REPUBLIC OF KENYA

IN THE ENVIRONENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 226 OF 2010

DICKSON MUSYOKI MAUNDU.....PLAINTIFF

VERSUS

KANGUNDO FARMING & RANCHING CO. LIMITED.....1ST DEFENDANT

PETER MUTUKU.....2ND DEFENDANT

JOSHUA MAKAU MBUVI.....3RD DEFENDANT

DAVID MBAI MUSYATI.....4TH DEFENDANT

JASPHER NTWIGA MWENDA T/A NTWIGA MWENDA LAND SURVEYORS.....5TH DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 29/10/2010 and amended on 25/01/2022, the plaintiff sought the following eight reliefs:

(a) A declaration that the survey exercise as undertaken by the 5th defendant on the 1st defendant's land be deemed irregular and illegal and the said exercise be nullified.

(b) That the court does find the survey exercise conducted by Maeke Associates as the bona fide survey exercise and be order that the approved survey exercise by Maeke and Associates be adopted towards the further survey of the said land, and in particular, on the land belonging to the plaintiffs and the 2nd, 3rd, 4th, and 5th defendants personally bear the costs of conducting the exercise up to acquisition of title deeds and any titles thereto issued as a result of the faulty survey exercise be cancelled forthwith.

(c) An order that the resurvey exercise be carried out by an independent surveyor, or in the alternative, the District Land Surveyor.

(d) An order of eviction to issue against the defendants and/or their agents, servants and or representatives of the defendants in occupation on any portion on the plaintiffs' land after resurvey in addition to demolition of all structures on the suit premises at the defendants' costs.

(e) Damages for continuing trespass from the filing of this suit to date.

(f) The cost of trees damaged cut and burned as suffered by 5th 2nd plaintiff.

(g) Costs of this suit with interest at court rates.

(h) Such other and further relief that the court may deem fit and just to grant in ensuring justice to all affected persons.

2. The plaint dated 29th October 2010 was filed by six plaintiffs, namely; Lucy Nthenya Muia; Jacob Kathuka; Josephat Musila Mutua; Wilson Muoka; Dickson Musyoki Maundu and Julius Mutuku. In the amended Plaint dated 25th January 2022, the other plaintiffs' names were cancelled leaving Josephat Musila Mutua and Dickson Musyoki Maundu as the only plaintiffs. On

27th March 2023 when this matter came up for hearing, Josephat Musila Mutua one of the two plaintiffs in the suit, sought and was allowed by court to withdraw his claim for reasons that he had no interest in the suit, having already obtained his titles from the 1st defendant. With that, the only plaintiff left in this suit is Dickson Musyoki Maundu.

3. The plaintiff stated that the 1st defendant is the registered proprietor of the parcel of land known as L.R. No. 11931/2 Ithanga (currently Ndithini Mananja Block 5/1-136) (suit property) and that the 2nd to 4th defendants were at all material times, directing the 1st defendant while the 5th defendant was at all material times the surveyor in regard to the suit property. That the 1st defendant is a land buying company formed in 1968 for purposes of purchase of land for its members and it purchased the suit property measuring 3472 acres.

4. That the plaintiffs are “shareholders and members of LR 11931/2 and the respective owner of parcels No. plot No. 33 (1st plaintiff) measuring 85.9 acres and plot

number 35 and 3 (2nd plaintiff) measuring 23.2 acres and 16.7 acres." They further stated that the 1st defendant having purchased the suit property, its members held a meeting on 19/10/1969 and made a resolution to divide the land into blocks and adopted a traditional survey, and balloted secretly for their respective blocks. That in a special meeting of 8th November 1980, members agreed that the suit property be subdivided into 93 portions of varying sizes according to individual shareholding to enable members acquire title deeds. That Maeke & Associates land surveyors were contracted as recommended in that meeting, an aerial photograph taken showing each members' occupation and development and a proposed subdivision map prepared. That the survey was done in conjunction with the Provincial Physical Planning officer Embu, then approved by Masaku Donyo Sabuk Land Control board and latter approved by the Commissioner of Lands Nairobi for subdivision purposes.

5. The plaintiff further stated that Mr. Maeke of Maeke & Associates surveyors died in 1994 and that by agreement dated 29/10/1998 between the 1st and 5th defendants, the 5th defendant undertook to complete the survey of the suit property as members of the 1st defendant had agreed that the survey process be completed.

