



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 13 OF 2019

WILLIAM MUTUURA KAIRIBA.....APPLICANT

VERSUS

SAMUEL NKARI.....1ST RESPONDENT

SAMUEL KATHIGA.....2ND RESPONDENT

DANIEL MUGAO.....3RD RESPONDENT

FRANCIS RUTEERE.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF THARAKA NITHI.....5TH RESPONDENT

(CONSOLIDATED WITH ELC MISCELLANEOUS APPLICATION NO. 3 OF 2019)

RULING

1. This ruling concerns Preliminary Objections filed by the 1st, 2nd, 3rd and 4th defendants. The Notice containing the Objections states as follows:

NOTICE OF PRELIMINARY OBJECTION

TAKE NOTICE that the 1st, 2nd, 3rd and 4th defendants shall on 9th July, 2019 or so soon thereafter when this suit shall come up for any hearing raise preliminary objections on points of law persuading this honourable court to dismiss the entire suit with costs to them on the grounds that:-

1. The honourable court lacks jurisdiction to hear this case for being res judicata Chuka High Court ELC Case No. 8 of 2018 (William Mutuura Kairiba –vs – Samuel Nkari, Samuel Kathiga & Daniel Mugao).
2. The plaintiff did not exhaust the remedies set out at sections 13, 14 and 26 of the Land Consolidation Act, Cap 283 and Section 26 and 29 of the Land Adjudication Act, Cap. 284, Laws of Kenya.
3. The application dated 9.7.2019 is fatally defective.

Dated at Meru this 05th day of July, 2019

FOR: THURANIRA ATHERU & CO.

ADVOCATES FOR THE 1ST, 2ND, 3RD & 4TH DEFENDANTS

2. The Preliminary Objection was canvassed by way of written submissions.

3. On **9th July, 2019**, the parties through their lawyers, by consent, agreed to

have File Numbers **ELC. MISC. Application 3 of 2019** and **ELC 13 of 2019 consolidated** with **ELC 13 OF 2019 to be the lead file.**

4. Before the Notice of Preliminary Objections was filed, this court, had at the exparte stage delivered the following ruling:

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC MISCELLANEOUS CASE NO. 03 OF 2019

WILLIAM MUTURA KAIRIBA.....APPLICANT

VERSUS

SAMUEL NKARI.....1ST RESPONDENT

SAMUEL KATHIGA.....2ND RESPONDENT

DANIEL MUGAO.....3RD RESPONDENT

FRANCIS RUTEERE.....4TH RESPONDENT

THE COUNTY GOVERNMENT OF THARAKA NITHI....5TH RESPONDENT

RULING

1. This application has been brought to court under Sections 1A, 1B and 3A of the Civil Procedure Act, under section 30 of the Land Adjudication Act, Order 40(1) (a) of the Civil Procedure Rules and all other provisions of the law.

2. The application seeks the following orders:

1. That due to the urgency of this motion, the same be certified urgent, service of the same be dispensed with and the motion be heard ex-parte in the first instance.

2. That upon hearing exparte, a temporary order of injunction be issued restraining the respondents by themselves, their personal representatives, their servants, agents and/or employees from trespassing and/or encroaching, leasing out, cutting down trees, alienating, cultivating, grazing, building, interfering with the applicant's peaceful use, occupation and title to the suit property, or in any other manner interfering with the parcel of land known as Mukothima "A" Adjudication Section Gikingo Location P/No. 150 pending hearing and determination of this application.

3. That a permanent injunction be issued against the respondents whether by themselves, their personal representatives, their servants agents and/or employees from trespassing and/or encroaching, leasing out, cutting down trees, alienating, cultivating, grazing building, interfering with the applicant's peaceful use, occupation and title to the suit property, or in any other manner interfering with the parcel of land known as Mukothima "A" adjudication section Gikingo Location, P/No. 150 pending hearing and determination of this suit.

4. That a mandatory injunction be issued against the respondents compelling them to restore the land to the same condition it was before the trespass and/or encroachment, pull down any building and/or structure erected on the land and/or cart way building materials deposited on the suit property at their costs and/or in the alternative reimburse the applicant for expenses incurred to restore the land in the same state it was before the encroachment and/or trespass (sic) pull down any building or carting away building materials deposited on the suit property.

