

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELC APPEAL NO. E013 OF 2023

MARY NAFULA
WAKWABUBI.....APPELLANT

VERSUS

WILLIAM KILISWA KITUYI.....
RESPONDENT

JUDGMENT

Introduction.

1. Vide a memorandum of appeal dated 07/03/2023, the Appellant herein **MARY NAFULA WAKWABUBI** who was the Defendant in the trial court before Hon. T.M. Orlando (Principal Magistrate) in Bungoma CM-ELC Case no. 30 of 2021 preferred this court challenging the judgment/Decree of the trial Magistrate delivered on 31/03/2021.

2. By way of background, the Respondent herein had sued the Appellant vide a plaint dated 24/05/2021 seeking for an order to compel the defendant to transfer 2 acres of the suit land plus costs and interest. The Appellant averred that he purchased land measuring 2 acres from the Appellant's husband namely Rudolf Wakwabubui to be carved out of land parcel NO.Kanduyi/10306. That the Appellant had signed transfer forms for the transfer of the 2 acres. That the Appellant did succession for the estate of her deceased husband vide PMCC HC 85 OF 1990. That before he acquired his title, the Appellant blocked his registration as

the owner of the said 2 acres prompting him to file Bungoma 603 of 1993 wherein the court ordered her to execute transfer documents. That he resides on the land and wishes to have the said 2 acres registered in his name.

3. The Respondent filed a defence dated 29/06/2021 where she stated that the purchase price referred to by the Respondent was for a consideration of Kshs. 26,500/= wherein only Kshs.18,000/= was paid leaving a balance of Kshs.8,5000/= . That the Respondents objection in SRM P&A No. 85 of 1990 failed and the judgment in Bungoma PMCCC No. 603 of 1993 was set aside by the High Court in Kakamega H.C. Civil Appeal No. 603(21) of 1993. That there was a similar suit filed over the same subject matter being Bungoma CMC ELC NO. 22 OF 2018 which was rejected by the court on 12/09/2019 for being *res judicata*. That the Respondent had also filed a claim before Bungoma District Land Disputes Tribunal -LDT No. 34 of 1996 wherein he lost. She sought to have the suit struck out with costs.

4. By consent of the parties, the suit before the trial court was agreed to proceed by way of viva voce evidence.

5. PW1 William Khasula Kitui adopted his witness statement as his evidence-in-chief. He produced into evidence 12 items contained in his list of documents as P-Exhibit 1-12. He made reference to the agreement dated 30/09/1987 where he stated

that the title number of the land is not mentioned because it had no number at the time. That he attended the Land Control Board on 30/06/1988. He testified that he had trees planted on the suit land and he resides therein.

6. DW1 Mary Nafula Wakwabubi adopted her witness statement dated 15/11/2022 as her evidence-in-chief. She admitted that her husband sold land to the Respondent.

7. Upon hearing and evaluating the evidence adduced, the trial court determined the dispute by entering judgment for the Respondent and ordering for the transfer of the 2 acres out of Land parcel NO. East Bukusu/North Kanduyi/10306 to him. The trial court also ordered each party to bear their own costs.

8. Aggrieved by the trial courts judgment, the Appellant preferred the present appeal on the following grounds;

a) The judgment on record. is in toto contradiction of the pleadings and the Provisions.

b) The judgment is a toto mockery of the res judicata Principal and the of the Limitation of Actions Act.

c) The judgment is an end product of a mistrial.

9. The appellant sought to have the appeal allowed and an order issued dismissing the Respondents claim.

10. Directions were taken and the parties agreed to have the appeal canvassed by way of written submissions.

11. At the time of preparing this judgment, only the Appellant had filed her submissions through the firm of ABK Advocates LLP dated 01/07/2025 which I have also considered.

Analysis and Determination.

12. From the pleadings and the evidence adduced, it is not in dispute that the Respondent entered into a sale agreement with the Appellant's late husband for the purchase of two (2) acres of land at a consideration of Kshs. 26,500/=. At the time of execution, the Respondent only paid Kshs. 18,000/=, leaving a balance of Kshs. 8,500/= which was due for payment on 20/11/1987. The evidence on record further reveals that the Respondent failed to settle the said balance as agreed but later deposited it in court on 18/06/1992 in connection with Bungoma PMC P&A Cause No. 85 of 1990. Subsequently, the Respondent instituted **Bungoma PMCC No. 603 of 1993** against the Appellant seeking an order for transfer of the two (2) acres out of land parcel **E. Bukusu/N. Kanduyi/1452**. The trial court allowed the claim and ordered the transfer. However, on appeal in **Kakamega HCCA No. 21 of 1993**, the High Court set aside the subordinate court's judgment, holding that the agreement between the Respondent and the Appellant's husband was void for breach of contract and for want of Land Control Board consent within six (6) months as required by law.