6. That they agreed that the survey work be carried out in strict compliance with the Survey Act, in accordance with proposed and approved plans submitted by Maeke & Associates. Further that members agreed to sell 30 acres being plot No. 2 for proposed public utility at Kshs. 40,000/= per acre to finance the subdivision work.

7. That in October 2002, a firm named On-line Land Surveys acting on instructions of the 5th defendant's purported to show the plaintiffs alleged beacons of their parcels which the plaintiffs objected to. That the 2nd, 3rd and 4th defendants refused to furnish the plaintiffs with the plans approved by the Director of surveys. That in November 2004, the 3rd plaintiff

obtained subdivision plans presented to the Director of surveys and that it was discovered that Government approved subdivisional plans were abandoned and that the subsequent subdivision plans were distorted as the original parcels were 96 but they had been increased to 136. That the mode of survey was changed from fixed to general boundaries. That members' boundaries were shifted and illegal consolidation of members parcels done. They complained that the 2nd, 3rd and 4th defendants being directors of the 1st defendant breached the fiduciary trust bestowed on them, leading to the plaintiffs being unable to develop their property.

8. The 2nd plaintiff averred that the defendants were attempting to forcibly dispossess him of his parcel Nos. 35 and 36 and had separated the two parcels making them economically unviable. That the 2nd defendant has trespassed on the 2nd plaintiff's land.

9. That on 7th April 2009, persons acting on behalf of the 2nd, 3rd and 4th defendants in an attempt to eject the 2nd plaintiff from the land he occupies, burnt down his house and granaries worth Ksh. 600,000/= and

critically injured one Julius Mutuku now deceased. That the 2nd plaintiff states that the defendants are liable for damage and injuries sustained due to unlawful shifting of boundaries.

10. The suit was opposed. The defendants filed statements of defence dated 4th February 2011. They denied the plaintiffs' claim and stated that members' occupation and permanent development of their plots would only be respected or upheld as far as possible only if the same did not amount to the reduction of respective acreages of the adjoining plots. They maintained that although their intention was to respect members developments, if was not possible to do so for every member because it has been about 35 years between the time the members got their parcels in 1968 and the time of survey. That 97% of members plots were shifted in accordance to the maps prepared by the late Maeke and that the affected members accepted the changes and received their titles in 2005.

11. They denied allegations that Maeke & Associates did an aerial photograph and survey showing each

member's plot, but stated that Maeke relied on Government survey plans. They stated that no survey was done by Maeke on the ground. According to them, the firm of On-line Land Surveys pointed out each members property's beacons and those members duly signed their respective beacon certificates. That the plaintiffs never raised any objections to the 1st defendant's board. The defendants further stated that survey and subdivision of the suit property was properly conducted in accordance with approved sub-division plans, which ensured each member got their respective plot. That they were unaware of any meetings where the plaintiffs demanded survey plans to be produced by the defendants. They denied breach of contract and alleged that there was no privity of contract as the contract was between the 1st defendant and the 5th defendant which was duly performed.

12. They took the view that as the plaintiffs' claim was based on contract the same was barred by the law on Limitation. They denied particulars of distortion ascribed to them and stated that although there were

originally 96 parcels, some members had entered into other private arrangements with the 5th defendant to further subdivide their own plots as per their personal needs, which did not affect the acreage. That the shifting and consolidation of members plots was inevitable as per the maps presented by Maeke, and that it was done by members concurrence and by approval of the 1st defendant. That the 3rd plaintiff authorized consolidation in respect of plot No. 29.

13. They stated further that the subdivision of the land was in accordance with the plans approved by the Commissioner of Lands and no members land was reduced in acreage and that if that happened, it was done by the 3rd plaintiff during his tenure as secretary of the board of the 1st defendant because he increased his parcel beyond what he was originally entitled to. That the 3rd plaintiff added himself over 70 acres while he reduced portions of 11 acres from plot N o. 1 belonging to William Nzioka; 1.1 acres from plot No. 7 belonging to Mbatha Nzavi, 2.2 acres from plot No. 11 belonging to Patrick Mutuku; 1.1 acres from plot No. 3

belonging to Joseph Makau; 3 acres from plot No. 44; 8 acres from plot No. 31 belonging to Paul Maingi and 2 acres from plot No. 72 belonging to Mathew Muthaa. That the 1st defendant reserves the right to repossess the fraudulently acquired acreage from the 3rd defendant.