5. That an order directing the OCS Gatunga Police Station to assist and cooperate in service and enforcement of the orders of this honourable court.

6. That this honourable court grants any other order it deems fit.

7. That costs of this application be awarded to the applicant.

3. The application has the following grounds:

1. That the applicant owns the parcel of land known as Mukothima "A" Adjudication Section Gikingo Location P/No. 150 and has occupied the said property from 1978 to date.

2. That the 1st, 2nd, 3rd and 4th respondents on or about August, 2018 encroached, trespassed, cut down trees, deposited building materials and dug trenches on the said parcel of land/property.

3. That the applicant approached the said respondents and set out a complaint and demanded that they immediately desist from

encroaching onto his land, but without any right and in blatant disregard of the applicant's right to peaceful enjoyment of his land, the 1st, 2nd, 3rd and 4th respondents have continued to trespass, cut down trees, encroach, deposit building materials, digging of trenches and carrying out construction. The matter was reported to the Land Sub-County Office at Gatunga but there was no relief granted to the applicant.

4. That the applicant came to learn that 5th respondent is responsible for the trespass on part of his property by the 1st, 2nd, 3rd and 4th respondents, as the 5th respondent has purported to allocate the said respondents the applicant's property and has gone ahead and sub-divided the said property into several portions.

5. That the 5th respondent has deemed to purportedly allocate the sub-divided properties to the 1st, 2nd, 3rd and 4th Respondents as follows:-

- a) Samuel Nkari – Plot No. 51a
- b) Samuel Kathiga – Plot No. 51b
- c) Daniel Mugao – Plot No. 86
- d) Franics Ruteere – Plot No. 49
- e) Unknown person – Plot No. 87

6. That the applicant is apprehensive that the respondents are in the process of dispossessing him, alienating, disposing and/or leasing the subject parcel of and to third parties which will jeopardize the applicant's rights and/or interests thereby causing irreparable loss and damage.

7. That the 1st, 2nd, 3rd and 4th respondents have continued to trespass, cut down trees, encroach, deposit building materials, digging of trenches and carryout construction on the suit property thereby changing the state of the land causing the applicant irreparable loss and damages.

8. That the applicant stands to suffer irreparable loss and damage if the orders sought are not granted.

9. That the applicant cannot be adequately compensated for his loss by way of damages.

10. That it is in the interest of justice that the court issues the said orders pending the hearing and determination of this matter.

11. That the respondents will not suffer any prejudice if this application is allowed.

4. The application is supported by the affidavit of William Mutuura Kairiba, sworn on 19th June 2019 which states:

I, WILLIAM MUTUURA KAIRIBA, a male adult of sound mind residing and working for gain in Tharaka Nithi County, within the Republic of Kenya and of P. O. Box 112-60215, Marimanti do hereby make oath and state as follows:

1. That I am the applicant herein fully conversant with the matters giving rise to this suit and therefore, competent to swear this affidavit.

2. That I am the absolute proprietor and/or legal owner of all that parcel of land known as Mukothima "A" Adjudication Section Gikingo Location, P/No. 150.

3. That I was allocated the land known as Mukothima "A" Adjudication Section Gikingo Location, P/No. 150 following adjudication and demarcation process within Mukothima "A" Adjudication Section.

(Attached herewith and marked "WMK1" is a copy of notice issued pursuant to section 5 of the Land Adjudication Act, Chapter 284 of the Laws of Kenya from the Ministry of Lands and Settlement, District Land Adjudication /Settlement, Tharaka Nithi District dated 28th May, 1996 showing the length and breadth of Mukothima "A" Adjudication Section of Gikingo Location, Tharaka North Division, Tharaka Nithi District).

4. That the adjudication and demarcation of the land in favour of myself was not challenged either by the respondents or any other person through the mechanism provided for under the Land Adjudication Act, Chapter 284 of the Laws of Kenya resulting in the adjudication and demarcation of the parcel of land known as Mukothima "A" Adjudication Section Gikingo Location, P/No. 150 in my favour.

