



**REPUBLIC OF KENYA**

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

**ELC 191 OF 2017**

**FORMERLY MACHAKOS ELC 58 OF 2016**

JOHN MASWILI ----- PLAINTIFF/RESPONDENT

*VERSUS*

MUNYWOKI KISE----- 1<sup>ST</sup> DEFENDANT /APPLICANT

NZOMO MUNYWOKI----- 2<sup>ND</sup> DEFENDANT/APPLICANT

MASILA MUNYWOKI ----- 3<sup>RD</sup> DEFENDANT/ APPLICANT

VAVU MUNYWOKI ----- 4<sup>TH</sup> DEFENDANT /APPLICANT

**RULING**

1) By their notice of motion application dated 29<sup>th</sup> August, 2017 and filed in court on 31<sup>st</sup> August, 2017, the defendants/applicants pray for order that:-

**1. That the plaint dated 20/7/2016 be struck off for being Res Judicata and all orders issued herein be set aside and or discharged.**

**2. That the County Land Registrar and or surveyor be ordered to rectify and or amend the register, the map and the physical delineations of the suit properties to comply with the order issued on 30/7/2012 in Misc. Civil Application No. 257 of 2006.**

**3. That the costs of this suit and application be borne by the plaintiff/respondent herein.**

2) The application is expressed to be brought under sections 1A, 1B, 3A and 7 of the Civil Procedure Act order 40 rule 7 of the Civil Procedure Rules and all other enabling provision of the law. It is predicated on the grounds on its face and supported by the affidavit of Munywoki Kisese sworn on the 29<sup>th</sup> August, 2017. It is opposed by the replying affidavits of John Maswili Mulwa, the plaintiff/respondent herein, sworn on the 19<sup>th</sup> September, 2017 and filed in court on the 27<sup>th</sup> September, 2017. On the 18<sup>th</sup> October, 2017 both parties agreed to dispose off this application together with the plaintiff application dated 19<sup>th</sup> September, 2017 by way of written submissions.

The latter application is for orders:

**1. That this honourable court be pleased to adopt a report of surveyor dated 9/5/2017 made**

**pursuant to the court order made on 3/3/2017 as judgement of the court**

## **2. Costs do abide the application**

3) The application is predicated on the grounds on its face and is supported by the affidavit of John Maswili Mulwa, the applicant herein, sworn on the 19<sup>th</sup> September, 2017. It is opposed by defendants/Respondents vide replying affidavit of Munywoki Kiseke, the first defendant/Respondent herein, Sworn on the 17<sup>th</sup> October, 2017 and filed in court on the 18<sup>th</sup> October, 2017.

4) The plaintiff's counsel's submissions are in respect of the two applications while those by the defendants' counsel are confined to their application dated 29<sup>th</sup> August, 2017 .

5) Regarding their prayer for striking out the plaint dated 20<sup>th</sup> July, 2017 for being res judicata and all orders issued herein being set aside and or discharged, the defendant's counsel referred the court to section 7 of the Civil Procedure Act as well case of **Bernard Mugo Ndegwa Vs James Nderito Githae & 2 others (2010) eKLR.**

The authority sets out the test for determining whether a matter is res judicata. The test is;

**a. That the matter directly and substantially in issue in the subsequent suit must have been the same matter which was directly and substantially in issue in the former suit.**

**b. That the former suit must have been between the same parties or between the parties under whom they or any of them claim.**

**c. That the parties must have litigated under the same title.**

**d. That the former suit must have been tried by a Competent Court.**

**e. That the former suit must have been heard and finally decided by such Competent Court.**

6) The counsel submitted that the matter in issue in this case is between the same parties as it was before the Makueni District Land Dispute Tribunal and Miscellaneous Civil Application No. 257 of 2006. The counsel pointed out that John Maswili Mulwa the plaintiff herein was the 1<sup>st</sup> ex-parte party in the aforementioned miscellaneous civil application and the 1<sup>st</sup> objector in the Makueni Lands Dispute Tribunal case number 26 of 2004. He went on to submit that the 1<sup>st</sup> defendant herein, Munywoki Kiseke was the 1<sup>st</sup> interested party in the same miscellaneous civil application and the claimant in the aforementioned Lands Dispute Tribunal Case. The counsel further submitted that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are the sons of the 1<sup>st</sup> defendant, Munywoki Kiseke.