14. Regarding the 1st plaintiff, they averred that he had never been a member of the 1st defendant; that the 1st plaintiff failed to produce title for plot No. 44(c) which does not exist in the list the 1st defendant's records; that the 1st plaintiff's claim of plot No.44 (c) is based on a fraudulent transaction not sanctioned by the 1st defendant; that the 1st plaintiff trespassed on the 1st defendants property and began cultivating it but was stopped and made to vacate; that the 1st plaintiff filed a similar suit being Machakos HCC No. 181 of 2010 against one Virginia Ngite and Laban Kitale Maangi which she had failed to disclose; that the 2nd plaintiff filed Machakos HCC No. 188 of 2008 (formerly Machakos HCC No. 22 of 2004) as against the 1st and 2nd defendants.

15. They accused the 2nd plaintiff of having filed HCC 188 of 2008 against the 1st and 2nd defendants and stated that the 3rd plaintiff was a schemer, sponsor, financier of the present and previous similar suits and that he has been fighting the 1st defendant and its directors since 1998. That the 3rd plaintiff, a previous board member and secretary of the 1st defendant initiated the survey program, collected money from members and failed to account for the same after the death of Mr. Maeke. That he was voted out in 1984 and a new board completed the survey work in 2002. That the 3rd defendant is always calling meetings for elections of directors of the 1st defendant yet he is not a board member. That he signed the beacon certificate of his parcel, thus endorsing the survey.

16. Regarding the 4th plaintiff, they stated that he signed the beacon certificate and obtained title for his parcel and is estopped from challenging the process thereof. As for the 5th plaintiff, they averred that he is not a member of the 1st defendant and hence lacks capacity to bring suit. They stated that one Gideon Maundu

Senga (deceased) father of the 5th plaintiff, was the one who had been a member of the 1st defendant.

17. That HCC No. 354 of 2004 raised similar issues hence this suit is *res judicata*. That subdivision and survey was done and completed in 2002 and titles issued to all members except the 2nd and 3rrd plaintiffs. That the 1st, 5th and 6th plaintiffs are strangers to the 1st defendant. That the plaintiff's action is overtaken and that there is no privity between the 5th defendant and the plaintiffs.

18. The suit was heard by way of oral evidence. The plaintiff presented three witnesses while the defendants presented one witness.

Plaintiff's evidence

19. PW1 was Dickson Musyoki Maundu alias Musyoki Senga who adopted his witness statement dated 14/7/2022 as his evidence in chief and produced documents attached to his list of documents dated even date, as P-Exhibits 1-23. His testimony was that he was founder member and former director secretary of the 1st defendant between 1975 to 1987. That on 4th August

1970 the 1st defendant was registered as proprietor of L.R No. 11931/2 measuring 3472 acres.

20. That the land was subdivided according to the members shareholding. That the subdivision map was approved by the Commissioner of Lands and Maeke & Associates prepared the ground for subdivision. That he died in 1994 before finalizing the subdivisions. That Maeke was contracted to undertake aerial photography to capture members development to confirm their position. That they agreed to have boundaries that used mathematically computed co-ordinates (fixed beacon survey) to show the exact acreage for each member.

21. He testified that in 1996, the new directors appointed the firm of Ntwiga Land Surveyors to finalize the work commenced by Maeke. That when some of his mango trees were cut down so as to have beacons placed on the land by the surveyor's agents, he suspected that something was amiss. That he sought for the map from the 2nd to 4th defendants in vain. That in 2002, On-line Land Surveyors acting on behalf of Ntwiga Mwenda

Land Surveyors sought to point out beacons to members and members were given a condition to sign their beacon certificates. That some members complained and uprooted their beacons. That when he saw the map used for subdivision, it was distorted from the approved map. That in that map, his land had shifted to his neighbor's land. That many members have already died.

22. On cross examination, he stated that he was not a founding member of the 1st defendant, but joined the 1st defendant in 1990 although the 1st defendant company was formed in 1968. That he had a share certificate which he had not produced. That his name was not on his P-Exhibit 3. According to him, his first plot measures 23.2 acres and the other plot measures 17.9 acres and that he was not aware if acreages were reduced. He stated that his plots were not developed. He stated that he was aware that titles had since been issued and that he was seeking cancellation of titles and issuance of fresh subdivision.

23. In re-examination he stated that he purchased shares from one Sammy Mathembu which were transferred to him. That the plot measuring 23.2 acres was an inheritance from his father.

24. PW2 was Josephat Musila Mutua the 1st plaintiff. He denied filing this suit and denied signing the documents in the suit and the affidavit dated 29/10/2010. He averred that the signature on the witness statements was not his. That he obtained his title from the 1st defendant and has no further interest in the suit. He asked to withdraw his claim. Therefore, the suit by the 1st plaintiff was marked as withdrawn with no orders as to costs.

