

**IN THE COURT OF
APPEAL AT
NYERI**

CIVIL APPEAL NO. 156 OF 2019

(CORAM: W. KARANJA, J. MOHAMMED & MUCHELULE, JJ.A)

BETWEEN

**JOSEPH BENWA EWOI.....1ST APPELLANT
ESTHER EKAI PATRICK2ND
APPELLANT JAMES LOTINI EDAPAL
.....3RD APPELLANT AND**

**ALAKE TADICHA1ST
RESPONDENT JOSEPH KANGETHI GATHIRU
.....2ND RESPONDENT ABDIKADIR GUYO
BUKICHA3RD RESPONDENT
EKAI ESUNYEN4TH
RESPONDENT ALFRED TINAM
....5TH RESPONDENT NGAWASA ESEKON
.....6TH RESPONDENT LONGIRO LOBUN
.....7TH RESPONDENT**

***(Being an Appeal from the Judgement of the Environment and
Land Court of Kenya at Meru (L. N. Mbugua, J.) dated 25th April,
2019***

in

ELC Case No. 247 of 2016)

JUDGMENT OF THE COURT

Background

1. Joseph Benwa Ewoi, Esther Ekai Patrick and James Lotini Edapal, the 1st, 2nd and 3rd appellants respectively, filed the appeal herein seeking that the judgment of the Environment and Land Court (ELC) (**L.N. Mbugua, J.**) be set aside and that land parcel number

Kambi Garba/786

Isiolo County (the suit land) measuring approximately 20 acres be declared their property.

Alake Tadicha, Joseph Kangethi Gathiru, Abdikadir Guyo Bukicha, Ekai Esunyen, Alfred Tinam, Ngawasa Esekon and **Longiro Lobun** are the 1st to 7th respondents respectively.

2. To place the appeal in context, the appellants moved the ELC via plaint

amended on 13th December 2016 alleging that the 1st appellant was

registered as owner of the suit land in the year 1991 from his deceased

father, **Patrick Koki** and that he held the land in trust for himself and

the 2nd and 3rd appellants who are his sister and uncle respectively

together with their families. That sometime in the year 2016, the

respondents hired goons who attacked the appellants and frequently

visited the suit land threatening to grab it in violation of the appellants'

right to property. As such the appellants sought the ELC to issue

injunctive orders restraining the respondents from interfering with their

occupation of the suit land.

3. The respondents filed their defence dated 16th April 2018 opposing the appellants' claim stating that they had no knowledge of the appellants' registration or occupation of the suit land. It was the respondents'

further statement that there was a pending ELC Case No. 58 of 2013 at Meru and that the appellants' suit was *res judicata*; that the documents relied on by the appellants in proof of ownership of the suit land were a forgery as there

was a court order that stopped allocation and registration of the suit land pending determination of ELC No. 58 of 2013.

4. After considering the evidence before it, the ELC framed 2 issues for determination, that is, whether the appellant's suit was *res judicata* and whether the appellants were entitled to the order of injunction sought. The

ELC noted that although the file for Meru ELC No. 58 of 2013 was transferred to Isiolo Chief Magistrates' Court and thereafter further

particulars could not be ascertained, its finding was that there was proof

of existence of the case and if the final orders therein contradicted with

the judgment of the present suit, it would create an absurdity. As such,

the ELC held that the suit was *res judicata*. The ELC then went ahead to

determine the 2nd issue on whether an injunction ought to be granted and

held that the suit land was not registered under any known law contrary

to the claim that the 1st appellant was the registered owner of the suit land.

Further, that the suit land did not belong to appellants alone in exclusion

of the other members of the Turkana community. Conclusively, the ELC,

dismissed the appellants' suit with costs to the respondents.

5. It is this finding that provoked the instant appeal. The appellants filed their Notice of Appeal dated 26th April 2019 against the impugned judgment. The appellant, in the memorandum of appeal dated 1st July 2019 sought, *inter alia*, that the suit land be declared their property.