(Attached herewith and marked "WMK2" is a copy of notice from the Land Adjudication Officer and demarcation confirming completion of adjudication and my land to have become on or about 12th February, 2001).

5. That I started occupying the land sometime in year 1978 and continued in quiet and peaceful occupation and use of the land and

upon confirmation of adjudication and demarcation I was allocated the land and continued in quiet and peaceful occupation and use of the land until August, 2018.

6. That on or about August, 2018, I noticed that there were persons unknown to me who were illegally, unlawfully unfairly and without any colour of right encroaching and/or trespassing onto my parcel of land known as Mukothima "A" Adjudication Section Gikingo Location, P/No. 150 by delivering building materials, cutting down trees, digging trenches and carrying out construction on the said parcel of land.

7. That the respondents jointly and severally identified themselves to me as the persons who had entered onto the land but failed, refused and/or neglected to avail any documents to justify their illegal, unlawful and/or unfair entry, trespass and/or encroachment into the subject parcel of land.

8. That the 1st, 2nd, 3rd and 4th respondents unlawfully, and without any colour of right entered my parcel of land known as Mukothima "A" Adjudication Section Gikingo Location, P.No. 150 without my consent or at all.

9. That the respondents either by themselves, their agents and/or their employees refused, failed and/or neglected to justify why they entered into my parcel of land known as Mukothima "A" Adjudication Section Gikingo Location, P/No. 150.

10. That upon trespassing onto the subject parcel of land, the 1st, 2nd, 3rd and 4th respondents unlawfully, illegally and without any colour of right cut down trees which I had planted and/or cultivated.

11. That the 1st, 2nd, 3rd and 4th respondents also dug foundation trenches, delivered construction materials and started construction on the subject parcel of land without seeking my consent or at all.

12. That the respondents have continued to trespass and/or encroach on my parcel of land which trespasses has (sic) caused and/or is causing me irreparable loss and damages.

(Attached herewith and marked "WMK3" (a)-(e) are copies of pictures showing encroachment by respondents).

13. That the applicant came to learn that 5th respondent is responsible for the trespass on part of his property by the 1st, 2nd, 3rd and 4th respondents, as the 5th respondent has purported to allocate the said respondents the applicant's property and has gone ahead and sub-divided the said property into several portions.

14. That the 5th respondent has deemed to purportedly allocate the sub-divided properties to the 1st, 2nd, 3rd and 4th respondents as follows:-

- a) Samuel Nkari – Plot No. 51a
- b) Samuel Kathiga – Plot No. 51b
- c) Daniel Mugao – Plot No. 86
- d) Franics Ruteere – Plot No. 49
- e) Unknown person – Plot No. 87

15. That despite sending the 5th Respondent notice to desist from further illegal allocation the same has persisted to date.

(Attached herewith and marked "WMK4" is a copy of the letter dated 6th September, 2018.

16. That attempts to resolve the conflict at the area Land Sub-County Offices at Gatunga have been futile and the respondents have continued to construct on my land and violate my right to access, occupy and use the subject parcel of land despite the fact that I gave them documents confirming that I was the *bonafide* owner of the property.

17. That I went to seek further assistance from the Land Adjudication office at Marimanti after my attempts to get reprieve at the Land Sub County Offices at Gatunga proved futile.

(Attached herewith and marked "WMK5" is the copy of the consent to sue from the Land Adjudication Office dated 3rd June, 2019.

18. That I am apprehensive that respondents are in the process of disposing, alienating and/or leasing the subject parcel of land to third parties and develop which will jeopardize my rights and/or interests thereby causing me irreparable loss and damages.

19. That I am apprehensive that respondents are in the process of dispossessing me, alienating disposing and/or leasing the subject parcel of land to third parties which will jeopardize my rights and/or interests thereby causing me irreparable loss and damages which illegal, unlawful and unjustifiable actions of trespass and/or encroachment can only be stopped by orders of this honourable court.

20. That I swear this affidavit in support of the application filed herewith.

21. That what is deponed hereinabove is true to the best of my knowledge and understanding, save as to information and belief sources of which I have disclosed herein above.