25. PW3 was Sammy Nzioka Mathendu. He stated that he sold the suit property to the 2nd plaintiff. He produced the letter dated 30/12/1990 showing the sale.

26. On cross examination, he stated that he was never given title by the 1st defendant. That he had no sale agreement with the 2nd plaintiff. That he was a member of the 1st defendant but was not aware that sale of his

land was supposed to be approved by the 1st defendant. That the letter he had produced did not show the acreage of the land or the consideration paid.

27. In reexamination he stated that although he send his letter to the 1st defendant he never received a response. That his land was between 16 to 18 acres. That on the defendants list, his name appears as number. 35. That there is Francis Macharia of No. 34 and G.M Senga at number 36.

28. With consent of the defence counsel, counsel for the plaintiff produced 136 copies of green cards of the titles that issued upon subdivision of the suit property, as P-exhibit 24. That marked the close of the plaintiff's case.

Defendants' evidence

29. DW1 was Peter Nicholas Mutuku, the secretary of the 1st defendant. He adopted his witness statement dated

11/7/2022 as his evidence in chief and produced documents attached to the list of documents of even date as D-exhibits 1 - 21. His testimony was that the plaintiff's suit should be dismissed for lack of merit as the High court in Nairobi in HCC No. 354 of 2004 held that the 2nd plaintiff had no locus standi to sue the defendants as he was not a member of the 1st defendant. Thus, that ruling has not been appealed against to date. That the 1st plaintiff already collected his title from the 1st defendant without any complain regarding the survey and subdivision of the land herein.

30. That the original shareholders were 96 but since subdivision was concluded after 37 years, when some members had passed on and the shares passed on to their children or had sold part of their portions, the number of plots increased. That in the subdivision of the land, members occupation and development were respected and upheld, in so far as the same did not amount to reduction of respective acreages to the

adjoining plots. That the map by Maeke showed shifting of 97% of members plots.

31. That it was not possible to do an aerial survey and that subdivision was properly conducted in line with approved plans. That On-line Surveys pointed out beacons for each member. That during the 1st plaintiff's tenure, he increased his portion by 70 acres by reducing 7 members parcels. He blamed the 2nd and 3rd plaintiffs stating that they filed HCC 354 of 2004 and JR 1277 of 2005 which sought to quash the Land Registrar's action of approving and consenting to the subdivision of the suit property and stated that the suits were unsuccessful.

32. On cross-examination, he stated that the plaintiff's father was 1st defendant's member. That everyone got their respective titles as per the green cards on record. That the 1st plaintiff asked the 1st defendant to give him his title stating that he had no case. That they entered into agreement with a surveyor called Mwendwa to do the survey. That Mr. Maeke did the survey on the map

and had never been on the land. That there were many gaps in Mr. Maeke's map.

33. Further that Mr. Maeke's map shifted some members. That in 1968, when members went on the land, there were wild animals and therefore they were forced to settle in one place. That the surveyors ensured everyone got their plot. That plot No. 35 did not belong to the plaintiff but his father. That it was not possible to do survey on the ground by Mr. Maeke because of the manner people had settled on the land. That Mr. Maeke did not do an aerial survey. That Mr. Maeke's map was taken as a draft because he did not complete his work. He stated that members were not forced to sign the beacon certificates. That the policy statement indicated that before beacons were placed for each member, they were not to put up permanent buildings. He stated that his plot was No. 39 and that his boundaries shifted upon survey. That he purchased ten acres from his neighbors and so his plot that was initially 17.69 Ha became 27.591 Ha. That he purchased from his neighbor before the survey. He

stated that there was no mutilation of maps. That boundaries were general boundaries. That the Chief Land Registrar was to issue titles according to the list given to him. That the physical planning department required that 10% of the land might be availed. That marked the closed of the defence case.

34. Parties filed written submissions in support of their respective cases. On record are the plaintiff's submissions dated 16th April 2024 and the defendants' submissions dated 11th April 2024.

