***Independent Electoral Boundaries Commission –vs- Maina Kiai & 5 Others, Nairobi CA Civil Appeal No. 105 of 2017 (2017)eKLR***, the Court of Appeal stated as follows:-

***“The rule or doctrine of res judicata serves the sanitary 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 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.”***

12. In the matter before me, it is clear to me that the Plaintiff has had his day in Court in regard to this self-same suit property and against the same Defendant. He had his chance to litigate all the issues in this world in regard to the suit property when he filed ELC Case No. 36 of 2013 against the Defendant. If he did not do so, he can only have himself to blame.

13. In the premises, I am persuaded that there is merit in the Defendant’s application dated 6<sup>th</sup> July 2017. I allow the same and proceed to strike out the Plaintiff’s suit with costs.

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of February, 2020.**

**J.O. OLOLA**

**JUDGE**