



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO 92 OF 2017**

**1. JUMWA KATANA MWARO**

**2. WALTER KATANA MWARO**

**3. JOEL KATANA MWARO.....PLAINTIFFS**

**VERSUS**

**1. SIMON KARISA(Wrongly sued as SAMUEL KARISA)**

**2. THE REGISTERED TRUSTEES OF KIBARANI PENTECOSTAL CHURCH**

**3. THE DISTRICT LAND REGISTRAR KILIFI**

**4. DISTRICT SURVEYOR KILIFI.....DEFENDANTS**

**RULING**

1. By a Complaint dated and filed herein on 21<sup>st</sup> April 2017, the three Plaintiffs Jumwa Katana Mwaro, Walter Katana Mwaro and Joel Katana Mwaro pray for Judgment against the four Defendants herein for:-

**a. An Order of permanent injunction;**

**b. An Order of eviction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants;**

**c. An Order directing the 3<sup>rd</sup> Defendants to issue title documents to the Plaintiff herein in respect to Plot No. 31 Kibarani Settlement Scheme; and**

**d. Costs of this suit.**

2. Simultaneously with the Complaint, the Plaintiffs filed a Notice of Motion application of even date seeking the issuance of temporary Orders of injunction to restrain Samuel Karisa and the Registered Trustees of Kibarani Pentecostal Church the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from trespassing, constructing on, alienating, sub-dividing, encroaching and/or in any way dealing with the Parcel of land known as Plot No. 31 Kibarani Settlement Scheme pending the hearing and determination of this suit. In addition, they seek orders barring the District Land Registrar Kilifi (3<sup>rd</sup> Defendant) and the District Surveyor Kilifi (4<sup>th</sup> Defendant) from dealing with, surveying, sub-dividing and/or in any manner dealing with the said parcel of land.

3. The said Application is premised on the grounds inter alia that:

**a. The Applicants are the registered and beneficial owners of Plot No. 31 Kibarani Settlement Scheme and that they have been in occupation thereof since 1978;**

**b. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have been attempting to trespass on the land since 1992 when the Plaintiff's husband and father passed on;**

c. That recently the 1<sup>st</sup> and 2<sup>nd</sup> Defendants began construction on the land and they have instructed the 3<sup>rd</sup> and 4<sup>th</sup> Respondents to survey and sub-divide the parcel of land albeit unlawfully in a bid to deny the Applicants proprietary rights to the land; and

d. That unless the Respondents are restrained by an order of this court, the Applicants stand to suffer great loss and prejudice.

4. Upon being served with the suit and the application, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants moved to Court on 8<sup>th</sup> June 2017 and filed a Notice of Preliminary Objection in which they object to both the suit and the application on the basis that the same is res judicata and a nullity in law. It is their case that the suit herein is in total contravention of Section 7 of the Civil Procedure Act and hence the same ought to be struck out with costs.

5. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have on the same day-8<sup>th</sup> June 2017 filed a Statement of Defence in which they aver at paragraph 7 thereof as follows:-

**“7. The Defendants further wishes to state that the suit herein is Res Judicata as the issues herein were seriously litigated in Kilifi SRMCC No. 656 of 2010- Mrs Jumwa Katana Mwaro –vs Pastor Simon Karisa, One Faith Pentecostal Church aka Pentecostal Church of Africa whereof the Plaintiff’s suit was dismissed with costs and a decree accordingly issued. The Defendants shall therefore at the earlier hearing of the suit raise a Preliminary Objection on that point.**

6. When the said application came up for hearing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as indicated raised the objection and produced a copy of the Judgment of the Honourable L.N Wasige dated and delivered on 9<sup>th</sup> February 2015 in Kilifi Senior Resident Magistrates Civil Case No. 656 of 2010; *Jumwa Katana Mwaro –vs- Simon Karisa & One Faith Pentecostal Church*.

7. I have considered the Preliminary Objection vis-à-vis the suit and the Notice of Motion dated 21<sup>st</sup> April 2017. I have equally considered the submissions of the Learned Counsel for the Defendant. The Plaintiffs did not file submissions in spite of being granted additional time to do so.

