



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 26 OF 2006**

**DANIEL MASILA MUTISO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**REUBEN MUNYAO.....1<sup>ST</sup> DEFENDANT**

**BEN MWEU.....2<sup>ND</sup> DEFENDANT**

**JULIUS WAMBUA.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**CHARLES MUNYAO.....4<sup>TH</sup> DEFENDANT**

**JAMES KIOKO.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**HENRY KATHOME.....6<sup>TH</sup> DEFENDANT/APPLICANT**

**FRED NZIOKI.....7<sup>TH</sup> DEFENDANT**

**FRANCIS KIIO.....8<sup>TH</sup> DEFENDANT**

**FLORENCE KASWIL.....9<sup>TH</sup> DEFENDANT**

**RULING**

1. The Defendants approached this court vide a Notice of Motion dated 26<sup>th</sup> March, 2020 that was filed under Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The following orders were sought:

*a. Spent*

*b. Spent*

*c. Spent*

*d. That the Honourable Court be pleased to set aside the ex-parte Judgment made on 10<sup>th</sup> July, 2017.*

*e. That the costs of the Application be provided for.*

2. The Application was supported by the Affidavit deponed by the 3<sup>rd</sup> Defendant with the authority of the 5<sup>th</sup> and 6<sup>th</sup> Defendants. It was deponed that the Defendants were not informed of the hearing date by their then advocates on record and that therefore their failure to attend court was the sole mistake of the former advocates, F.N. Mulwa & Co Advocates.

3. It was deponed that the Defendants have a permanent residence on the land in issue; that they have resided thereon for almost four (4) decades; that the statement of Defence raises triable issues and that the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants are desirous of defending the suit.

4. In reply to the Application, the Plaintiff's/Respondent's advocate deponed that the Application is *res judicata* because it is similar to an Application dated 19<sup>th</sup> April, 2018 in which a Ruling was delivered on 16<sup>th</sup> November, 2018.

5. The Plaintiff's advocate deponed that the Defendants/Applicants being dissatisfied with the Ruling dated 16<sup>th</sup> November, 2018 filed a Notice of Appeal indicating an intention to Appeal to the Court of Appeal and that the Application should be dismissed with costs.

6. The Application was canvassed vide written submissions. It is only the Defendant's/Applicant's submissions which are on record. Learned counsel for the Defendants/Applicants cited the provisions of Order 12 Rule 7 of the Civil Procedure Rules 2010 that provides as follows:

*"Where under this Order Judgment has been entered or the suit has been dismissed, the court, on Application, may set aside or vary the Judgment or order upon such terms as maybe just."*

7. Reliance was also placed on the case of *Mbogo vs. Shah [1968] EA 93*, at page 95 where it was stated:

*"Whether...in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment, if necessary, upon terms to be imposed."*

8. It was the argument of counsel that the mistake of counsel should not be visited upon the Applicants herein since they were innocent litigants; that the issue in dispute herein involves land which is quite emotive and that the Applicants reside with their families on the suit property. Reliance was placed on the case of *Belinda Murai & others vs. Amoi Wainaina (1978) LLR 2782 (CALL)* cited in *Harrison Wanjohi Wambugu vs. Felista Wairimu Chege & another (2013) eKLR*, where it was stated:

*"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of injustice to dictate. It is known that courts of justice themselves make mistakes which is politely referrers to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule..."*

9. The court was urged to allow the Application. The Defendants' advocate did not submit at all on whether the Application is *res judicata* or not.

10. Having considered the pleadings and submissions by the Applicants, the first issue for determination is whether the Application dated 26<sup>th</sup> March, 2019 is *res judicata*, and if not, whether the Defendants are entitled to an order of setting aside the Judgment of this court.

11. Section 7 of the Civil Procedure Act states that:

*"...No court shall try any 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 issues has been subsequently raised and has been heard and finally decided by such Court."*

12. In the case of *Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another, (2017) eKLR*, the Court of Appeal extensively considered the principle of *res judicata* and held as follows:

*"...The elements of res judicata have been held to be conjunctive rather than disjunctive. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 others (2007) eKLR*

*"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 common-sensical 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 forces 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."*

13 In the case of *Mburu Kinyua vs. Gachini Tutu (1978) KLR 69 Madan, J. quoting with approval William Koross vs. Hezekiah Kiptoo Komen & 4 others (2015) eKLR*, stated:

*"Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same person to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in context, but which was not brought forward, only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which parties exercising reasonable diligence might have brought forward at the time."*

14. The doctrine of *res judicata* is grounded on public interest and thus transcends the parties interest in a suit. In the *Maina Kiai* case (*supra*), the court quoted with approval the Indian Supreme Court in the case of *Lal Chand vs. Radha Kisham*, AIR 1977 SC 789 where it was stated:

*“The principles of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”*

15. The Ruling delivered by this court on 16<sup>th</sup> November, 2018 dismissed the Application dated 19<sup>th</sup> April, 2018 in which the Defendants had sought to set aside the Judgment of this court of 10<sup>th</sup> July, 2017. The bone of contention in the Application dated 19<sup>th</sup> April, 2018 was that the Defendants failed to attend court because their advocate did not inform them of the hearing date.

16. Indeed, the Defendants/Applicants’ then Advocate, Franzis Mwanzi Mulwa, also filed an Affidavit in which he deponed that although he was served with a hearing notice of 24<sup>th</sup> March, 2017, he honestly believed that the matter was not ready for hearing. The said Application was opposed by the Plaintiff. In its Ruling delivered on 16<sup>th</sup> November, 2018, the court found as follows:

*“Considering that neither the Defendants nor their advocate appeared before the court on 22<sup>nd</sup> March, 2017 and 15<sup>th</sup> May, 2017 despite being notified, I find and hold that no good reason has been given why I should set aside the Judgment of this court...”*

17. The issues for determination in the Application dated 19<sup>th</sup> April, 2018 are the same issues for determination in the instant Application, between the same parties. Indeed, as was held in *Henderson vs. Henderson*(1843) 67 ER 313, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

18. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

19. The Defendants in this matter sought to set aside the Judgment of this court in the Application dated 19<sup>th</sup> April, 2018, which Application was dismissed by this court. The Defendants cannot seek for the same order, even if the said Application is based on different grounds, which grounds might have been brought forward in the earlier Application.

20. That being the case, it is my finding that the Application dated 26<sup>th</sup> March, 2019 is *res judicata* the Application dated 19<sup>th</sup> April, 2018. The Application dated 26<sup>th</sup> March, 2019 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2020.**

**O.A. ANGOTE**

**JUDGE**