



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 120 OF 2007

AMRI MGHORO MWAMURI.....PLAINTIFF

VERSUS

1. MATANO MWASINA

2. IBRAHIM NJOROGI KIMANI

3. BETINA WALTHER

4. SWAN ISLAND LIMITED

5. MOSES KABERI.....DEFENDANTS

AND

1. DICKSON OTIENO AKENO

2. CHRISTINE MUMBI MIANO.....INTERESTED PARTIES

RULING

1. Before me for determination is the Interested Parties Notice of Motion application dated 18th September, 2019 which seeks to strike out in respect of LAND PARCEL NO. KWALE/DIANI COMPLEX/391. The application is premised on the grounds thereon and is supported by the affidavit of Dickson Otieno Akeno, the 1st Interested Party /applicant. It is the applicants case that they are not registered proprietors of the PROPERTY KNOWN AS KWALE/DIANI COMPLEX/391 and that the plaintiff's suit over the said land discloses no reasonable cause of action in law. That the plaintiff's claim of adverse possession against the 1st defendant/respondent with regard to the suit land is no longer tenable and does not make sense as the applicants are now the registered owners of the said parcel of land. The applicants aver that they are certain to be adversely affected by any order made in this suit while they have already obtained judgment against the plaintiff in Mombasa ELC Case No. 115 of 2011 and are now the registered proprietors of the suit property. That is in the interest of justice and fairness that this application be granted to save the court's time. The applicants have annexed a copy of title deed for TITLE NO. KWALE/DIANI COMPLEX/391 issued on 11th August, 2010 in the names of Dickson Otieno Akeno and Christine Mumbi Miano and judgment delivered on 28th June, 2018 in Mombasa HCCC No.115 of 2011, **Dickson Otieno Akeno & Christine Mumbi Miano –v- Amri Mchoro Mwamuri**

2. The plaintiff opposed the application through a replying affidavit sworn by himself on 29th October, 2019. The plaintiff avers that the applicants sued him in Mombasa ELC Case No. 115 of 2011 seeking inter alia, vacant possession of the suit property being KWALE/DIANI COMPLEX/391 for reasons that the interested parties were innocent purchasers of the suit property. That he filed a statement of defence dated 8th June, 2011 invoking the defence of adverse possession and clearly notifying them of the existence of the current suit in which the plaintiff is seeking adverse possession over the suit property. The plaintiff states that notwithstanding the pendency of this suit, the applicants decided to continue with the hearing of ELC Case No. 115 of 2011 instead of applying to be enjoined as interested parties in the instant suit, ELC Case No. 120 of 207 (O.S) resulting into the judgment in ELC Case No. 115 of 2011. The plaintiff avers that the judgment in ELC Case No. 115 of 2011 was to the effect that the applicants were innocent purchasers but that the learned judge declined to adjudicate on the issue of adverse possession, noting that the issue was being handled in ELC Case No.120 of 207 (O.S) which is the instant case and in which is yet to be heard and judgment is yet to be delivered. The plaintiff states that the judgment in Mombasa ELC Case No. 115 of 2011 was to the effect that the applicants were innocent purchasers but they purchased the suit property which was subject to litigation and thus will be affected by the judgment in this case if the plaintiff is declared to have dispossessed the true owner (s) of the land and that was the reason the applicants applied to be enjoined in this suit. Accordingly to the plaintiff, the judgment in ELC Case No. 115 of 2011 is of no consequence

to this suit. The plaintiff avers that he has a legitimate interest in the suit property which is to be ascertained in this suit. The plaintiff urged the court to dismiss the application with costs. The plaintiff annexed copies of the pleadings and judgment in Mombasa ELC Case No. 115 of 2011.

3. The court directed that the application be canvassed by way of written submissions which were duly filed by both parties. The interested parties submitted that the issue of adverse possession was adjudicated in ELC Case No. 115 of 2011 and therefore this suit is res judicata and that the court does not have jurisdiction to entertain it in view of the mandatory provisions of Section 7 of the Civil Procedure Act.