6. The appellants' grounds of appeal set out in the memorandum of appeal are that the ELC erred in law and in fact by: -

- i. Dismissing the appellants' case against the weight of the evidence;
- ii. Holding that the matter was *res judicata* whereas there was no evidence that ELC Case No. 58 of 2013 directly related to this matter, no evidence was adduced in this case regarding the said case. The parties similarly were not the same and were not litigating under the same titles. The decision went against the provisions of section 7 of the Civil Procedure Code Cap 21 laws of Kenya;
- iii. Failing to consider that the suit land in issue was already surveyed, the appellants had been issued with a certificate of beacon, Minutes that allocated the land, Part Development Plan (P.D.P) and that they had already paid rates to the County Government of Isiolo;
- iv. Holding that the suit land does not seem to have been registered under any known law against the overwhelming weight of the evidence;
- v. Holding that the members of Turkana Community appeared to be the ones claiming the suit land against the weight of the evidence;
- vi. Holding that the suit land is not registered land against the weight of the evidence;
- vii. Failing to find that appellants herein had proved their case on a balance of probability against the weight of the evidence; and
- viii. Failing to consider that municipal land is allocated through minutes of the local government (new defunct).

7. The appellants sought the following orders:

- a) That the impugned judgment be quashed and set aside;
- b) That judgment be entered in favor of the appellants and that the suit property be declared their property; and
- c) Costs and interests of the appeal.

Submissions by counsel

8. The appeal was disposed of by way of written submissions with brief oral highlights. At the hearing of the appeal, the appellants were represented by learned counsel, **Ms. Gikundi** while learned counsel **Mr. Mageria** was holding brief for learned counsel **Mr. Mbaabu Inoti**.

From the record, the

firm of **Mbaabu M’Inoti & Co. Advocates** had filed a notice of change of

advocates dated 29th October 2021 but failed to file their written submissions despite being duly served with a hearing notice on 16th

January 2024 by the Court registry. **Mr. Mageria** opted not to submit

orally despite having not filed written submissions.

9. **Ms. Gikundi** submitted that sufficient evidence was adduced in support

of the case, therefore, the dismissal of the suit was erroneous. That the

suit was not *res judicata* as the facts relied upon by the appellants were

not in existence at the former suit, ELC no. 58 of 2013. That the ELC noted

that the file in respect of Meru ELC Case No. 58 of 2013 was transferred

to Isiolo Chief Magistrates’ Court and further particulars could not be ascertained. That as such there was no judgment from a court of competent jurisdiction to justify the trial court’s finding of *res judicata*.

10. Further, counsel submitted that the appellant adduced weighty evidence in respect of the certificate of beacon, application for part development plan, minutes of the council that allocated him the suit land and receipts of payments of rates which were not considered by the trial court. That the

appellant was the registered owner of the suit land under the Isiolo County Government and it was erroneous for the trial court to find that it was the Turkana Community as whole that appeared to own the suit land.

Determination

11. We have considered the record, the submissions filed, the authorities cited and the law.

12. As a first appeal, the Court reminds itself of its mandate as the first

Appellate Court to re-evaluate the evidence, assess it and reach a

conclusion bearing in mind that it neither saw nor heard the witnesses

and make due allowance for that. See **Rule 31 (1)** of the **Court of Appeal**

Rules, 2022 and this Court's decision in **Gitobu Imanyara & 2 others v**

Attorney General [2016] eKLR. See also **Selle & Another vs Associated**

Motor Boat Co. Ltd & Others (1968) EA 123.

13. We discern the issues for determination before this Court to be: whether

the appellants' suit was *res judicata* and whether the appellants' suit had

merit.

14. The Supreme Court of Kenya in the case of **Kenya Commercial Bank**

Limited v Muiri Cofee Estate Limited & another [2016] eKLR held

that:

“[52] Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.”

[58] Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

15. There must be finality of the previous decision to qualify for the doctrine

of *res judicata*. Section 7 of the Civil Procedure Act is instructive and provides as follows:

“7. 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.”