13. The record further shows that the Respondent once again lodged a claim before the Land Disputes Tribunal vide **LDT Case No. 34 of 1996**, though there is no evidence on the outcome of that complaint. Not deterred, the Respondent instituted yet another suit, **Bungoma CM ELC No. 22 of 2018 (formerly HCCC No. 126 of 2017)**, wherein the Appellant raised a Notice of Preliminary Objection on grounds that the suit was *res judicata* and statute barred. Upon hearing the objection, the court upheld the said objection.

14. Having reviewed the pleadings that were filed before the subordinate court; the evidence tendered both oral and documentary; the record of appeal and upon consideration of the written submissions filed by and on behalf of the parties, the one singular issue that commend for determination of the instant appeal in my view is whether the Respondents suit before the trial court was *res judicata* and statute barred.

15. From the foregoing summary of pleadings and evidence, the undisputed position is that the subject matter in the present suit has been the subject of previous litigation between the same parties. The Appellant before the subordinate court and in this appeal has raised the twin objections that the Respondent's suit was barred by the doctrine of *res judicata* as provided under **Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya**, and that it was also statute barred pursuant to the **Limitation of Actions Act, Cap 22 Laws of Kenya**.

16. Section 7 of the Civil Procedure Act provides:

“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.”

17. The doctrine of *res judicata* is important in adjudication of cases and serves two important purposes;

- a) it prevents multiplicity of suits which would ordinarily clog the Courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and**
- b) it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.**

18. In order therefore to decide as to whether this case is *res judicata*, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- a) What issues were really determined in the previous case;
- b) Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- c) Whether the parties are the same or are litigating under the same title and that the previous case was determined by a Court of competent jurisdiction.

19. The supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 held as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

20. Looking at the present appeal and the suit before the trial court viz a viz the previous proceedings as highlighted in preceding paragraphs, it is clear that the parties are the same

and that there is a valid judgment on record pronounced by a court of competent jurisdiction. As for the subject matter, this court notes that in **Bungoma PMCC No. 603 of 1993**, the Respondent sought against the Appellant an order for transfer of two (2) acres out of land parcel **E. Bukusu/N. Kanduyi/1452** while in the case before the trial court, he had sought similar orders in L.R NO. **E. Bukusu/N. Kanduyi/10306**. The two parcels of land in the two suits may seem distinct. However, from the green card attached, it is clear that the latter is a subdivision of the former and further that the agreement sought to be enforced is the same.

21. In the case of **E.T vs Attorney General & another (2012) eKLR** the court held;

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action 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 which has been resolved by a court of competent jurisdiction.”

22. In the case of **Omondi s NBK & Others (2001) EA 177** the court held:

“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 and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: 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 doctrine of res judicata....."

23. Guided by the above principles, this Court finds that the issues raised in the Respondent's suit before the trial court were conclusively heard determined in the earlier suit. The Respondent cannot later re-open the same issues through fresh litigation. The suit before the trial court was therefore *res judicata*.

24. The second issue for determination relates to the limitation of Actions. The Respondent's claim is premised on a sale agreement dated 1987. By his own admission, the alleged balance of the purchase price was not paid as agreed, and the High Court in **Kakamega HCCA No. 21 of 1993** found the contract void for breach. Even assuming for arguments sake that a cause of action arose from that transaction, the limitation period for actions to recover land is prescribed under **Section 7**

of the Limitation of Actions Act, Cap 22, which provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...”

25. The cause of action, if any, arose in 1987 when the contract was executed, or at the latest in 1993 when the appellate court pronounced itself. The present suit, filed in 2021, was clearly lodged well beyond the statutory period of twelve years. Applying this principle, the Respondent’s claim was statute barred and the trial court erred in entertaining it.

26. In the end, I find this appeal merited and proceed to set aside the judgment and decree of the trial court. The Respondents suit before the subordinate court is hereby struck out with costs. The costs of this appeal shall also be borne by the Respondent

27. Orders accordingly.

DATED and **SIGNED** and **DELIVERED** at **BUNGOMA** this 23rd day of October, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Alovi for the Appellant.

2. Respondent/Advocate-absent.

3. Bett C/A.