



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 385 OF 2016

ZEINAB AHMED MOHAMED.....PLAINTIFF

-VERSUS-

1. FADHILA ZAHRAN MOHAMED

2. KHADIHA ABDULKAMAN MWINZAGU

3. RUKIYA MOHAMED HA.....DEFENDANTS

RULING

1. By a Notice of Motion dated 9th June 2017, the Defendants seek orders:

i. THAT this application be certified as urgent and service thereof be dispensed with in the first instant.

ii. THAT pending the hearing of this application inter-parties this Honourable Court do give an order restraining the Defendant by counter-claim personally or through her employees, servants and/or agents from interfering and trespassing into or in any way dealing with the shop on PLOT NUMBER MOMBASA/BLOCK XXXVII/13 belonging to the Wakf of the late MWANAMISHI BINTI AZIZ BIN JUMA.

iii. THAT pending the hearing and determination of this suit the Defendant personally or through her agents or representative be restrained from dealing with the affairs of the Wakf of MWANAMISHI BINTI AZIZ BIN JUMA including taking possession, leasing or in any way dealing with the shop existing on PLOT NUMBER MOMBASA/BLOCK XXXVII/13 and belonging to the Wakf of the late MWANAMISHI BINTI AZIZ BIN JUMA.

iv. THAT the costs of this Application be in the cause.

2. The Application is based on the grounds on the face of the Motion and supported by the affidavit of Khadija Abdulrahman Mwinzagu sworn on 9th June 2017.

3. On the 16th October 2017 the Respondent filed a Preliminary Objection dated 12th October 2017 objecting to the said Application on the following grounds:

i. THAT the Court has no jurisdiction to entertain, determine and grant the said orders.

ii. THAT the orders sought is against the principle of Res Judicata since the issues therein have already been adjudicated upon and the court pronounced itself on them on 30th March 2017.

iii. THAT a previous similar application on the same orders had been made and struck out by this Honourable Court and the Applicants are thus estopped from any further proceedings on the same.

iv. THAT the order sought is fatally defective and ill-conceived.

v. THAT the omnibus Application is misconceived and a gross abuse of the Court Process.

vi. THAT there is a pending Application dated 16th May 2017 seeking review and setting aside of the said orders.

4. The Preliminary Objection was canvassed by way of Written Submissions with the Plaintiff/Respondent filing his submissions on 22nd November 2017 while the Defendants filed theirs on 7th November 2017. The Respondent has submitted that the Application dated 9th June 2017 is res judicata as the matter in issue is identical with the Application dated 7th December 2016 that was determined by this Court and a ruling rendered on 30th March 2017.

5. In their submissions, the Defendants have submitted that the principle of res judicata is not applicable as the issues raised in the previous Application involved alleged interference with peaceful occupation of a shop situated on **PLOT NUMBER MOMBASA/BLOCK XXXVII/13** while the current Application seeks to restrain the Respondents from interfering and trespassing into or in any way dealing with the shop on **Plot No. Mombasa/block/xxxvii/13**.

6. I have considered the rival submission filed and the authorities placed before me. Section 7 of the Civil Procedure Act provides as follows:

7. 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 the same title, in court competent to try such subsequent suit or suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

7. 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.

8. The essential ingredients of the doctrine of res judicata have been expounded in many cases. See for example, Bernard **Mugo Ndegwa –v- James Nderitu Githae & 2 Others (2010)eKLR**; **Nancy Mwangi t/a Worthlin Marketers –v- Airtel Network (K) Ltd (formerly Celtel Kenya Ltd) & 2 Others (2014)eKLR**; **Kamunye & Other –v- Pioneer General Assurance Society Ltd (1971) EA 263**; **John Florence Maritime Services Ltd & Another –v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR**, and **MWK –v- AMW (2016)eKLR**. These ingredients are:

i. Whether there was previous litigation in which identical claims were raised or in which identical claims could have been raised;

ii. Whether the parties in the present suit are the same as those litigated in the original claim;

iii. Whether the Court which determined the original claim had jurisdiction to determine the claim;

iv. Whether the original action received a final judgment on the merits.

It has also been stated that the principle applies to applications with the same force whether the application be final or interlocutory.

9. I have perused the Application dated 7th December 2016 and the ruling delivered by the Court on 30th March 2017. There is no dispute that the parties are the same in all these proceedings. Both Applications are seeking restraining orders over the same subject matter that is **PLOT NUMBER MOMBASA/BLOCK XXXVII/13.** These issues are similar in all forms and this court determined them in the earlier decision.

10. The statutory provision under Section 7 of the Civil Procedure Act is clear and bars a Court from hearing a suit or issue if the same was substantially in issue in a former suit between the same parties, if the issue was determined in the former suit after a hearing. In this Application, the Applicants were the Respondents in the previous Application. Whatever issue being raised now could have been raised in the previous Application. By virtue of Section 7 of the Civil Procedure Act, this Application is barred by the doctrine of *res judicata*.

11. By reason of the foregoing I find that the Preliminary Objection dated 12th October 2017 is merited and the same is upheld. I also find that the Notice of Motion dated 9th June 2017 is an abuse of the Court Process as it raises issues which had been substantially litigated and adjudicated upon by a Court of competent jurisdiction. The same is dismissed with costs.

Delivered, signed and dated at Mombasa this 19th March, 2018.

C. YANO

JUDGE