Plaintiff's submissions

35. Counsel for the plaintiff submitted that the plaintiff's suit was not *res judicata* as Nairobi Miscellaneous Application No. 1277 of 2005 was abandoned by the plaintiff on technicalities and Nairobi HCC No. 354 of 2004 was dismissed for want of prosecution. Counsel argued that as the two suits were not heard on merit, the instant suit is not *res judicata*. Reliance was placed on section 7 of the Civil Procedure Act, Order 1 Rule 6

of the Civil Procedure Act and the case of **Dina Management Ltd v County Government of Mombasa & 5 Others, SCP No. 8 (E10) OF 2021.** Counsel further argued that the illegalities complained of by the plaintiffs in the letters dated 15/07/2004 and 28/07/2005 show that this being a land matter, limitation sets in after 12 years.

36. On whether the plaintiff was a member of the 1st defendant, counsel relied on section 120 of the Evidence Act and contended that the defendants were estopped from denying the fact that the plaintiff was a member of the 1st defendant as proved in several plaintiffs' exhibits including P-exhibits 11, 16, 17, 19 and 21 and defendants' exhibits 9, 13 and 14.

37. The plaintiffs' counsel submitted that there was an approved plan for subdivision of the suit property as per plaintiff exhibits 2, 4, 7 and 8. That in the approved plans aforesaid there were only 96 parcels, a matter confirmed by the defendants in their affidavit filed in Nairobi HCC 354 of 2004. Counsel argued that the

defendants were aware of the subdivision done by Maeke & Associates as shown in their exhibits 7 and 8.

38. It was the submission of the plaintiff's counsel that the nature of subdivision approved and prepared by Maeke and Associates was in accordance to the repealed Registration of Titles Act, the regime under which the title herein was registered, where fixed boundaries were used and that the boundaries used were mathematically computed coordinates and not general boundaries as shown in the disputed subdivision. Reliance was placed on Section 20 of the repealed Registered Titles Act, section 22 of the Survey Act and section 22 of the repealed Registered Land Act. On that basis, counsel argued that the conversion from fixed boundaries to general boundaries was illegal as the repealed Registered land Act was not applicable to the suit property. The court was also referred to the case of Republic v Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others [2006] 1 KLR (E & L) 563 to buttress this point.

Defendants' submissions

39. Counsel for the defendants argued that the plaintiff was not a member or shareholder of the 1st defendant as no share certificate was produced. Counsel argued that where there is sale of a share of a company, there must be transfer of share approved by the company which was not the case herein.

40. On whether the plaintiff had *locus standi* to file this suit, counsel relied on the case of **Law Society of Kenya v Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 200**0 and submitted that as the plaintiff was not a shareholder of the 1st defendant, he lacked the necessary *locus* to bring this suit. That in a similar suit filed being HCC No. 354 of 2004, his application for injunction was rejected on account of want of locus.

41. It was also argued for the defendants that in the above suit, which was dismissed for want of prosecution, it involved similar reliefs as those in the current suit and

was filed by the same counsel, hence the plaintiff was misleading court.

42. Regarding the legality of the impugned subdivisions, counsel submitted that an aerial survey was not possible and that Maeke & Associates relied on Government maps. Counsel maintained that the subdivision was properly completed by On-line Land Surveys and each member obtained their title.

Analysis and determination

43. The court has carefully considered the pleadings, evidence and submissions. The following issues arise for the court's determination;

a) **Whether this suit is res judicata in view of Nairobi HCC NO. 354 of 2004 and Nairobi JR No. 1277 of 2005**

b) **Whether the plaintiff's claim was time barred.**

c) **Whether the plaintiff had capacity to file suit against the defendants**

d) **Whether the survey of the suit property that culminated in issuance of titles to members of the 1st defendant was lawful**

e) **Whether the plaintiffs are entitled to the orders sought.**

44. As the issue of res judicata touches on the court's jurisdiction, the same has to be interrogated first, before the merits of the suit can be considered. Section 7 of the Civil Procedure Act provides for the doctrine of *res judicata* as follows;

"Res judicata

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.

Explanation. **— (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.**

Explanation. **— (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

Explanation. **— (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

Explanation. **— (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

Explanation. **— (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.**

Explanation. **— (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."**

45. Therefore, the doctrine of *res judicata* bars a court form trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit where a competent court has determined such matter or issue with finality.

46. Essentially, the elements of *res judicata* are as follows;

(a) There is a judgment or order in a former suit which is final.

(b) The judgment or order in the former suit was on merit.

(c) The judgment or order was rendered by a competent court with jurisdiction.

(d) The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.

47. In the case of **The Independent Electrical and Boundaries Commission v. Maina Kiai & 5 Others [2017] eKLR** the Court of Appeal held that;

> **For the bare of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms;**

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

(b) That the 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.

