



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 51 OF 2018**

**JOSEPH KIMATU.....PLAINTIFF**

**VERSUS**

**1. JONES ALAKA KIMATU**

**2. RUKIA BINTI SOOD.....DEFENDANTS**

**R U L I N G**

1. Before me for determination is the preliminary objection dated 15<sup>th</sup> May, 2018 raised by the 1<sup>st</sup> Defendant which seeks to strike out the plaintiff's suit for reasons that the claim as presented offends the express provisions of sections 5, 6 and 7 of the Civil Procedure Act.

2. The Plaintiff brought this suit by the Plaint dated 7<sup>th</sup> March, 2018 against the Defendants seeking a declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the property known as **CR. No.10703 subdivision No.1811 Section VI Mainland North** comprising 0.1275 of an acre or thereabouts; a declaration that the documents of title by the Defendants was fraudulently acquired hence null and void and therefore stands cancellation by this court; permanent injunction against the Defendants as well as costs of the suit.

3. The plaintiff avers that he purchased the suit property from the 2<sup>nd</sup> Defendant together with all developments thereon sometime on 25<sup>th</sup> September 1988 and expected the 2<sup>nd</sup> Defendant to transfer the property to him. However, the property was later registered in favour of the 1<sup>st</sup> Defendant. It is the Plaintiff's contention that the registration and transfer of the property in favour of the 1<sup>st</sup> Defendant was fraudulent with a view to deprive him of his proprietary rights as the same was done inter alia, in disregard of a court order and while the issue was pending before court.

4. In his statement of defence dated 15<sup>th</sup> May, 2018, the 1<sup>st</sup> Defendant pleaded inter alia, that the plaintiff's suit herein contravenes express provisions of the law as regards the doctrine of res judicata and pendency of related suits. These others suits were listed as **Mombasa ELC No.259 of 2014 Jones Alaka Kimatu –v- Joseph Kimatu; and Mombasa CMCC No.1434 of 2009 Jones Kimatu & Another – v- Joseph Kimatu**, and the subject matter in those suits was the same as the subject matter in the present suit.

5. It is the 1<sup>st</sup> Defendant's submission that the plaintiff's suit touches on issues that have been litigated before by the same parties over same property and the issues have been heard and determined previously by a Court of Competent jurisdiction. The 1<sup>st</sup> Defendant singled out the judgment in **ELC No.259 of 2014** delivered on 26<sup>th</sup> October 2018 in which Omollo J entered judgment against the Plaintiff and held that the 1<sup>st</sup> Defendant is entitled to exclusive and unimpeded right of possession and occupation of the suit property. Therefore the 1<sup>st</sup> Defendant submitted that the suit herein is res judicata. The 1<sup>st</sup> Defendant relied on the case of **Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates –v- Salama Beach Hotel Limited & 3 Others (2017)eKLR; Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017)eKLR; E.T.V Attorney General & Another (2012)eKLR and Omondi –v- National Bank of Kenya Limited & Others (2001) EA 177.**

6. It is the Plaintiff's submission that the validity of title over the suit property was not a subject of **ELC No. 259 of 2014**. The Plaintiff quoted paragraph 20 of that judgment in which Omollo J stated:

**“Is the plaintiff entitled to orders of vacant possession as well as orders of injunction as prayed in the plaint? As the registered owner of the suit land, the law allows him to unimpeded use and occupation under Section 24 and 25 of the Land Registration Act. Since there is no evidence to counter his titled as provided under Section 26 of the Land Registration Act, accordingly I enter judgment in terms of prayers (a), (b) and (c) of the plaint. The Defendant shall hand over vacant possession of the suit land to the plaintiff within six months from the date of this judgment. In default, the plaintiff is at**

liberty to evict him.”

7. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd-v- West End Distributors Ltd (1969)EA 696** at page 701, Sir Charles Newbold P. said:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of discretion.”**

8. In this case, the preliminary objection has been raised by the 1<sup>st</sup> Defendant. Therefore it could only be argued on the assumption that all the facts pleaded by the plaintiff are correct. One such pleading is that the transfer was done in disregard of a court order and that there was pending suit before court. That suit has now been decided and is admitted by both parties. That there have been previous proceedings before court of competent jurisdiction between the same parties, over the same subject matter is not in dispute. The only argument that the plaintiff has raised is that the validity of the title and the sale between the Defendants were not subject of the previous suit.

9. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the Civil Procedure Act which states:

**“No court shall try any suit 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 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.”**

10. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

11. The doctrine of res judicata as stated has been explained in a plethora of decided cases. In the recent case of the **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 others (2017) eKLR**, the Court of Appeal held that:

**“Thus, for the bar 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 distinctive but conjunctive terms;**

- a) **The suit or issue was directly and subsequently in issue in the former suit.**
- b) **The former suit was between the same parties or partes 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 suit in which the issue is raised. ”**

12. The court explained the role of the doctrine thus:

**“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 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 or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice. ”**

13. In my understanding, the res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the 1<sup>st</sup> Defendant in the objection raised has satisfied the conditions for the principle of res judicata in view of the facts of this case.

14. From the pleadings and submission the subject matter in **ELC No.259 of 2014** was the suit property herein. The former suit was between the 1<sup>st</sup> Defendant as plaintiff and the plaintiff herein as Defendant. From the judgment in the former suit, it is clear that the issue herein was directly and substantially in issue in the former suit. The issue was heard and finally determined on 26<sup>th</sup> October 2018 by Omollo, J. There is no doubt that the court that formerly heard and determined the issue was competent to try the suit. The court in the former suit entered judgment in favour of the 1<sup>st</sup> Defendant herein. In the case of **E.T.V Attorney General & Another (2012)eKLR** Majanja, J correctly warned that:

**“The courts must be vigilant to guard against 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 a form a new cause of action which has been resolved by a court of competent**

jurisdiction.”

15. In **Gurbachau –v- Yowani Ekori (1958) EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the **Vice Chancellor in Henderson –v- Henderson (1), 67 ER 313** at page 319 wherein it was stated that:

**“In trying this question I believe I state the rule of the court correctly when I say that, 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 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.**

16. In the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary for Transport and Infrastructure & 3 others (2015)eKLR**, the ingredients of the doctrine of res judicata were stated as firstly, that the issue in dispute in the former suit between parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally. In that case, the Court of Appeal stated as follows:

**“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 court’s limited resources and timely termination of cases. Court are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.”**

The court of Appeal in the same case further stated that:

**“The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the court entertaining the dispute jurisdiction to take any further steps in the matter with the consequence that the suit will be struck out for being res judicata.... ”**

The Court of Appeal went on and stated:

**“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata bases 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 and 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 open that issue.”**

17. Applying the stated law to the facts before me, it is clear that the plaintiff seeks to open issues that ought to have been raised in **ELC No. 259 of 2014**. The issue of validity of title in the 1<sup>st</sup> Defendant’s name may not have been raised but ought to have been made in the earlier proceedings as it was relevant to the issues that were decided by the court in that case. There is no dispute that the parties are the same in all these proceedings save that the 2<sup>nd</sup> Defendant has been added in the suit herein. The subject matter in both suits is the property known as **CR.No.10703 subdivision No.1811 Section VI Mainland North**.

Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this suit, the plaintiff is trying to litigate a concluded matter by bringing an issue or cause of action which rightly could have been raised in the former suit.

18. In the result I find and hold that the preliminary objection has merit and I uphold the same. This suit is res judicata. Accordingly, the plaintiff’s suit is struck out with costs to the Defendants.

**DATED, SIGNED and DELIVERED at MOMBASA this 27<sup>th</sup> day of May 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Muganda holding brief for Magolo for Plaintiff

Ms. Rukia holding brief for Apollo Muinde for 1<sup>st</sup> Defendant

No appearance for 2<sup>nd</sup> Defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**