5. At the exparte stage the applicant's advocate, told the court that he solely relied on the grounds on the face of the Notice of Motion and on the applicant's supporting affidavit sworn on 19th June, 2019.

6. I have perused the apposite pleadings and I do find that at this exparte stage, the application evinces some merit.

7. I issue the following orders:

- a) The application is not certified urgent BUT will be heard on priority basis.
- b) Prayers 2 and 5 are granted pending hearing and determination of this application.
- c) Application and the orders issued by the court today to be properly served upon the respondents within 5 days of today.
- d) Costs of this application shall be in the cause.
- e) Interpartes hearing on **9.7.2019**

Delivered in open Court at Chuka this 25th day of June, 2019 in the presence of:

CA: Ndegwa

Nyabuti for the Applicant

P. M. NJOROGE,

JUDGE.

5. The submissions filed by the 1st, 2nd, 3rd and 4th defendants are reproduced in full herebelow without any erasure or correction of any spelling or other mistakes which may be there.

1ST, 2ND, 3RD AND 4TH DEFENDANT'S SUBMISSIONS IN SUPPORT OF THE NOTICE OF PRELIMINARY OBJECTION DATED 05.07.2019.

May it please Your Lordship, we hereby submit as follows.

On 09.07.2019, you directed that the afore-stated preliminary objection be disposed of first, through written submissions, hence our so doing herein.

On GROUND No. 1

Section 7 of the Civil Procedure Act is in the following terms:-

"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."

My Lord, the subject matter in this suit is Land Parcel No. 150 Mukothima "A" Land Adjudication Section. This was the same subject matter in **CHUKA HIGH COURT ELC CASE. NO 8 OF 2018 (WILLIAM MUTUURA KAIRIBA -VS- SAMUEL NKARI, SAMUEL KATHIGA & DANIEL MUGAO)**(herein after simply called the 'earlier suit'). For starters the earlier suit involved the same plaintiff and the same 1st, 2nd and 3rd Defendants. The issues are the same. The only difference is addition of the 4th and 5th Defendants without altering the substance of the plaint which is almost word for word of the plaint in the earlier suit.

And vide a ruling delivered on 12.11.2018 this court dismissed the earlier suit with costs. It would be different if the court simply struck out the earlier suit. This court should not allow a party to forever be filing one suit after another. Before a party comes to this court they must be resolute on the parties they intend to sue and the documents they need for that purpose. Litigation cannot be allowed to be in installments. It is also a cardinal principle of law that litigation must come to an end. If the plaintiff felt aggrieved by the ruling in the earlier suit he ought to have appealed and not file other suits thereafter as he has done here.

On GROUND No. 2 of the said preliminary objection, this suit must fall en masse because the plaintiff did not exhaust all the remedies set

out at sections 13, 14 and 26 of the Land Consolidation Act Cap. 183 and Sections 26 and 29 of The Land Adjudication Act, Cap. 284.

The subject matter ownership and occupation which the plaintiffs purport to challenge through this case relate to Mukothima “A” Adjudication Section.

Section 11(2) of the Land Consolidation Act, Cap. 284 require that if a committee is unable to reach a decision the Arbitration Board shall decide the matter. If the plaintiff was genuinely aggrieved in any way he ought to have filed an objection in an adjudication committee to determine his dispute as the adjudication process is still ongoing in the area. If dissatisfied with the said decision of the land committee for Adjudication Section, he ought to have referred the dispute to the Arbitration Board. Inexplicably, he did not explore that remedy.

Section 26(1) of Land Consolidation Act, Cap. 283 enjoins the plaintiff to file an A/R Objection case before the Land Adjudication Officer, to be heard by him, assisted by the committee, if they got aggrieved by the committee’s verdict which allocated the suit lands to the 1st to 3rd defendants, but he has opted to start the process here, a shortcut unknown in law.

Section 26(1) & (2) of the Land Adjudication Act, cap.284 gives the plaintiff the right to file an A/R objection case to be heard by the Land Adjudication officer alone, but he did not explore that avenue, unexplainably.

