



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 13 OF 2017**

**HALLAN MUTUA KIVUMBU.....PLAINTIFF**

**VERSUS**

**FRANCIS KIMILU MWAU.....DEFENDANT**

**RULING**

1. This is a ruling on the defendant's Notice of Preliminary Objection dated 23<sup>rd</sup> October, 2017 and filed in court on 30<sup>th</sup> October, 2017. The defendant contends that the plaintiff's suit dated 10<sup>th</sup> February, 2017 and filed in court on 20<sup>th</sup> February, 2017 is res judicata and/or subjudice in that a similar suit being Machakos RMCC 43 of 1991 and the resultant appeal therein being Machakos HCCA No.80 of 1992 have already been heard and determined.
2. On the 22<sup>nd</sup> November, 2017, the court directed that the Notice of Preliminary Objection be disposed off by way of written submissions which the defendant and the plaintiff proceeded to file on the 01<sup>st</sup> December, 2017 respectively.
3. The submissions by the defendant's counsel are that the Preliminary Objection is based on **Sections 6 and 7 of the Civil Procedure Act Chapter 21 of the Laws of Kenya**. The counsel further submitted that the orders sought in this suit are similar to the orders sought in Machakos RMCC 43 of 1992 which led to the judgment that was delivered on the 01<sup>st</sup> October, 1992. The counsel went on to submit that the defendant in RMCC 43 of 1991 appealed in Machakos HCCA No.80 of 1992.
4. Regarding the parties, the counsel submitted that Francis Kimilu who is the defendant herein was a co-plaintiff in Machakos RMCC 43 of 1991 while one Kukumbu Ndwiwa who is now deceased was the defendant. The counsel pointed out the plaintiff herein, Hellen Mutua Kivumbu, is the son of Kivumbu Ndwiwa who was the defendant in Machakos RMCC 43 of 1991.
5. The counsel urged the court to dismiss the plaintiff's suit since the orders sought are similar to ones that were canvassed in the aforementioned suit taking into consideration that they touched on land parcels number **Nzaui/Kalamba/594** and **Nzaui/Kalamba/638**.
6. The counsel relies on the case of **Livingstone Mutsune & Another Vs African Tours Hotels Limited (in receivership) [2014]eKLR**.
7. On the other hand, the plaintiff's counsel submitted that in order for res judicata to apply, the same parties must have been in the previous case, that the same title or subject matter must have been the same in the previous suit, that in the previous suit the matter directly and substantially must have been heard and finally decided by the former court.
8. The plaintiff's counsel went on to submit that the decision in Machakos RMCC 43 of 1991 was appealed in Machakos HCCA No.80 of 1992 which was later dismissed for want of prosecution. As such, the counsel opined, the boundary dispute has never been resolved to date. He correctly pointed out that there is no other pending suit between the parties herein in relation to the subject matter in order for this matter to be subjudice.
9. Having read the submissions filed, my finding is that the issues for determination are whether or not this suit is res judicata and whether or not it is subjudice. I propose to start with the issue of subjudice.
10. Section 6 of the Civil Procedure Act Chapter 21 of the Laws of Kenya reads as follows:-

***“No court shall proceed with a trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claim.”***

11. My reading of the above section is that there must be a previously instituted suit or proceeding between the same parties or between parties under whom they claim. The issue in the new suit must be directly and substantially in issue in the previously instituted suit.

12. The facts herein are that there was Machakos RMCC 43 of 1991 whose judgment was appealed in Machakos HCCA No.80 of 1992. The appeal dismissed for want of prosecution. As such, in my view, it cannot be said that there is a pending suit. The doctrine of subjudice, therefore, cannot apply herein.

13. On the issue of res judicata, Section 7 of the aforementioned Act states as follows:-

***“No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the 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 courts.”*** The Section has explanatory notes.

14. The defendant herein was a co-plaintiff in Machakos RMCC 43 of 1991 and also a co-respondent in Machakos HCCA No.80 of 1992. The plaintiff in the suit before me has averred in his pleadings that he has sued on behalf of his late father. As a corollary to the foregoing, there is no indication that the plaintiff is suing as a personal representative of his late father save that he prays for a declaration that land parcel number **Nzaui/Kalamba/638** is solely and legally owned by the estate of the late Kivumbu Ndwiwa.

15. Under such circumstances, the plaintiff lacks capacity to institute this suit. But of importance to note is that prayers in this suit are directly and substantially in issue in Machakos RMCC 43 of 1991.

16. The judgment therein remains unchallenged in light of the fact that Machakos HCCA No.80 of 1992 was dismissed for want of prosecution, an issue the plaintiff does not dispute. By filing this suit, I am of the view that the plaintiff is trying to achieve that which the late Kivumbu Ndwiwa failed to get in the appeal that was dismissed for want of prosecution.

17. Litigation must come to an end.

18. I hold that the preliminary objection has merits. In the circumstances, I hereby proceed to strike the plaintiff's suit with costs to the defendant. It is so ordered.

**Signed, Dated and Delivered on this 23<sup>rd</sup> Day of January, 2018.**

**MBOGO C.G.,**

**JUDGE.**

**In the presence of:**

Mr. Kyalo holding brief for Mrs. Nzau for the plaintiff and Mr. Muthama for the Defendant, Mr. Kwemboi – Court Assistant.

**MBOGO C.G.,**

**JUDGE.**