REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 29 OF 2019 (O.S)

MBARAK SAID ALI

SALIM MKOTA KOMBO.....PLAINTIFFS/APPLICANTS

VERSUS

SULTAN PALACE DEVELOPMENT LIMITED...DEFENDANT/RESPONDENT

RULING

1. By their Originating Summons dated 7th February 2019 as filed herein on 14th May 2019, Mbarak Said Ali and Salim Mkota Kombo (the Plaintiffs/Applicants) claim as against Sultan Palace Development Ltd (the Defendant/Respondent) to be entitled as proprietors of the parcel of land registered as LR No. MN/III/1075 by virtue of Adverse Possession for the period prescribed in the Limitation of Actions Act, Cap 22, Laws of Kenya and urge the Court to determine the following: -

1. Whether the Plaintiffs/Applicants are entitled to be declared proprietors of LR No. MN/III/1075 (the suit property) by virtue of adverse possession;

2. Whether the Defendant/Respondent's title to the suit property (should) be declared extinguished and/or invalid and void and the Plaintiffs/Applicants be registered as proprietors of the suit property;

3. Whether the Deputy Registrar of the Honourable Court is to be directed that the order made herein authorizes the Deputy Registrar to execute all necessary documents to facilitate transfer of the suit property into the names of the Plaintiffs/Applicants as the absolute proprietors of LR No. MN/III/1075;

4. Whether the Defendant/Respondent either by themselves, their agents or servants or whomsoever can be restrained from entering, constructing, wasting, damaging and/or in any way alienating LR No. MN/III/1075; and

5. Whether the costs are to be in the cause.

2. Some three months after filing the Originating Summons, the Plaintiffs also filed on 30th September 2019, a Notice of Motion application dated 16th August 2019 wherein they sought orders of injunction to restrain the Defendant from interfering with their occupation and quite use and enjoyment of the suit property. That application was however marked as withdrawn on 4th November 2019 to pave way for the hearing of the Originating Summons.

3. By way of response to the Originating Summons however, the Defendant filed herein a Notice of Preliminary Objection dated 20th December 2019 objecting to the hearing of the Summons on the grounds: -

a) That the suit herein is a non-starter, fatally defective and grossly incompetent for the mandatory 12 years period required in a claim for adverse possession has not crystallized against the Respondent since they acquired title to the suit parcel LR No. MN/III/1075 on 23rd November 2011 and the Originating Summons offends Section 7 of the Limitation of Actions Act; and

b) That the suit herein is a non-starter and grossly incompetent as the claim for adverse possession has not crystalized against the Respondent who acquired title to the suit parcel LR No. MN/III/1075 on 23rd November 2011from the previous registered owner of the suit title, the National Social Security Fund Board of Trustees which is a Government Institution or State Corporation, of which time for a claim for adverse possession could not be computed to run against such institution (sic) as provided in Section 41(a) (i) of the Limitation of Actions Act.

c) That the Applicants suit is misconceived and an abuse of the Court process whereby the same ought to be struck out with costs to the Respondents.

4. In addition to the Preliminary Objection, the Respondent subsequently filed a Notice of Motion application dated 26th November 2019 praying for orders that:

1. ….

2. This application be heard together with the Notice of Preliminary Objection dated 20th November 2019;

3. The Honourable Court be pleased to strike out the Applicant's Originating Summons as the same is bad in law(and) as such is an abuse of the process of the Court;

4. The Originating Summons filed herein is Res Judicata;

5. The Honourable Court be pleased to order that the Applicants be removed and/or evicted from the suit premises known as LR No. MN/III/1075; and

6. That the cost of this application and of the suit be borne by the Applicants in the Originating Summons.

5. The application which is supported by an affidavit sworn by the Respondent/Defendant's General Manager Liu Tiancai is premised on the grounds and reasons:

a) That the Applicants in the Originating Summons had previously filed before Court HCCC No. 375 of 2009(OS) claiming adverse possession and ownership of the suit premises;

b) That the Applicants and the then Respondents Counsel thereafter entered into a written binding consent dated 19th May 2010 settling the said HCCC No. 375 of 2009(OS) on inter alia, the following terms:

1. The Defendant do pay the 1st and 2nd Plaintiffs a gratuitous sum of Kshs 950,000/- all-inclusive as detailed hereunder

1st Plaintiff Kshs 400,000.00

2nd Plaintiff Kshs 400,000.00

Party and Party Costs kshs 150,000.00

2. That the said payment by the Defendant to the 1st and 2nd Plaintiff(is) in full and final settlement of the entire suit herein and/or of all claims by the Plaintiffs against the Defendant and its property Plot No. 1075/Section III/MN.

3. That the 1st and 2nd Plaintiffs and/or their agents have no further or any other claim whatsoever against the Defendant or its property Plot No. 1075/Section III/MN Grant No. CR 19153 measuring 8.168 Ha.

4. That the 1st and 2nd Plaintiffs shall vacate the Defendant Property Plot No. 1075/Section III/MN, Grant No. CR 19153 measuring 8.169 Ha upon recording of this consent in Court. In default the Defendant shall be at liberty to evict the 1st and 2nd Plaintiffs from the said property without any notice whatsoever.

