



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC CASE NO. 358 OF 2017**

FLORENCE NDUNGE.....1<sup>ST</sup> PLAINTIFF/APPLICANT

JENIFFER MWONGELI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

**VERSUS**

AGNES MWIKALI MUTUNGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT

**THE COUNTY**

LAND REGISTRAR MAKUENI.....2<sup>ND</sup> DEFENDANT/RESPONDENT

**THE LAND ADJUDICATION**

OFFICER MAKUENI.....3<sup>RD</sup> DEFENDANT /RESPONDENT

**THE HONOURABLE**

ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

1) What is before this Court for ruling is the first Defendant's notice of preliminary objection dated 11<sup>th</sup> December, 2017 and filed in Court on 13<sup>th</sup> December, 2017.

2) The preliminary objection is in respect of the Plaintiffs' notice of motion application dated 7<sup>th</sup> November, 2017 and filed in Court on 8<sup>th</sup> November, 2017.

3) The grounds are:-

1. That the issues canvassed in support of the said application are *resjudicata* the same having been directly and substantially in issue between *inter alia*, the 1<sup>st</sup> Plaintiff herein in HCCC No. 679 & 726 of 1980 wherein judgement was entered as against the 1<sup>st</sup> Plaintiff who then was the 1<sup>st</sup> Defendant.

2. That the issue raised herein is purely a succession matter as it deals with succession and transfer of deceased estate i.e Solomon Mutyambui Mulili and not a land matter and as such this Court has no jurisdiction.

3. That this suit is time barred since the subject matter in issue has been raised more than twelve years since the cause of action took place and as such offends the provisions of the Limitation of Actions Act pertaining to matters of this nature.

4. That this case is an afterthought and only serves to waste Court's time since it was only instituted after the 1<sup>st</sup> Defendant made good her word to institute criminal proceedings against the 1<sup>st</sup> Plaintiff for trespass and maliciously damaging trees in the suit land.

4) Directions were given that the preliminary objection be disposed off by way of written submissions.

5) Mwangangi & Associates for the 1<sup>st</sup> Defendant have submitted that the Plaintiffs' application in its entirety contains issues that were directly and substantially in issue between *inter alia*, Philip Mutungi, the husband of the 1<sup>st</sup> Defendant herein (*emphasis are mine*) and the 1<sup>st</sup> Plaintiff herein who was then the 1<sup>st</sup> Defendant in Nairobi HCCC No. 679 & 726 of 1980 wherein judgement was entered against her. That the said judgement extinguishes any rights of the 1st Plaintiff who together with her brother tried to fraudulently acquire land parcel No. Kilungu/Kivani/272 and Kilungu/Kivani/274. The Counsel went on to submit that the above being the case, the 1<sup>st</sup> Plaintiff should be stopped from asserting the same rights that she was denied over twenty seven (27) years ago.

6) The Counsel cited Section 7 of the Civil Procedure Act Cap 21 of the Laws of Kenya which 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.”**

7) Arising from the above, the Counsel pointed out that the issues raised in the application are *res judicata* and urged the Court to dismiss the Plaintiffs' suit as against the 1<sup>st</sup> Defendant. The Counsel cited the case of AMN Vs PNM [2016] eKLR that defined what constitutes *res judicata*.

8) The Counsel went on to submit that the Plaintiffs application raises issues which are purely succession in nature and the transfer of the estate of Solomon Mutyambui Mulili, who is now deceased. The Counsel went on to point out that as such, this is not a land matter and, therefore, the Court lacks jurisdiction to hear the suit herein.

9) On the other hand, the Plaintiffs' Counsel submitted that a perusal of the 1<sup>st</sup> Defendants' notice of preliminary objection raises the following issues;

**a) Whether the Plaintiffs' notice of motion dated 7<sup>th</sup> November, 2017 and the plaint are *res judicata*.**

**b) Whether the Court has jurisdiction.**

**c) Whether the subject matter is time barred.**

**d) Whether the Plaintiffs' application dated 7<sup>th</sup> November, 2017 should be heard on merit?**

10) Regarding the first issue, the Plaintiffs' Counsel submitted that both suits and the application raise different issue that ought to be heard and ventilated on merit. The Counsel cited Black's Law Dictionary (10<sup>th</sup> Ed) at page 1504 which defines *res judicata* as **“an issue that has been definitely settled by a judicial decision.”** The Counsel was of the view that the issues raised by the suit and the application do not fall under the purview of Section 7 of the Civil Procedure Act. The Counsel pointed out that the issues in contention between the parties herein have never been the subject of any litigation between the parties herein.

11) The Counsel further submitted that in order for preliminary objection to succeed, the parties should be the same, they should have litigated over the same subject matter before a competent Court and the matter should have been heard and determined. The Counsel was of the view that the issues raised by this suit are different from those raised in Nairobi HCCC no. 679 and 726 of 1980.

12) The Counsel urged the Court to hear the suit on merit. The Counsel further submitted that in HCCC No. 679 and 726 of 1980, the dispute was between the Plaintiff's father and the 1<sup>st</sup> Plaintiff (*whatever that meant*) and that the determination was in favour of the Plaintiff's father. The Counsel pointed out that any transfer that was to be effected would only have been done under the Law of Succession Act and not any other means. The Counsel cited the case of Nancy Mwangi t/a Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Cetel Kenya Ltd) & 2 Others [2014] eKLR Gikonyo, J defined what constitutes *res judicata*.