7) The counsel cited the case of **Omondi Vs National Bank of Kenya Ltd & Others (2004) EA 177** where it was held that parties cannot evade the doctrine of res judicata by adding other parties or causes of actions in a subsequent suit. The counsel pointed out that Makueni Lands Dispute Tribunal Case No. 26 of 2004 and Misc Civil application no. 257 of 2006 were tried by competent courts and finally determined by courts which had jurisdiction to deal with the matters before them. The counsel added that it is evident that parties litigated under the same title in both suits.

8) On the issue of whether or not the County Registrar and/or Surveyor should be ordered to rectify and/or amend the register, the map and the physical delineation of the suit premises to comply with order issued on 30<sup>th</sup> July, 2017 in Misc Civil application number 257 of 2006, the defendants counsel submitted that the said order was not challenged by way of appeal or any other means prescribed by law and as such, it should be reinforced by this court.

9) On the issue of whether or not the plaintiff/respondent should bear the costs of this application, the

defendant's counsel submitted that it is clear that the plaintiff/respondent is gambling with the justice system such that when he is not awarded judgement by one court, which he is not satisfied with, he tries another court to see whether he can hopefully raise his stakes. The counsel added that this is great hardship to the defendants/applicants as they are forced to litigate twice for the same case, an issue the counsel termed as unacceptable. As such, the counsel submitted, the costs of the application should be borne by the plaintiff/respondent.

10) The counsel for the plaintiff submitted that the defence dated 27<sup>th</sup> September, 2016, as well as the replying affidavit deponed on the same date never raised the issue of res judicata. The counsel went on to submit that since the defendants in their defence insist that they are on land parcel number 610 and deny encroachment on land 210, this is an issue that the court needs to settle. The counsel added that the plaintiff's title has no encumbrance and has never been challenged in any court of law.

11) Regarding Misc. No. 257 of 2006 filed by the defendants, the plaintiff's counsel submitted that the defendants have failed to disclose to this court what the issues for determination were in the said application and how they were resolved and pointed out that eviction was not one of the issues. The counsel added that the application did not decide the rights of any of the parties and that it was simply dismissed.

12) Regarding the issue of the award of the Tribunal whose number the counsel did not disclose, his submissions were that the award only touched on the boundaries and not title and that on 6<sup>th</sup> June, 2015, the defendants withdrew the issue of boundary and as such, the counsel wondered how the rights of the parties were determined by a competent court.

The counsel termed the defendants notice of motion application 29<sup>th</sup> August, 2017 as mischievous and an abuse of the court and should therefore be dismissed with costs. The counsel went on to submit that the report dated 19<sup>th</sup> May, 2017 has not been challenged or appealed against and urged the court to adopt it as it is expert evidence. The counsel relies on two authorities, copies of which he did not supply to the court nor did he provide in their correct citation.

14) Having read the two applications and the submissions filed, the issues for determination in my view, are:-

a) Whether or not the plaint dated 20<sup>th</sup> July, 2016 is res judicata

b) Whether the county Land Registrar and/or Surveyor should be ordered to rectify and/or amend the register, the map and physical delineations of the suit properties to comply with order issued on 30<sup>th</sup> July, 2012 in Misc.Application no. 257 of 2006

c) Whether or not the surveyors report dated 9<sup>th</sup> May, 2017 should be adopted.