5. That upon payment of the sums as specified in paragraph (2) above any further suit filed by the 1st and 2nd Plaintiffs or their agents whatsoever regarding the suit property herein, the suit so filed shall be deemed Res judicata and null and void ab initio.

c) ***That the issues raised by the Applicants in this suit is directly and substantially similar to the issues in HCCC No. 375 of 2009(OS) that was settled by consent despite the fact that the Defendant in that suit is not the Respondent herein; and***

d) That the said HCCC No. 375 of 2009 (OS) having been so settled, this Court is functus officio and the applicants are estopped from raising similar issues in the concluded case in the instant and as such this suit is not only res judicata but is also an abuse of the Court process.

6. In response to the application, the Plaintiffs/Applicants have filed Grounds of Opposition dated 30th December 2019 stating as follows:

1. That the application is fundamentally misconceived since no single element of Res Judicata as stipulated under Section 7 of the Civil Procedure Act (Cap 21 of the Laws of Kenya) has been demonstrated to exist; in particular

a) The parties in Mombasa High Court Civil Suit No. 375 of 2009 (OS) are different when contrasted to the parties in the present suit;

b) The subject matter directly and substantially in issue in the HCCC No. 375 of 2009 is Plot No. 1075/III/MN whereas the subject matter herein is LR No. MN/III/1075 which has never been directly or substantially in issue in any former suit between the parties to the present suit;

c) There has never been a final Judgment or any Judgment at all on the merits concerning the same parties in the present suit over the subject matter in the present suit.

2. That the Defendant/Applicant has not produced before this Honourable Court a Decree as proof of a final adjudication on the merits of any matter directly and substantially in issue in a former suit which is now directly and substantially in issue in the present suit.

3. That the application is an abuse of the Court process since the Defendant/Applicant has sought to rely on a conditional consent in a former suit between different parties over different subject matter to elicit a finding of Res Judicata in the present suit. In any event, no proof has ever been tendered from the former suit (Civil Suit No. 375 of 2009) that the terms of the conditional consent were ever performed by any of the parties in that former suit; the conditional consent is therefore incapable of being construed as a final adjudication on the merits in that suit.

4. That the application is an abuse of the Court process by relying on a former suit (Civil Suit No. 375 of 2009(OS) to elicit a finding of Res Judicata in the present suit notwithstanding that an extract of the title of the subject matter in that former suit had not been annexed in contravention to the then mandatory provisions of Rule (D)(2) of Order XXXVI Civil Procedure Rules without complying with that mandatory rule, the Honourable Court in the former suit was incapable of arriving at a finding on the merits let alone issuing a decree in final adjudication on the merits in the former suit.

7. I have perused and considered both the Preliminary Objection and the Motion related thereto. I have also perused and considered the response thereto as well as the submissions and authorities placed before me by the Learned Advocates for the parties.

8. The doctrine of *res judicata* is captured under Section 7 of the Civil Procedure Act 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."

9. In ***Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR***, the Supreme Court while considering the said provisions held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

a) The suit or issue was directly and substantially in issue in the former suit;

b) That 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; and

e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

10. The rationale for the doctrine was long asserted in the old English case of ***Henderson –vs- Henderson (1843) 67 ER 313 thus:***

"……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 (except under special circumstances) 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. 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."

11. In the instant matter, it is contended by the Respondent that the Plaintiff/Applicants herein had filed a previous suit in regard to the same subject matter herein and that the said suit was compromised by a consent of the parties. The Plaintiffs do not deny that they had indeed instituted ***Mombasa HCCC No. 375 of 2009 (OS); Mbarak Said Ali & Another –vs- The Board of Trustees National Social Security Fund.*** It is however their case that the subject matter of the dispute and the parties thereto were not the same as those in these proceedings. They further deny that the said suit was heard and finally determined as envisaged under Section 7 of the Civil Procedure Act.

12. From the material placed before me, I had no hesitation in concluding that the subject matter of the dispute is one and the same. I say so because it was evident from a perusal of a copy of their Originating Summons dated 6th October 2009 that the subject matter in the former suit was a parcel of land described as Plot No. 1075/III/MN Grant No. 19153 measuring approximately 8.169 Ha. The description of the Parcel Number in that former suit was nothing but a reversal of the description of the property in this present suit wherein the property is described as Plot No. MN/III/1075 Grant No. 19153 measuring approximately 8.169 Ha.

13. Secondly and of greater significance, the 1st Plaintiff in his Supporting Affidavit in both the former suit and the present suit avers that he has resided in the said suit property all his life and that he has developed the same by constructing a semi-permanent house and planting coconut trees thereon. I did not think that it was possible for the 1st Plaintiff to have lived all his life in two different parcels of land and I found no basis for that contention.

14. As can be seen from the case citation in the former suit, the Defendant/Respondent herein was not the one sued in that matter. Instead the Plaintiffs had sued the Board of Trustees of the National Social Security Fund (NSSF) seeking a determination of the same question as to whether they had become entitled to the suit property herein under the doctrine of adverse possession.