13) On the issue of the Court's jurisdiction, the Counsel cited Section Article 162 (2) of the Constitution of Kenya, 2010 as well as Section 13 of the Environment and Land Court Act No. 19 of 2011 which gives this Court the power to hear and determine disputes relating to the environment, the use and occupation of, and title to land, and to make provision for its jurisdiction functions and powers and connected purposes.

14) The Counsel pointed out that the issues in contention relate to un-procedural and illegal amalgamation of two parcels of land being Kilungu/Kivani/272 and Kilungu/Kivani/274 into what is now known as Makueni/Kivani/ 1474 and subsequent transfer of the same to the 1<sup>st</sup> Defendant with the assistance of the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants. The Counsel submitted that the Plaintiffs are in actual possession of the suit premises despite the title deed being in the name of the 1<sup>st</sup> Defendant. As such, the Counsel was of the view that this Court has jurisdiction to hear both the application and the main suit. The Counsel added that to uphold the preliminary objection would amount to denying the Plaintiffs the chance to be heard on merit. The Counsel cited the cases of Kasimu Sharifu Mohamed V Timbi Ltd in Malindi, HCCC No. 3 of 2006 (OS) and Celina Wambui Kigwe V Urithi Housing Co-operative Society Ltd [2017] eKLR. I would like to point out that the Counsel did not avail the Kasimu case to this Court and as such, I will not consider it. Celina's case is on the issue of what constitutes *res judicata* and not jurisdiction.

15) On the issue of whether the matter is time barred, the Counsel submitted that **Section 13(1) of the Limitations of Actions Act** provides that;

**“A right of action to recover land does not accrue unless the land in questions is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, there under Section 9,10,11 and 12 of this Act a right of action to recover land accrues on certain date and person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”**

The Counsel submitted that the Plaintiffs have been in actual possession of the suit land and have never at any particular time relinquished their possession of the land. The Counsel further submitted that an aggrieved party ought to take a case to Court for enforcement of their rights running from the period when the party discovered the said fraud as is provided under Section 26 of the Limitation of Actions Act. The aforementioned Section provides that;

**“Where, in the case of action for which a period of Limitation is prescribed, either -**

**a) The action is based upon the fraud of Defendant or his agent, or of any person through whom he claims or this agent; or**

**b) The right of action is concealed by fraud of any such person as aforesaid, or**

**c) The action is for relief from consequence of mistake, the period of Limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”**

16) It was also submitted on behalf of the Plaintiffs that they rely on the doctrines of *exturp causa non oritur actio* and *ex dolo malo no Oritur action* and therefore the actions of the 1<sup>st</sup> Defendant are simply unconstitutional.

17) On the issue of whether application dated 7<sup>th</sup> November, 2017 should be heard on merit, the Counsel submitted that the principles of natural justice ought to apply herein so as to enable the Plaintiff get justice.

18) The Counsel concluded by urging the Court to dismiss the 1<sup>st</sup> Defendant’s notice of preliminary objection.

19) I have read the preliminary objection, the plaint dated 7<sup>th</sup> November, 2017 as well as the submissions that were filed by the Counsel on record. I wish to point out the preliminary objection is convoluted in that whereas it is aimed at the Plaintiffs’ notice of motion application dated 7<sup>th</sup> November 2017, it is essentially raised against the Plaintiffs’ suit. Ideally that is how a preliminary objection ought to be since an application has its legs on the plaint. To strike out an application alone on grounds of *res judicata* without striking out the plaint would serve no purpose. Be that as it may, if I understood the 1<sup>st</sup> Defendant’s Counsel, the main issue raised in the preliminary issue is that this suit is *res judicata* on account of Nairobi HCCC No. 679 and 726 of 1980 wherein the parties were Solomon M. Munyambu, the father of the 1<sup>st</sup> Plaintiff herein, and Philip Mutungi, who the husband of the 1<sup>st</sup> Defendant herein. The two were the Plaintiffs in the said suit. The Plaintiffs seeks a declaration that land parcel number Kilungu/Kivani/274 and Kilungu/Kivani/272 which were later amalgamated into land parcel number Makueni/Kivani/1474 are part of the estate of the late Solomon Mulili Mutyambui. Both the 1<sup>st</sup> Defendant’s Counsel as well as the Plaintiffs Counsel have ably submitted through the authorities that they cited on what substitutes *res judicata*. I need not repeat the same herein. I have looked at the judgement in Nairobi High Court Civil case No. 679 and 726 of 1980 which is document number 4 in the Plaintiffs’ list of documents. In the said judgement, AM. Akwumis J (*as he then was*) declared;

**“In the result it is hereby declared that the 1<sup>st</sup> Plaintiff is the absolute owner of plots Nos. 274 and 272 and therefore entitled to transfer to the 2<sup>nd</sup> Plaintiff.”**

20) The above essentially falls within the four (4) corners what constitutes *res judicata* since the issue in the matter herein is directly and substantially an issue which had been directly and substantially in issue in Nairobi HCCC No. 679 and 726 of 1980. It is clear that the parties herein claim under the parties in the latter case.

21) The upshot of the foregoing is that the application has merits and in the circumstance, I hereby proceed to strike out the Plaintiffs’ suit and the notice of motion application dated 7<sup>th</sup> November, 2017 and filed in Court on 8<sup>th</sup> November, 2017. The 1<sup>st</sup> Defendant shall have the costs of the main suit and the application. It is so ordered.

**Signed, Dated and Delivered at Makueni this 22<sup>nd</sup> Day of February, 2019.**

**MBOGO C.G**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Muthiani for the 1st Defendant/Respondent

No appearance for the Plaintiffs

Ms Nzioka Court Assistant

**MBOGO C.G, JUDGE**

**22/2/2019**