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

48. In the above case, the Court of Appeal stated the purpose of the doctrine of *res judicata* as follows;

> **"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 commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of**

intrepid pleaders hoping, by multiplicity of suits and for a, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* this rest in the public interest for swift, sure and certain justice."

49. I have considered the evidence on record. The defendants produced the plaint in Nairobi HCC No. 354 of 2004. That plaint shows that the parties in that suit are the same as those in this suit and the subject matter was the suit property. In that suit, the Plaintiff herein sued the 1st defendant herein, its directors and the 5th defendant herein. The fact that the directors sued in the former suit are defendant, from those sued herein is immaterial as they are sued for their mandate as directors. Therefore, I find and hold that the parties in the former suit and in the instant suit are the same. The issue for determination in the former suit was the legality of the subdivision of the suit property the same having been done by the 5th defendant herein. The

plaintiff herein argued that the subdivision of the suit property was not in compliance with the proposed subdivision plans by Maeke and Associates. That is the same complaint raised in the instant suit. The defendants did not produce a judgement on merit in regard to Nairobi HCC NO. 354 of 2005. They however produced an order dated 13th July 2010, demonstrating that that suit was dismissed for want of prosecution. Therefore, there is no evidence that NAIROBI HCC NO. 354 of 2005 was heard and determined on merit with finality, hence in regard to that suit, I find and hold that the instant suit is not *res judicata.*

50. On whether this suit is *res judicata* on account of Nairobi JR No. 1277 of 2005, the pleadings filed by the defendants show that the said suit sought for quashing of the decision of the Land Registrar to register titles arising from the subdivision of the suit property and to issue titles in respect of the suit property on account that the subdivision of the suit property by the 1st respondent did not comply with Maeke's proposed subdivision and that the number of the transferees was

136 instead of 96. Again, no judgment was produced by the defendants in respect of the said suit. From the pleadings, I have no doubt that the issues, parties and subject matter in Nairobi HCC 354 of 2005 and JR 1277 of 2010 are the same, with cosmetic changes and touch on the same cause of action and also sought the similar reliefs as those sought in the instant suit. It is also not disputed that the two suits were abandoned by the 1st plaintiff herein resulting in Nairobi HCC 354 of 2004 being dismissed for want of prosecution. In the premises, there being no judgment on merit in regard to the two former suits, I find and hold that this suit is not *res judicata.*

51. The two former suits involved the same parties, subject matter issues and reliefs. Those suits were not pursed by the plaintiff herein to their logical conclusion as the plaintiff herein lost interest in the claim and one of the suits was dismissed for want of prosecution.

52. Therefore, the question that this court ought to answer is whether a plaintiff who has failed to pursue his suit to its logical conclusion resulting in the same

being dismissed for want of prosecution, has the liberty in law to file a fresh suit on the same issues and involving the same parties? I do not think such liberty exists. I take the view that where a claim is dismissed for want of prosecution, the claimant cannot bring a fresh suit. Any suit filed after a former suit on the same cause of action, issues, subject matter and involving the same parties is dismissed for want of prosecution, is in my view, an abuse of the court process. A claimant whose suit is dismissed for want of prosecution cannot lawfully file a fresh suit on the same cause of action. If he is still interested in enforcing his alleged rights, the only option he has is to challenge the order dismissing the suit for want of prosecution, through the available lawful channels including review and appeal. There must be an end to litigation and a party has no liberty to file and abandon cases at will.

53. In the case of **Satya Bahma Gandhi v Director of Public Prosecutions & 3 Others [2018] KEHC 6100 (KLR),** the Court held as follows;

“22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse

may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent."

54. It is clear to me that this is the third time the plaintiff in this matter is complaining in court about the same issue involving the 1st defendant and its directors as well as the 5th defendant; challenging titles issued on the subdivision done by the 5th defendant. That, in my view is an abuse of the court process and cannot be countenanced by this court. This court has inherent powers to prevent the misuse of its processes for purposes other than the pursuit of justice, including the weaponization of its processes to turn them into instruments of harassment, oppression and injustice. A suit filed in abuse of the court process cannot be heard on merit, and for those reasons, this court will not interrogate the merits of this suit. Ultimately, I find and hold that this suit is an abuse of the court process, which I hereby dismiss with costs to the defendants.

55. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 8TH DAY OF OCTOBER 2025.

A. NYUKURI

JUDGE

In the presence of;

Ms Mwanzia holding brief for Mr. Mutua for the plaintiff

Mr. Wasonga for defendants

Court Assistant- Delphine