Section 29 of the same Land Adjudication Act, Cap. 284 provide another avenue to lodge an appeal to the minister within sixty (60) days from the date of the decision in an A/R Objection.

The plaintiff, having failed to start and or exhaust the remedies laid down in the afore-sated two Acts of parliament, is estopped from pursuing any perceived interest in the suit land through this case.

Consequently, we submit that this court has no jurisdiction to entertain this frivolous and vexatious civil case.

Your Lordship the issue as to whether a court has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.

Even the overriding objective of dispensing justice and/or the “O₂” principle do not salvage this case because, without jurisdiction, the overriding objective and/or the “O₂” principle cannot breath life to a legally dead matter like this one. In **MALINDI COURT OF APPEAL CIVIL APPEAL NO. 46 OF 2014: RANSA CO. LTD. & 2 OTHERS VS. MANCA FRANCESCO (2015) Eklr**, it was held on **pages 8 and 11 thus:-**

Page 8: “while the overriding principle ...will serve the administration of justice well, it is not a panacea for all ills and in every situation. A foundation must be properly laid for its application.... The “O₂ principle” must not be applied arbitrarily and its application must not create uncertainty. It must be guided by sound judicial foundation. If improperly invoked, the principle could become unruly horse..... The overriding principle has not uprooted well established principles, precedent or rules of procedure.....

Failure to comply with Rules....is so grave and renders the notice and record of appeal incompetent as it goes to the jurisdiction of the court that renders the overriding principle inapplicable.....”

Page 11: “with the introduction of these principles parties can no longer hide their failures behind abstract excuses that their advocates’ mistakes cannot be visited upon them. Article 159 and Section 3A and 3B have clearly replaced Section 3A of the civil procedure Act which was, before the enactment of Article 159 and the “O₂ principle”, the most misapplied provision, where advocates and parties took refuge in whenever they were not certain. These inherent powers are to be resorted to only in situations where there are no specific or alternative of the law.

we come to the conclusion that both the notice of appeal and the record of appeal are incompetent and accordingly strike them out with costs.”

The Court of Appeal at NAIROBI IN CIVIL APPL. NO. 6 OF 2010: HUNKER TRADING COMPANY LIMITED VS. ELF OIL KENYA LIMITED (2010) Eklr held as follows on page 6 and 7 regarding the application of the overriding objective/double “O” principle /O₂ principle:-

Page 6: ... *the principal aim is for the court to act justly in every situation either when interpreting the law or exercising its power....*

...O₂ principal” which must of necessity turn on the facts of each case is double-faced, and for litigants to thrive under its shadow, they must place themselves on the “right side”. In the circumstances of this matter, the applicant is clearly on the wrong side and for this reason, the principal must work against it.

Page 7:....*in the exercise of our powers under the “O₂ principle”, what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are “O₂” compliant so as to maintain consistency and certainty.*

Accordingly the same is dismissed with costs to the respondents.”

On GROUND No. 3

The Application as filed and served on the 1st to 4th Defendants is post dated 19th July, 2019 yet it was filed on 25.6.2019. This means the supporting affidavit to the application is a perjury and all its contents are a lie. We urge the Honourable Court to strike out the said Application for being based on a defective affidavit and discharge the interim orders, which are causing prejudice to the 1st – 4th Defendants who have buildings there at advanced stage of construction.

CONCLUSION

May your Lordship find and hold that since the plaintiff filed this suit after his earlier suit on the same subject matter, issues and parties against as ordained in law and deliberately refused to exhaust all available remedies and appeal processes as laid down in law, then, the court lacks jurisdiction to hear this matter, whose consequence is to uphold the subject preliminary objection dated 5.7.2019 and filed in court on 05.07.2019, proceed to dismiss this case and the Application Post dated 19.7.2019 and award costs thereof and of the said P.O to 1st to 4th Defendants.

This Your Lordship is our humble submission and innocuous prayer, for and on behalf of the 1st to 4th Defendants.

DATED AT MERU THIS.....14thDAY OFJULY....2019

FOR: Thurania Atheru & CO.