15. By a consent recorded in those proceedings on 20th May 2010, the former suit was compromised on condition that the NSSF would pay the Plaintiffs herein a sum of Kshs 950,000/- upon which they would relinquish their claim to the suit property and vacate it forthwith.

16. Again from the material placed before me, it was evident that subsequent to the consent recorded in Court, the NSSF vide an agreement executed on 11th March 2011 proceeded to sell and transfer the suit property to the Defendant/Respondent in the present suit. Having learnt of the said developments, the Plaintiffs waited some eight years before instituting the present suit against the new owners of the property.

17. I did not however think that the Plaintiffs could be permitted to proceed in that manner. The consent order filed and adopted in ***Mombasa HCCC No. 375 of 2009*** on 20th May 2010 had effectively determined any claim they may have had on the suit property. Indeed, while the Plaintiffs submitted herein that the said consent was conditional and that it could not be relied upon as the basis for a defence of res judicata, there was nothing placed before me to demonstrate that the Plaintiffs had been dissatisfied with the same and had challenged it or moved the Court to set it aside.

18. As was stated by Majanja J in ***ET –vs- Attorney General & Another (2012) eKLR:***

> *"The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of actions so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in form of a new cause of action a matter which has been resolved by a Court of competent jurisdiction. In the case of* **Omondi –vs- NBK & Others (2001) EA 177***, the Court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case, the Court quoted Kuloba J, (as he then was) in the Case of* **Njanju –vs- Wambugu & Another, Nairobi HCCC No. 2340 of 1991 (unreported)** *where he stated:*
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> > *If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to Court, then I do not see the use of the doctrine of res judicata…..…"*

19. As it were, compromises negotiated and agreed upon by the parties to litigation are encouraged by the Courts as a recognized manner of settling disputes and parties are bound to abide by the same. Since they have the force of law, no party is permitted to discard them unilaterally. The consent entered into between the parties in Mombasa HCCC No. 375 of 2009 on the 20th day of May 2010 was therefore in my view a binding agreement where each party took a benefit that was endorsed by the Court.

20. In my mind, a consent Judgment is a Judgment whose terms are settled and agreed to by the parties and having been sanctioned by the Court, the consent has the effect of *res judicata* in respect of the matters dealt therewith.

21. Expounding on the doctrine in ***John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 others (2015) eKLR***, the Court of Appeal observed that:

> ***"The doctrine of res judicata has two main dimensions; cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised or decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue."***

22. It is clear to me that the cause of action herein is the self-same one that was before the Court in ***Mombasa HCCC No. 375 of 2009.*** The Plaintiffs had a Judgment partially in their favour in regard to the issue of adverse possession to the suit property and they cannot be allowed to lie in wait for their adversary's successor in title a number of years later to make a similar claim as they have purported to do herein.

23. As the Court of Appeal stated in the ***John Florence Maritime Services Ltd Case (Supra):***

> *"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent Courts. It promotes confidence in the Courts and predictability which is one of the very essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably…."*

24. Similarly, ***in Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR***, the Court of Appeal lauded the essence of the doctrine and delivered itself thus:

> ***"The rule or doctrine of res judicata serves the statutory 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 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."***

25. The Plaintiffs herein having accepted the sum of Kshs 950,000/ from the predecessors in title to relinquish their interest in the suit property were clearly acting in abuse of the Court process in bringing this suit and failing to disclose the existence and or outcome of the former suit.

26. In any case and as was stated by the Court of Appeal in ***Kasuve –vs- Mwaani Investment Ltd & 4 Others (2004) 1KLR***:

> *"In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of the land openly and as of right 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*."

27. Accordingly, the key test for a claim of adverse possession would be whether the registered owner of the land was dispossessed or has on his own discontinued possession for the period of 12 years. While the Plaintiffs herein contend to have been in such exclusive possession for the requisite period, they have not denied entering into the consent Judgment of 20th May 2010.

28. Given those circumstances, the claim for adverse possession against the present Defendant/Respondent is rather far-fetched. By entering into the said consent with the previously registered owner they relinquished any hostile claim they may have had against the owner and their stay on the land if at all became permissive in nature. That in essence meant that the calculation of time for any previous possession they may have had stopped running.

29. From the material placed before me, the Respondent herein purchased the suit property from NSSSF on 11th March 2011. That is only eight years before the Plaintiffs instituted this suit on 14th May 2019. That is some four years short of the period required under Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya) for the Plaintiffs claim to crystallize as against the Respondent/Defendant.

30. In the premises, it is self-evident that the Plaintiffs suit is misconceived and filed in abuse of the Court process. Accordingly, I allow the Respondents Preliminary Objection and the Motion dated 26th November 2019 in terms of prayers Nos. 3, 4, and 5 and strike out the Originating Summons with costs.

Dated, signed and delivered at Malindi this 5th day of November, 2020.

J.O. OLOLA

JUDGE