16. The findings of the ELC on the issue of *res judicata* were that:

“I find that indeed a suit no Meru ELC No. 53 of 2013 did exist whereby Lorot Nicholas Ewaton (DW3 herein) and 9 others had sued the County Government of Isiolo, the Isiolo District physical planner and the Attorney General as the defendants. This suit was transferred to Isiolo

Chief

Magistrates' court on 17.1.2018, hence further particulars cannot be ascertained from the said file. However, I find that the Interested party (County Government of Isiolo) did file an application on 14.12.2016, whereby they stated that the other suit was filed on 20.4.2013 where orders were sought to stop the County Government from preparing the PDPS. Even if the interested party did not participate in this trial, it is clear that the suit does exist. The plaintiffs here cannot feign ignorance of the same. Court documents are public documents which can be inspected to ascertain their existence. Part of the documents which plaintiff have relied on in their case herein is a PDP allegedly issued on 1.10.2015. It was hence issued during the pendency of the other suit. It follows that any judgement that may be given herein has the potential of being in conflict with the judgement in the Isiolo case. For instance, if this court finds

that plaintiff's case is merited, and in the Isiolo case, the Plaintiffs therein also succeed, the ensuing the (sic) orders would be absurd! A court of law ought to issue orders that bring logic and finality in a dispute and not to throw fireworks in the mix. The provisions of section 7 of the Civil Procedure Act were meant to cure such absurdities. I am inclined to believe that the subject matter herein is the same as in the Isiolo matter. And considering that the Isiolo case was filed in 2013, then this suit is certainly Res judicata."

17. In the instant case, the ELC acknowledged that the Meru ELC file had been transferred and that no further particulars could be ascertained. There was, therefore, no proof of a final judgment capable of triggering the application of **Section 7** of the **Civil Procedure Act**.

18. From the foregoing, we find that there was no final decision of the court in respect of the Meru ELC case No. 53 of 2013 as the file was

transferred to the Isiolo Chief Magistrates' Court and as stated by the ELC, no further

particulars could be ascertained. The ELC acted on the assumption that final judgment was pronounced on the basis that the previous case was for the year 2013. With due respect, that is not a consideration in an application of the doctrine of *res judicata*. There was no evidence that Meru ELC case No. 53 of 2013 was conclusively determined and final orders

pronounced. With that, we find that the appellants' case was not *res judicata*.

19. As regards the issue whether the appellants are entitled to the prayers of

injunction sought in their suit, we have noted that the appellant did not

produce proof that they were the registered owners of the suit land as

alleged. The appellants based their entitlement to the suit land on minutes

of the County Council of Isiolo, now the County Government of Isiolo, rates

payment receipts from the council, beacon certificate and application for

Part Development Plan (PDP). In **Wreck Motors Enterprises v/s The**

Commissioner of Lands and 3 others, Civil Appeal No. 71 of 1997,

this Court held that:

"... Title to land property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and

actual issuance thereafter of title document pursuant to provisions held....”

20. Thus, the minutes of the council and the rates payment receipts from the council, just like an allotment letter, does not confer an interest to land. The minutes ought to be actualized through issuance of an allotment letter

and registration to validate the appellants' interests on the land. This position was well stated by the Supreme Court in the case of

Torino

Enterprises Limited v Attorney General (Petition 5 (E006) of 2022)

[2023] KESC 79 (KLR) (22 September 2023) (Judgment).

“[60] Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a Stand Premium and Ground Rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an Allotment Letter...”

21. In view of the foregoing, we find that there is no evidence that the

appellants are the registered owners of the suit land hence the appellants

not did not meet the threshold for grant of an order of injunction. The

minutes of the council relied upon by the appellants as proof of acquisition

of the suit land were a mere step forward and the same ought to be

actualized through registration. The documents relied upon were preliminary in nature and could not, in the absence of an allotment

letter and registration, confer legal or equitable title. Consequently, the appellants failed to demonstrate proprietary rights capable of supporting an order of injunction.

22. In view of the foregoing, we find that although the appellants' ground that the suit was not *res judicata* succeeds, the appellants did not establish ownership or a protectable interest in the suit land.

23. In the result, the appeal fails and is hereby dismissed with no orders as to costs.

Dated and delivered at Nyeri this 30th day of January, 2026

W. KARANJA

.....
JUDGE OF APPEAL

JAMILA

MOHAMMED

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

*I certify that this is
a True copy of the
original*

Signed
DEPUTY REGISTRAR