ADVOCATES FOR THE 1ST, 2ND, 3RD & 4TH DEFENDANTS

6. The submissions filed by the plaintiff are reproduced in full herebelow without any erasure or correction of any spelling or other mistakes which may be there.

PLAINTIFF'S SUBMISSIONS IN REGARD TO THE PRELIMINARY OBJECTION DATED 5TH JULY, 2019

MAY IT PLEASE YOUR HONOUR,

INTRODUCTION.

The Plaintiff in this suit filed a Miscellaneous Application No.3 of 2019 dated 19th June, 2019 together with a Plaint and accompanying documents ELC Suit No. 13 of 2019 dated 24th June, 2019 and filed on 26th June, 2019 seeking Judgment that this Honourable Court:-

- a) Issues a Declaration that the Plaintiff is the rightful owner of the parcel of land known as **Mukothima "A" Adjudication Section Gikingo Location, P/No.150,**
- b) A permanent Injunction restraining all the Defendants
- c) A Mandatory Injunction compelling all the Defendants to restore the land to the same condition it was before the trespass and/or encroachment.
- d) Costs and interests of the suit
- e) Interest on costs of restoring the land, pulling down any building and/or structure erected on the land and carting away any building materials and/or debris at Court rates from the date of Judgment until payment in full
- f) Any other reliefs that this Honourable Court may deem fit to grant.

The 1st -4th Defendants have filed a Preliminary Objection dated 5th July 2019 and filed on even date on the basis that:-

1. The Honourable Court lacks jurisdiction to hear this case for being Res Judicata, *Chuka High Court ELC case No.8 of 2018 (William Mutuura Kairiba –vs- Samuel Nkari, Samuel Kathiga and 2 others.*
2. The Plaintiff did not exhaust the remedies set out at *Sections 13, 14 and 26 of the Land Consolidation Act, Cap 283 and Section 26 and 29 of the Land Adjudication Act, Cap284 Laws of Kenya.*
3. The application dated 19.7.2019 is fatally defective.

The Plaintiff prays that the Defendants Preliminary Objection should be dismissed for lack of merit for the following reasons.

LEGAL ISSUES.

1. Is the Current suit filed before this Court Res Judicata?

Your Honour, **Section 7 of the Civil Procedure Act states as follows in regard to 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.”

Your Honour **In John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** stated as follows:-

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

In the case of **Saifudeen Abdulla Bhai & Hussein Abdulla Bhai Vs Zainabu Mwinyi (2014) Eklr** in which the Plaintiff had filed an application for an injunction which had been granted but had lapsed due to the operation of the law and on filing another application for injunction, the Defendant raised the plea of *res judicata*. The Plaintiff successfully argued that the new application was in respect of a completely new construction which could not be said to be based on the same facts as the earlier application.

Justice Richard Kuloba (as he then was) set out the Definition and essentials of res judicata as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.

The plea of *res judicata* is applicable only where the former judgment was;

- (a) That of a court of competent jurisdiction.
- (b) Directly speaking upon the matter in question in the subsequent suit and;
- (c) Between the same parties or their privies.

In the case of **M W K v A M W [2016] eKLR**, Justice Joel Ngugi stated as follows:-

“The essential ingredients of the doctrine – see, for example, Nancy Mwangi T/A Worthlin Marketers -v-Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR; Kamunye & others -v-Pioneer General Assurance Society Ltd [1971] E.A. 263 and John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR.

There are, restated, four ingredients:

- a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?"
- b. Are the parties in the present suit the same as those who litigated the original claim?"
- c. Did the Court which determined the original claim have jurisdiction to determine the claim?"
- d. Did the original action receive a final judgment on the merits?"

*I have come to the conclusion that it does not. Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in **The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880**. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.*

In the present case, the Judge struck out the suit because it had been predicated on the wrong provisions of the statute. Instead of predicating the case on the Matrimonial Property Act of 2013 (whose commencement date was 16/01/2014, the Applicant carelessly predicated her suit on the Married Women Property Act of 1882. It should be pointed out that this issue was raised suo motto by the

Learned Judge in his ruling on another preliminary objection. It is not clear if the parties had an opportunity to address the issue or cure the imperfection of the suit. In any event, in the circumstances of the case here, it would be a stretch to conclude that the matter was determined on their merits.