15) On the issue of whether or not the plaint dated 20<sup>th</sup> July, 2016 is res judicata section 7 of the Civil Procedure Act chapter 21 of the laws of Kenya provides that ;

***“ 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) As was submitted by Mr. Mulei Advocate for the defendants/Applications in the application dated 29<sup>th</sup> August, 2017, the test for determining whether or not a matter is res judicata was set out in the case of ***Bernard Mugo Ndegwa Vs James Nderito Githae & 2 others [2010] eKLR*** as follows;

a) **That the matter directly and substantially in issue in the subsequent suit must have been**

**the same matter which was directly and substantially in issue in the former suit.**

**b) That the former suit must have been between the same parties or between the parties under whom they or any of them claim.**

**c) That the parties must have litigated under the same title.**

**d) That the former suit must have been tried by a Competent Court.**

**e) That the former suit must have been heard and finally decided by such Competent Court.**

It is worth noting that under section 7 of the Civil Procedure Act, a suit is not res judicata if the former suit was heard by a court or tribunal which did not have jurisdiction. Munyao J has this to say in the case of **Vincent Kiprosngok Rotich Vs Orpah Jelagat Ngetich [2014] eKLR.**

***“ It is apparent from reading of section 7 of the Civil Procedure Act that res judicata will not apply where former suit was heard by a court or tribunal which did not have jurisdiction...”***

**17)** From the Judicial Review proceedings in Machakos High Court Misc Civil Application number 257 of 2006 marked as annexure MK -1 in paragraph 2 of the defendants/applicant’s supporting affidavit dated the 29<sup>th</sup> August, 2017 Munywoki Kisese (the first defendant herein) was the claimant in Makueni Land Disputes Tribunal Case Number 26 of 2004. Maswili Mulwa (the plaintiff herein) was the first respondent in the aforementioned Tribunal case. Munywoki Kisese was one of the claimants in the case in question. This is not denied by the plaintiff. In their statement of claim dated 12<sup>th</sup> October, 2004 Munywoki Kisese (the defendant herein) and his co-claimants accused Maswili Mulwa (the plaintiff herein) of :-

**a) Encroachment into their land**

**b) Interference of the original boundaries**

**c) Occupying and working on their land**

**d) Trespassing on their land**

As can be seen from annexure MK-1, the dispute involved boundaries to land parcels numbers Nzau/Kilili/610, Nzau/Mumbuni/210 Nzau/Mumbuni/211, Nzau/Mumbuni/214, Nzau/Kilili/616, Nzau/Mumbuni/212 and Nzau/Mumbuni/471. The Land Disputes Tribunal allowed Munywoki Kisese and his co-claimants claim and directed: “ the surveyor to draw the boundary as it is on the ground. The Land Disputes Tribunal award was adopted by Makueni Senior Resident Magistrate’s Court on 11<sup>th</sup> October, 2006.

**18)** Maswili Mulwa and his co-respondents did not appeal against the Tribunals award. They instead choose to commence Judicial Review proceedings vide Mks Civil Application number 257 of 2006 (annexure MK-1)

**19)** The respondents who were the applicants in the aforementioned Judicial Review proceedings complained that the Land Disputes Tribunal had no jurisdiction to entertain the claim since the boundary dispute touched on parcels of land registered in the names of deceased persons. The application was dismissed on the 30<sup>th</sup> July, 2012. Thus the Land Disputes Tribunal award which had been adopted by the Makueni Senior Resident Magistrate’s court as it’s judgement remained unchallenged.

**20)** Mr. Tamata for the plaintiff has submitted that what is in issue herein is eviction as can be seen from prayer 1 of the plaint dated 20<sup>th</sup> July, 2016 . It is not lost on me that on the 27<sup>th</sup> July, 2016 plaintiff filed

the notice of motion application dated the same day. Prayer 2 of the applications sought an order to direct Makueni County Surveyor to determine the boundary between land parcels number Nzai/Mumbuni/210 and Nzai/Kilili/610. The application was allowed vide the court's ruling dated the 3<sup>rd</sup> March, 2017 and the following orders were issued:-

- a) **The Makueni District Land Register and the surveyor to visit parcels of land numbers Nzai/Mumbuni/210 and Nzai/Kilili/610 and locate the position of each land viz a viz each other**
- b) **The Makueni District Land Registrar and the surveyor to file their report in this court within sixty (60) days from the date of this ruling**
- c) **The status quo prevailing now be maintained pending the hearing of the suit or further orders of this court**