8. The doctrine of res-judicata is anchored at Section 7 of the Civil Procedure Act 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.”**

9. As the Court of Appeal stated in *John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR

**“Re Judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled.”**

10. The Learned Judges of Appeal in the *John Florence Maritime Services Ltd(Supra)* in emphasizing the old nature of the doctrine cite the rendition in the case of **Henderson V. Henderson(1843)67 ER 313** where the English the Court observed that:-

**“....Where a given matter becomes the subject of litigation in and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not, except under special circumstances, permit the same to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a Judgment but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...”**

11. The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter.

12. In the matter before me the Plaintiffs have brought up the suit and the application on the purport that they are the registered owners of Plot No. 31 Kibarani Settlement Scheme. They accuse the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of trespassing and encroaching upon the same and of having instructed the 3<sup>rd</sup> and 4<sup>th</sup> Defendants to survey and sub-divide the land for purposes of directing the ownership thereof from the Plaintiffs.

13. From the material placed before me, it is evident that the 1<sup>st</sup> Plaintiff is the mother of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. In the suit filed before the Kilifi Senior Resident Magistrate’s Court, the 1<sup>st</sup> Plaintiff brought the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein in near similar fashion. At paragraph 2 and 3 of the Judgment of the Honourable L.N. Wasige(SPM) dated and delivered on 9<sup>th</sup> February 2015, the 1<sup>st</sup>

Plaintiff's claim and the Defendant's response are captured as follows:-

**“In her Plaint, the Plaintiff states that she is the legal owner of Plot No. 31 Kibarani Settlement Scheme hereinafter “the suit premises” upon which the defendants without any lawful excuse have trespassed and started constructing structures without the Plaintiffs consent. The Plaintiff is apprehensive that the Defendants will change the state of her land by constructing structures thereon unless they are stopped by the Court.**

**The Defendants filed a Statement of Defence and denied the contents of the Plaint. The defendants deny encroaching onto the Plaintiff's land. The defendants allege that the development that they have done are on the 2<sup>nd</sup> Defendant's Plot which is 1093 (hereafter “the disputed land”) and not on No. 31”.**

14. It is evident again from the Learned Magistrate's Judgment that the 1<sup>st</sup> Plaintiff and one of her stepson's Jackson Katana testified in the said case as PW1 and PW2 respectively. The 1<sup>st</sup> Defendant herein also testified as DW3 in the said proceedings. Having considered the dispute, the Learned Magistrate dismissed the Plaintiff's case and observed in the penultimate paragraph of her decision as follows:-

**“The upshot is that the Plaintiff has not proved her case on a balance of probabilities. Orders of injunction cannot be granted against the defendants over their own parcel of land. In any case, it shall be the Plaintiff who will be trespassing into the 2<sup>nd</sup> Defendant's parcel of land as long as the plot in question is Plot No. 1093.”**

15. It is evident to me that other than adding her two sons as Co-plaintiffs and enjoining the Kilifi District Land Registrar and Surveyor herein, the issue in dispute herein is the same one that was directly and substantially in dispute between the parties in the Subordinate Court. That suit was essentially between the Plaintiffs herein on the one hand and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the other litigating under the same title. The said dispute was fully and finally determined by the Resident Magistrate's Court and it would appear to me that no appeal was preferred therefrom.

16. As was stated again in the John Florence Maritime Services Ltd case(supra)

**“Res Judicata ensures the economic use of Court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.**

**.....It promotes confidence in the Courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.....”**

17. I think I need not say more. The inescapable conclusion is that the proceedings before me offend the doctrine of res judicata as embodied in Section 7 of the Civil Procedure Act. This suit and the application before me have been brought in gross abuse of the Court process. I will not let them be.

18. The Motion and the suit both dated and filed herein on 21<sup>st</sup> April 2017 are accordingly struck out with costs to the Defendants.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of May, 2018.**

**J.O. OLOLA**

**JUDGE**