The legal position that the Court comes to, then, is that a suit which is struck out as being incompetent solely for being predicated on the wrong statutory provision does not trigger the application of the doctrine of res judicata. This interpretation is in accord with our jurisprudence's general preference for deciding, within limits of reasonableness, cases on their merits as opposed to technicalities. It is further supported by the constitutional principle now anchored in Article 159(2)(d) of the Constitution that Courts shall endeavour to do justice without undue regard to procedural technicalities.

To permanently bar a party from litigating an interest in property solely on the mistake of counsel to frame the litigation on the correct statutory provision will be to elevate form over substance and to engage in a particularly virulent form of "root canal" formalism of the kind Article 159(2)(d) of the Constitution sought to exorcise".

Your Honour, ELC suit No.8 of 2018 was filed before this Honourable Court and had not been heard and determined on its merits as the suit was dismissed on a technicality on the basis that the Plaintiff had not obtained a consent from the Land Adjudication Officer of the area to allow the Plaintiff to file a suit before this Honourable Court as per the provisions of section 30(5) of the Land Adjudication Act, Cap 283 of the Laws of Kenya. (Attached herein is a copy of the Ruling dated 12th November, 2018.

2. The use of Remedies stated under section 26 and 29 of the Land Adjudication Act and Section 13, 14 and 29 of the Land Consolidation Act.

Your Honour, in the case of **Stanley Lezen Mliwa –vs- Leonard Kapala Makangalu & 2 others**, Justice Maraga (as he then was) held that:-

“Section 30(1) of the Land Adjudication Act, does not oust the courts jurisdiction. All it does is to stop parties from rushing to court on any and every disagreement in the adjudication process until it is complete”.

Your Honour, the current suit filed before this court has complex issues ranging from trespass, to illegal and unlawful construction on the Plaintiff's land. The gravity of the issues raised in the suit warrants the court's intervention as the court is empowered under Section 3A of the Civil Procedure Act to use its discretion in the proper administration of justice in matters before the court.

Your Honour, it should be further noted that at present due to the adjudication process between Meru and Tharaka Nithi counties stands suspended and this limits the forum to which the Plaintiff can seek redress for the grievances that he is currently facing. It is also poignant to note that the Plaintiff has obtained the requisite consent from the Land Adjudication officer authorizing the Plaintiff to file the suit before this Honourable Court.

The remedies available under both the Land Adjudication Act and Land Consolidation Act therefore do not bar the Court's intervention and settlement of the current dispute.

CONCLUSION.

Your Honour, the Plaintiff has demonstrated that he stands to suffer prejudice if the current suit is not heard and determined by the court, as the defendants have already trespassed and are allocating the suit property to third parties to his detriment.

Further the matter is not Res Judicata as it has never been heard and determined on its merits. We therefore request this Court to dismiss the Preliminary Objection with costs and allow the matter to be heard and determined on its merits.

Dated in Nairobi this ...16thday.....ofJuly, 2019

GAKARIA, KURIA & NGALAKA COMPANY

ADVOCATES FOR THE PLAINTIFF/APPLICANT

7. The 5th Defendant's submissions are reproduced in full herebelow without any erasure or correction of any spelling or other mistakes which may be there.

5TH DEFENDANT'S SUBMISSIONS ON PRELIMINARY OBJECTION DATED 5/7/2019

The 1st – 4th defendants through their counsel filed a Notice of preliminary Objection seeking to have the entire suit dismissed. They set out 3 grounds:-

1. That the matter herein is res-judicata ELC NO 8 of 2018.
2. That the plaintiff has not exhausted the remedies set out in the Land Adjudication Act and the Consolidation Act.
3. That the application dated 19/6/2019 is fatally defective.

THE LAW ON PRELIMINARY OBJECTION

The law on what constitutes a preliminary objection was clearly set out in the famous case of MUKISA BISCUITS MANUFACTURING CO. –VS- WEST ENDDISTRIBUTORS LTD (1969) EA 696, when it was held

“ A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

Following the holding in the above case, it is clear that the notice herein raise pure point of law that does not require investigations or evidence to determine.