21) In his plaint, the plaintiff prays for an order of eviction against the defendants. Though he has not pleaded the basis upon which the order for eviction is sought, the inference to be drawn is that the defendants have trespassed into Land Parcel Number Nzai/Mumbuni /210 owned by the estate of Mbili Mulwa Syulwa. If this is purely a question of trespass, then why did the plaintiff file the aforementioned application dated 27<sup>th</sup> July, 2016? Why does he want the boundary between Nzai/Mumbuni/210 and Nzai/Kilili/610 ascertained? In my view the plaintiff is seeking the same orders that were dealt by the Land Disputes Tribunal in Tribunal Case 26 of 2004 and later made Judgement in Makueni Senior Resident Magistrate's court LDTC No. 39 of 2006 which judgement remained unchallenged after miscellaneous civil application No. 257 of 2006 was dismissed.

22) On the issue of whether or not the Land Disputes Tribunal had jurisdiction to deal with the issues before it which related to boundary and trespass, section 3 of the Land Dispute Tribunal Act, (now repealed) provided for :-

*“Subject to this Act all cares of civil nature involving a dispute to;*

- a) **The division of , or the determination of boundaries to land, including land held in common,**
- b) **A claim to occupy or work land; or**
- c) **Trespass to land shall be heard and determined by a Tribunal established under section 4.”**

23) As submitted by the defendants' counsel jurisdiction was raised in the judicial review proceedings. This issue was determined when the High Court in the Judicial review proceedings dismissed the application.

24) Arising from the above it is clear that the Land Disputes Tribunal had Jurisdiction in case No. 26 of 2004.

25) As earlier on stated, the tribunals award was made judgement of the court in Makueni Senior Resident Magistrate's court in LDTC no. 39 of 2006. As observed in my ruling, the main issue in the matter before me is a boundary dispute between land parcels numbers Nzai/Mumbuni/210 and Nzai/Kilili/610, an issue that was heard and determined in the aforementioned cases. I have already held that the plaintiff and the first defendants were parties in the two aforementioned cases. The second, third and fourth defendants herein are the sons of the first defendants. The dispute clearly falls within Section 7 of the Civil Procedure Act notwithstanding the fact the defendants herein never raised the preliminary objection in their defence.

In my view the preliminary objection can be raised at any time just like the defendants did. As such, I

hold that the plaint dated 20<sup>th</sup> July, 2016 is res judicata.

**26)** Should the County Land Registrar and or surveyor be ordered to rectify and or amend the register, the map and physical delineation of the suit properties to comply with the order issued on the 30<sup>th</sup> July, 2012 in Misc Application number 257 of 2006?

In my view the prayer in the notice of motion application dated 29<sup>th</sup> August, 2017 has no legs to stand on as it is not grounded in the defendant's defence dated 27<sup>th</sup> September, 2016 and filed in court on 28<sup>th</sup> September, 2016. And besides, the court having found the suit to be res judicata, the only recourse is to strike out the suit.

**27)** Should the Surveyor's report dated 9<sup>th</sup> May, 2017 be adopted? Again for the reason that I have just given herein above, my answer to this question is in the negative.

**28)** Parties herein have litigated over this issue for close to fourteen (14) years. Both have contributed to the delay in resolving and implementation the judgement in Makueni Senior Resident Magistrate's Court LDTC 39 of 2006 after the Judicial Review Proceedings were dismissed in Machakos High Court Miscellaneous Civil Application No. 257 of 2006. I am of the view that under such circumstances, both should bear their own costs. Consequently, **the plaintiff's application dated 19<sup>th</sup> September, 2017 is hereby dismissed. The defendant's application dated 29<sup>th</sup> August, 2017 is allowed in terms of prayer 1. Each party to bear his own costs.**

**29)** This ruling will apply to ELC 190 of 2017.

**Signed , dated and delivered at Makueni on this 5<sup>th</sup> day of February, 2018.**

**Mbogo C.G**

**Judge**

**In the presence of:**

Mr. Tamata for the plaintiff

Mr. Mulei for the defendant

Mr. Kwemboi Court Assistant

**Mbogo C.G**

**Judge**

**5/2/2018**