



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 337 OF 2017

(Formerly ELC. No. 782 of 2015 - Nairobi)

WELYAND MUEMA NZIOKA.....PLAINTIFF/RESPONDENT

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....1ST DEFENDANT/RESPONDENT

MAVOKO LAND DEVELOPMENT COMPANY LTD.....2ND DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 26th June, 2020, the 2nd Defendant has prayed for the following orders:

a) That the Honourable Court be pleased to dismiss the Plaintiff's suit with costs as the suit is res judicata following the Judgment delivered on 31st May, 2019, between the 2nd Defendant herein and Kasina Housing Scheme Society, Machakos ELC. NO. 366 of 2009 in which the boundary dispute was determined and settled.

b) The suit be dismissed with costs.

2. The Application is supported by the Affidavit of the 2nd Defendant's Director who deponed that sometimes in the year 2009, the 2nd Defendant's land L.R. No. 25062 measuring 17.58 Ha. at Mlolongo township was illegally and unlawfully encroached on by Kasina Housing Scheme Society which purported to have a leasehold title, L.R. No. 11895/27.

3. The 2nd Defendant's Director deponed that the said Kasina Housing Scheme Society, without regard of the 2nd Defendant's leasehold title for L.R. No. 25062, sub-divided and gave the 2nd Defendant's land to its members and that the Plaintiff is one of the members of Kasina Housing Scheme Society.

4. It was deponed that the 2nd Defendant made several attempts to stop the said Kasina Housing Scheme Society from trespassing on the suit property without success; that aggrieved by the Society's action, the 2nd Defendant herein instituted Machakos ELC Civil Suit No. 366 of 2009; and that while Machakos ELC Civil Suit No. 366 of 2009 was pending hearing and determination, the Plaintiff herein took possession and occupation of Plot Nos. 110 and 112 as allotted to him by Kasina Housing Scheme Society and commenced to construct on the land.

5. According to the 2nd Defendant's Director, the Plaintiff moved and filed this suit in court despite the fact that the 2nd Defendant had filed a suit against Kasina Housing Scheme Society in which the Plaintiff was a member and that the suit between the 2nd Defendant herein and Kasina Housing Scheme Society proceeded for hearing and Judgment delivered on 31st May, 2019 in favour of the 2nd Defendant herein.

6. The 2nd Defendant's Director deponed that in that Judgment, the court determined the boundary dispute; that a private and independent surveyor was hired to establish the beacons for L.R. No. 25062 and that the said surveyor has since prepared a survey report.

7. It was deponed that from that Judgment and the established beacons, the Plaintiff's land, Kasina Plots No. 110 and 112, are within the 2nd Defendant's leasehold title, L.R. No. 25062, as decreed by the court and that this suit is *res judicata*.

8. In response, the Plaintiff deponed that he is the *bona fide* owner of plot numbers 110 and 112 which are as a result of the sub-division of land known as L.R. No. 11895/35; that he acquired the said land lawfully and procedurally and that he has since been registered as the proprietor of the said two parcels of land which were surveyed as Athi River Block 9/95 and 97.

9. According to the Plaintiff, the issues raised in the two suits are fundamentally different; that he was not a party in Machakos ELC No. 366 of 2009 and that he is not aware that his two parcels of land are within the 2nd Defendant's land.

10. The 2nd Defendant's advocate filed written submissions which I have considered. The Plaintiff's advocate relied on his client's Affidavit which I have also considered. The only issue for determination is whether this suit is *res judicata* Machakos ELC No. 366 of 2009.

11. Section 7 of the Civil Procedure Act provides as follows:

"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."

12. The 2nd Defendant has annexed on its Director's Affidavit the Judgment of this court in ELC No. 366 of 2009 dated 31st May, 2019. In the said suit, the 2nd Defendant was the Plaintiff, while Kasina Housing Scheme Society and four (4) others were the Defendants.

13. The issues as framed in the Judgment of the court in Machakos ELC. No. 366 of 2009 were as follows:

a) Whether the title for L.R. No. 11895/27 previously held by the 2nd Defendant (Kasina Housing Scheme Society) is null and void?

b) Whether the resurvey of the suit properties by the Director of Surveys was lawful.

c) Whether the 1st - 4th Defendants have encroached on the Plaintiff's land.

d) Whether the Plaintiff's suit should be allowed.

14. In its Judgment, the court found that the 1st Defendant's (*Kasina Housing Scheme Society*) title L.R. No. 11895/27 bearing the names Kasina Housing Scheme Society is fake, null and void. The court directed for the re-survey of the boundaries for L.R. No. 25062.

15. The Judgment of the court in Machakos ELC No. 366 of 2009 did not enumerate the members of Kasina Housing Scheme Society, neither did it make reference to the titles that the Plaintiff herein is holding. Indeed, the Plaintiff herein was not a party in Machakos ELC No. 366 of 2009.

16. If the Plaintiff herein was allocated the suit properties by Kasina Housing Scheme Society, and the titles he is holding falls within the land decreed by the court as belonging to the 2nd Defendant, then the said issues can only form part of the evidence of the 2nd Defendant at trial.

17. However, to the extent that on the face of the pleadings the parties and the suit properties herein are different from the parties and the suit properties in Machakos ELC No. 366 of 2009, it is my finding that this suit is not *res judicata* Machakos ELC No. 366 of 2009.

18. For those reasons, I find the Application dated 26th June, 2020 to be unmeritorious. The Application dated 26th June, 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 6TH DAY OF NOVEMBER, 2020.

O. A. ANGOTE

JUDGE