The question of res judicata is of pure point of law. The court has been furnished with a copy of its ruling in the case of WILLIAM MUTUURA KAIRIBA –VS- SAMUEL NKARI, SAMUEL KATHIKA and DANIEL MUGAO at Chuka Environment and Land Court. The suit therein involved 3 of the 5 defendants herein. It involved the same subject matter.

After hearing arguments in a preliminary objection filed against the suit, the court proceeded to dismiss the entire suit. The court did not strike out the suit, it dismissed. In dismissing the suit, the court upheld the twin grounds as set out in the preliminary objection.

The court held that the plaintiff had not exhausted the dispute resolution mechanisms set out in the Land Adjudication Act. The matter having been dealt with conclusively in that case, the plaintiff in that case, the plaintiff is forbidden from to bring the dispute back to court.

The plaintiff has clearly pleaded that the subject matter falls within Adjudication Section. It is not pleaded that the register has been declared closed in all respect. He has not exhausted the dispute resolution mechanisms set out in the Adjudication Act..

Under the Act, the lowest tribunal to deal with dispute within Adjudication Section is the committee. Section 11 of the Act provides for an avenue to appeal to the Arbitration Board in the event a party is not satisfied by the decision of the committee. Section 26 of the Act requires an aggrieved party to file an objection before the Adjudication Officer. Section 29 of the Act provides yet another avenue by an appeal to the minister within 60 days of the determination of the objection

It is clear from the pleadings that the plaintiff failed to exhaust the remedies laid down in the Act and opted for a short cut. He is estopped by the clear provisions of the law to pursue his perceived rights through this suit.

For the reasons herein, we apply that the entire suit be dismissed with costs.

DATED AT MERU THIS.....16THDAY OF...JULY,....2019

FOR: MURANGO MWENDA & CO.

ADVOCATES FOR THE 5TH DEFENDANT

8. I have considered the submissions filed by all the parties in support of their respective submissions. I have also considered the authorities the parties have proffered to buttress their assertions. The authorities proffered by the parties are proper authorities in their facts and circumstances. As the principles espoused by the authorities have been enunciated in the submissions filed by the parties which have been reproduced in full in the earlier part of this ruling, I opine that it is not necessary to regurgitate them. However, no two cases are congruent in their facts and circumstances to a degree of mathematical exactitude.

9. I find that except for the **inclusion of the 4th and 5th defendants** in this suit and **in Chuka Miscellaneous Case No. 3 of 2019**, all the other parties are the same. The issues are the same. A party cannot obviate the application of the doctrine of res judicata by merely adding one or two or even more litigants in a new suit. It is pellucid that **Chuka ELC No. 8 of 2018** was dismissed in totality by this court on **12th November, 2018**.

10. In the circumstances, I **uphold grounds 1 and 2** of the Preliminary Objection. This being the case, I find that the application dated **19th July, 2019** is **fatally defective** as urged by the **advocate representing the 1st, 2nd, 3rd and 4th defendants**.

11. It is hereby ordered as follows:

- a) **Chuka ELC suit NO. 13 of 2019 is hereby dismissed.**
- b) **Chuka Miscellaneous Application No. 3 of 2019 is hereby dismissed.**
- c) **Orders granting prayers 2 and 5** granted by this court in **Chuka Miscellaneous Application No. 3 of 2019** are **hereby vacated** and the apposite application dated **19th June, 2019** is **hereby dismissed**.
- d) **Costs in Chuka ELC No. 13 of 2019** and in **Chuka Miscellaneous No. 3 of 2019** are **awarded to the defendants/respondents**.

Delivered in open Court at Chuka this **31st day of July, 2019** in the presence of:

CA: Ndegwa

Kirimi Muturi h/b Atheru for 1st to 4th Defendants

Linus Ndungu h/b Gakaria for the Plaintiff

Mwiti h/b Murango Mwenda for the 5th Defendant

P. M. NJOROGE,

JUDGE.