4. The applicants further submitted that they were registered as proprietors of the suit property on 11th August 2010 and therefore time could only start running against them from that date, hence the plaintiff's suit is untenable. Further, that the judgment in ELC Case No.115 of 2011 arrived at a finding that the plaintiff is a trespasser on the suit property and therefore cannot claim any rights by way of adverse possession.

5. On his part, the plaintiff submitted that the suit cannot be said to be res judicata because there is a pending appeal against the judgment in ELC No.115 of 2011. That the existence of the Appeal knocks down the present application.

6. I have considered all the issues raised in the application and the rival submissions. It is clear that the applicants seek to strike out the plaintiff's suit herein for being res judicata. The law pertaining to the doctrine of res judicata is captured under the provision of Section 7 of the Civil Procedure Act which states:

“No court shall try any suit or issues 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 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.”

7. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

8. The doctrine of res judicata as stated has been explained in a plethora of decided cases. In the case of **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017)eKLR**, the Court of Appeal held as follows:

“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 distinctive terms;

a) The suit or issue was directly and subsequently in issue in the former suit.

b) The 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 was raised.”

9. The Court of Appeal went ahead and 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 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 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 foundation of res judicata thus rest in the public interest for swift, sure and certain justice. ”

10. In my understanding, the res judicata principle 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. The question therefore is whether the applicants in the application herein have satisfied the conditions for the principle of res judicata in view of the fact of this case.

11. From the pleadings and submission, the subject matter in ELC Case No. 115 of 2011 the property known as Kwale/Diani complex/391 which is the suit property herein. The former suit was between the applicants as plaintiffs and the plaintiff herein as defendant. In the former suit, the plaintiff's claim against the defendant (who is now the plaintiff herein) was for orders of vacant possession. The defendant raised the defence of limitation and that he had filed this suit claiming for adverse possession over the suit property. The issues were heard and finally determined on 22nd May, 2018 by L. Komingoi, J. in paragraphs 10 and 11 of the said judgment, the court held:

“10. The defendant bases his claim in the suit property on adverse possession. They have relied on the case of Cherron Kenya Limited (Formerly known as Caltex Oil Kenya Limited) –versus- Harrison Charo Washutu in Malindi CA Civil Appeal No. 17 of 2016. I have gone through the said authority and find that the facts in that case

are different than in the present case.

11. In the case of Kasuve –versus- Mwaani Investments Limited and 4 Others (2004) KLR 184 it was held;

“In order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. ”.

I have considered the facts presented herein by the defendant and I find that the same do not contain the ingredients set out in the above case.

I find that the defendant has not proved possession.”

12. In this case, the plaintiff is basing his claim over the suit property on adverse possession. There is no doubt that the court that formerly heard and determined the issue of adverse possession in ELC Case No. 115 of 2011 was competent to try the suit. The court in the former suit entered judgment in favour of the applicants herein. Applying the stated law to the facts before one, it is clear that the plaintiff seeks to open issues that have been raised and determined in ELC Case No. 115 of 2011. Even the issue regarding adverse possession was fully canvassed and determined. There is no dispute that the parties are the same in all these, proceedings save that the defendants herein have been added in the suit herein. The subject matter in both suits is the property known as KWALE/DIANI COMPLEX/391. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in subsequent suit. In my view, the existence of an appeal over the judgment in the previous suit does not in itself render the principle of res judicata inapplicable. What is clear to me is that the plaintiff is trying to litigate a concluded matter. By virtue of Section 7 of the Civil Procedure Act, this suit is barred by the doctrine of res judicata.

13. In the result I find and hold that the notice of motion dated 18th September 2019 has merit and the same is hereby allowed. The suit is res judicata.

Accordingly, the plaintiff’s suit is struck out with costs to the interested parties and the defendants.

14. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE