



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC. NO. 181 OF 2014**

**MWANAHAMISI IDD MWACHANYUMA ..... PLAINTIFF**

**- VERSUS -**

**1. HASHIM SALIM AWADH**

**2. PHILIP NGUGI MUCHEMI ..... DEFENDANTS**

**RULING**

[1] Mwanamisi Idd Mwachanyuma filed this plaint. She states that she is the beneficial proprietor and trustee of legal customary land right interest of title in all that piece or parcel of land originally known as Kwale/Diani Beach/642. She says the land was subsequently subdivided into Kwale/Diani Beach 879,909,910,911,912,915 and Title numbers Kwale/Diani Beach 984 and 919. She states that all the said subdivisions are unlawful. She stated that she let a portion of 10 X 17 meters to the first defendant for use as a restaurant business. She avers that the first and 2nd defendant have since 2001 erected on the portion of land to let to the plaintiff a restaurant banda popularly known as Coast dishes. That on the week ending 30 June 2014 the 1st and 2nd defendant started constructing a perimeter boundary fence on the suit land. That those constructions are beyond what the plaintiff and the 1st and 2nd defendants had initially agreed. The plaintiff has therefore brought this suit seeking for injunctive orders against the 1st and 2nd defendant.

[2] The 1st and 2nd defendant filed their defence, they denied the allegations of the plaintiff. They however admitted that the original property Kwale/Diani Beach/642 was subdivided into various subdivisions, way back in 1991 and that the subdivisions have been transferred to various third parties. They state that Kwale/Diani Beach 902 was registered in the name of Wilfred Kiplagat from whom the 2nd defendant purchased the suit property. The defendant state that vide Miscellaneous application no. 344 of 2006 (JR) the ownership of Plot No. Kwale/Diani Beach/642 and all its subdivisions was placed on one Francis Kipkoech Kigen. That there has been no appeal on that case. They raised in their defence the issue of *res judicata*.

[3] On 1st August, 2014 Mr. Munyao Learned Counsel for the defendants therefore raised a Preliminary Objection and argued that the issue in this suit was *res judicata*. He relied on Section 7 and 8 of the Civil Procedure Act. He argued that the interest being claimed by the plaintiff in this case is the same interest determined in Civil Case No. 479 of 2009. The Learned Counsel argued that the plaintiff in this case is the same as in Mombasa HCCC. 479 of 2009. She was claiming ownership in both suits. That Justice Ojwang (as he then was made a finding of fact that the high court had settled the issue of ownership with finality and that the several subdivisions of the suit land had been validated by the court.

[4] Mr. Asige Learned Counsel for the plaintiff opposed the application. He argued that in a Preliminary Objection facts must be agreed that a Preliminary Objection cannot be raised if facts are indispute. He argued that the defendant must show that there was a trial of any issue in a previous suit. He argued the JR is neither civil nor criminal. He said that plots are identified and that plot no. 902 is not part of the plots that Justice Ojwang identified and made his orders. However he conceded that Plot No. 902 the subject matter of this suit was a subdivision of Kwale/Diani/642. He finally argued that the defendants to this suit were not parties to the Judicial Review proceedings He relied on *Mukisa Bisquites* case.

[5] A perusal of Section 7 of the Civil Procedure Rules is instructive in this matter it states;

*"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."*

The issue for determination in the *HCC. Miscellaneous application No. 344 of 2006 and in Mombasa Civil suit No. 479 of 2009* was the ownership of Plot No. Kwale/Diani Beach/642 and its various subdivisions. A finding of fact was made in those two cases. Indeed in *Mombasa HCCC 479 of 2009* Justice Ojwang states;

*"As between these parties the High Court had settled the question of ownership of plot no. Kwale/Diani Beach/642 with finality; the legal owner was 2nd defendant herein. The court had gone further to validate the several subdivisions already created out of Plot No. Kwale/Diani Beach/642 and to prohibit the Land Registrar from making any alterations to the Registers."*

*The plaintiff, however by her plaint of 22nd December, 2009 just-under-three years since the High Court's orders, returns with prayers for injunction to restrain the subdivision of Plot No. Kwale/Diani Beach/642; for deceleration nullifying the subdivision that have already taken place and have declared valid; for cancellation orders directed at the Land Registrar; for a declaration that the plaintiff is the lawful owners of the said property. That cannot be done res judicata, since this position must be well apprehended by the plaintiff's counsel who filed the suit papers, the suit is to be regarded as a glaring abuse of the process of the court."*

[6] The plaintiff in that case is the same plaintiff here. The High Court has in no uncertain terms determined the issue of ownership of Kwale Diani Beach/642 or any of its subsequent subdivisions. It does not matter that the defendants are different. If her claim stems from her alleged ownership of the suit land then the suit will still be res judicata. Her suit is a clear abuse of the process of court. The Preliminary Objection is upheld, the suit is dismissed with costs to the defendants.

**Dated and delivered in open court at Mombasa this 14th day of November 2014.**

**S. MUKUNYA**

**JUDGE**

**14.11.2014**

In the presence of:

Mr. Thiaka advocate for Mr. Munyao advocate for the defendant.

Mr. Asige advocate for the applicant.