REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL CASE NO 390 OF 1992(OS)

KIBUNDI ……..…….…. PLAINTIFF

VERSUS

MUKOBWA & ANOTHER ……..... DEFENDANT

RULING

This is a preliminary question as to whether, by reason of the determination of the originating summons by the High Court, in the High Court Civil Case No 2411 of 1979 (OS), at Nairobi, the instant originating summons, which was also started at Nairobi but in due course was transferred here, is barred by the application of the doctrine of *res judicata*.

On 25th February, 1993, I had an opportunity, in the case of *Mwangi Njangu Meshack Mbogo Wambugu and Esther Mumbi*, High Court of Kenya at Nairobi, Civil Case No 2340 of 1991, to delve, within the limited judicial time, in aspects of this doctrine. As the principles and the law on *res judicata* are laboriously set out in that judgment which I have once more studied for the purposes of this ruling, today, I beg leave to respect brevity and speak with a lot of economy on time and space.

The authorities discussed in *Mwangi Njangu's* case show that in order to sustain a plea of *res judicata*, it is necessary to show:

> (a) that everything that is directly and substantially in controversy in the subsequent suit as the foundation of the claim for relief was also directly and substantially in controversy or open to controversy in the early suit (ie that the subject matter in dispute is the same), either actually or constructively;
>
> (b) that the same subject matter in dispute now came in question before a Court of competent jurisdiction;
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> (c) that the result in the former case was conclusive; and
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> (d) that the former suit was between the same parties or between parties under whom they or any of them claim, litigating under the same title.

That is to say, there I showed the conditions of applying the doctrine of *res judicata* to be

> (a) Identity of the matter in issue;

(b) Identity of the parties;

(c) Sameness of title;

(d) Concurrence of jurisdiction;

(e) Finality of the previous decision.

And on the authorities available to me at that time, collated by myself from my own unaided researches, I explained it length each of these ingredients.

Applying those principles to the instant case, requires a look at the pleadings, proceedings and judgment in the former case, and a look at the pleadings and issues in the present case. What I find is this. In the former case, ie HCCC No 2411 of 1979 (OS) the orders sought were, that the applicant (Grishoni Muindi Baruthi Kibundi), the same man as the applicant in the present case, be registered as the proprietor of the same land as the one today claimed, in substitution of six respondents.

The present respondents in the instant application are two only, namely Willys Gantinku Mukobwa and Robert Njogu. Two names of the six respondents in the former suit, having some similarity to those of the two respondents in the instant case were Gatinku Mukobwa and Raphael Robert Njugu.

Given the fact that sometimes different people may bear the same or similar names or names with very small or insignificant differences, one requires positive evidence to show that the two of the six respondents in the former suit are the same as the two respondents in the instant case, or that the ones in one of the cases claim title under those in the other. A positive identity must be shown. I do not think it is enough merely to assert that they are the same people or that some were or are privies.

The affidavit of the applicant in support of the former originating summons showed that the applicant there as in the instant originating summons, based his claim on adverse possession. That was as at July 24, 1974, the time of filing the originating summons. In his judgment delivered on September 10, 1985, Mr Justice Joseph Butler – Sloss, went through the evidence and found that as at the time of filing the originating summons in 1979, the applicant had not been in possession of the suit land to the exclusion of the respondents and in its entirety “though he may be making use of part of it”, and that such use of part of the land was insufficient to constitute adverse possession of the whole land claimed.

In short, the learned judge in the earlier case decided that the applicant exercised nothing more than a shared possession with all the respondents. There was another question, ie whether time ran prior to 1976 when the respondents were registered as proprietors of the land, or it ran from that year. That is to say, had 12 years elapsed? The leaned judge made no finding as to the duration of the applicant’s possession. He left that question undecided, and it remained an open one. And there the matter rested.

Then, in March 1989, this present originating summons was taken out by the same applicant, touching on the same land which was in dispute in the former action. It, too, raises a claim founded on adverse possession. While in the earlier case the applicant had based his claim of adverse possession on his allegation that he had been in possession since he was born, this time he bases it on his post 1976 alleged possession. The issue of whether possession “since 5.7.1976” (as he says in paragraph 6 of his present affidavit) was adverse possession, was not, and could not be before Mr Justice Joseph Butler – Sloss in the 1979 case.

Moreover, it may be that after 1976 the nature of the possession (if any) changed from the shared one to an exclusive possession. We do not know this aspect yet, until evidence is brought. The applicant seems to be saying that from 1976 he acquired a new course of action founded on a new adverse possession independently of his pre-1976 position.

It is my opinion, based on *Heming v Wilton* (1832) 5 C&P 54; *Liverpool Corporation v Chorley Waterworks Co* (1852) 2 De G M & G852; *Hall v Levy* (1875) LR 10 CP 154; Re *Inecto Ltd* (1922) 38

TLR 797; and *R V Middlesex Justices Ex parte Bond* [1933] 2 K B I at p 9; that the development of fresh circumstances (as distinguished from a mere discoverey of fresh evidence on matters which have been open for controversy in the earlier proceedings), may found a new cause of action based on adverse possession. And the applicant should be allowed to take advantage of any such new circumstances as he may be able to rely upon for his claim. The mere fact that the new circumstances touch on the same subject matter between the same people or those who claim under them, may not necessarily raise the same issues on the two occasions.

Even testing the situation here against the requirement of the matter being directly and substantially in issue, the objection raised becomes difficult to sustain. A matter cannot be said to have been 'directly and substantially' in issue in a suit unless it was alleged by one party and denied or admitted either expressly or by necessary implication by the other. The post – 1976 position of the applicant was not alleged and denied or admitted in the former case.

Whether a matter was directly and substantially in issue in a former suit is to be determined by a reference to the pleadings, the issues and judgment. Here I have seen the originating summons and its supporting affidavit, plus the judgment. The response of the respondents to the applicant's affidavit and summons are not before me.

So on this objection what is favorable to the respondents seems to be the sameness of the land and applicant. The other aspects from which one should be made to apply the doctrine of *res judicata*, are missing. The preliminary objection cannot be sustained.

I accordingly reject the objection, and allow the applicant to present his originating summons for hearing on the merits of the case, and for each party to give evidence upon which the case shall be decided and disposed of. The parties may take hearing dates. Orders accordingly.

Dated and Delivered at Meru this 17th day of November, 1993

R.C.N. KULOBA

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JUDGE