



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 331 OF 2017**

**1. LEONARD MASHAKA MSANGA**

**2. AMOS MWAKUGHU MWAMBURI.....PLAINTIFFS**

**-VS-**

**1. RONALD MZAME MWAKIO**

**2. JULIANA MRUNDE MWASHANGULA**

**3. MWAKIO MWAKUGHU**

**4. ESTHER NG'ANDU MWAKIO**

**5. BARNABA MWANJEWE MWIKAMBA**

**6. BAZIL M. MWADIMEME**

**7. TAITA TAVETA COUNTY GOVERNMENT.....DEFENDANTS**

**RULING**

1. This Ruling is in respect of a Preliminary Objection dated 17<sup>th</sup> October 2017 by the 5<sup>th</sup> and 6<sup>th</sup> Defendants on the ground that the Application dated 13<sup>th</sup> September 2017 is *res judicata* as a similar Application had been filed and determined in **Wundanyi SRMCC No.10 of 2013** and a Preliminary Objection dated 24<sup>th</sup> October 2017 by the 7<sup>th</sup> Defendant on the ground *inter alia* that this court lacks jurisdiction to entertain this Suit under section 30(1) of the Land Adjudication Act, that the matter is *res judicata* and that the Plaintiffs have no *locus standi* to seek the remedies sought in the Application and the Suit.

2. By a Plaint dated 13<sup>th</sup> September 2017, the Plaintiffs have brought this Suit against the Defendants seeking the following reliefs:

**a. A declaration that the compulsory acquisition with regard to Plot No.1329 has abated and/or lapsed and the plot is therefore the property of the Plaintiff.**

**b. An order that the County Registrar deletes the name of the 7<sup>th</sup> Defendants and registers the Plaintiffs as the owner of Plot No.1329.**

**c. Permanent orders of injunction do issue against the Defendants their employees, servants and/o agents from trespassing and encroaching onto and/or constructing and/or developing or in any way whatsoever interfering with PLOT NO.1329 CHAWIA WUMARI SECHU/ADJUDICATION SECTION**

**d. Any other relief that this Honourable Court may deem just and fair to grant.**

**e. Costs and interest.**

3. The Plaintiffs' claim is that at all material time to this Suit the 1<sup>st</sup> Plaintiff was the registered owner while the 2<sup>nd</sup> Plaintiff was a beneficial owner of all that parcel of land Registration Number **TAITA/CHAWIA WUMARI SECHU/ADJUDICATION SECTION PLOT**

NO.214 within Mwatate Sub-County.

The Plaintiffs aver that a portion of **Plot No.214** was compulsorily acquired by the Government giving rise to **Plot No.1329** which was reserved for proposed expansion of Mwatate Trading Center and has since been registered in the name of the 7<sup>th</sup> Defendant. The Plaintiffs further aver that no compensation has ever been paid towards the acquisition as required by law and hence it is their contention that **Plot No.1329** has reverted to them by operation of the law. The Plaintiffs state that on several occasions and without probable and/or justifiable cause and/or consent from the Plaintiffs, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants have trespassed into the Suit Property while the 6<sup>th</sup> Defendant who purports to have purchased a portion of it from the 5<sup>th</sup> Defendant has encroached on a portion allegedly purchased and commenced the erection of a permanent structure on an already constructed foundation belonging to the 2<sup>nd</sup> Plaintiff. It is the Plaintiffs contention that despite numerous interventions by the Ministry of Lands, Housing and Urban Development and the Land Adjudication and Settlement Officer, the 6<sup>th</sup> Defendant has willfully refused and/or neglected to desist from his acts, hence this Suit and Application. The Plaintiffs further contend that as a result of the Defendants acts, they have been denied the use of development of their land and have suffered loss and damage.

4. The Plaintiffs filed the Notice of Motion dated 13<sup>th</sup> September 2017 seeking orders of Temporary Injunction pending hearing and determination of the Suit. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed separate statements of defence in which they each denied the Plaintiffs' claim and pleaded that the matter had been heard and determined in **Wundanyi SRMCC No.10 of 2013**.

5. The Preliminary Objections were canvassed by way of Written Submissions. The 5<sup>th</sup> and 6<sup>th</sup> Defendants filed their Written Submissions on 23<sup>rd</sup> November 2017 in which it was submitted that the matter is *res judicata* in view of the decision in **Wundanyi SRMCC No.10 of 2013**. The 1<sup>st</sup>, 4<sup>th</sup> and 7<sup>th</sup> Defendants filed their submissions on 1<sup>st</sup> March 2018 in which they also submitted *inter alia* that the Plaintiffs' Application is *res judicata* and should be dismissed in limine.

6. The Plaintiffs filed their submissions on 25<sup>th</sup> January 2018 in which they submit that the Application dated 27<sup>th</sup> October 2015 sought to review and set aside the judgment in **Wundanyi SMRCC No. 10 of 2013** whereas the application herein is seeking conservatory orders for preservation of the Suit Property pending hearing and determination of the Suit herein.

7. I have considered the Preliminary Objections, the filed Written Submissions and the authorities cited. I have also looked at the pleadings herein. 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.**

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. In the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR**, the ingredients were stated as firstly, that the issue in dispute in the former Suit between the parties must be directly or substantially be in dispute between the parties in the Suit where the doctrine is a bar. Secondly, that the former Suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former Suit was litigated was competent and determined the Suit finally. See also the case of **Karia & Another –v- Attorney General and others (2005)1 EA 83** and **Kamunye & Others –v- Pioneer General Assurance Society Ltd (1971) EA 263**. *Res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior Suit between the same parties or their representatives. In the case of *John Florence Maritime Services Limited (Supra)*, the Court of Appeal stated as follows:

**“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. *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.”**

The Court of Appeal in the same case further stated:

**“The doctrine is not a technicality. It goes to the root of the jurisdiction of the court to entertain a dispute. If it is successfully ventilated, the doctrine will deny the Court entertaining the dispute jurisdiction to take any further steps in the matter with consequence that the Suit will be struck out for being *res judicata* ”**

The Court of Appeal went on and stated:

**“The doctrine of *res judicata* had 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-open that issue. ”

9. I have perused the pleadings as well as the judgment and ruling in **Wundanyi SRMCC No.10 of 2013, Amos Mwakughu Mwamburi & 2 Others –v- Ronald Mzame Mwakio & 4 others.**

There is no dispute that the parties are the same in all these proceedings save that some Defendants have been added in the Suit herein. The subject matter in both Suits is **Plot No.246** and **plot No.1329**. These issues are similar in all forms and the Court in **Wundanyi SMRCC No.10. of 2013** determined them in the earlier decision. The statutory provision under Section 7 of the Civil Procedure Act as well as Section 28 of the Environment and Land Court Act are 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. The issue in dispute in the two cases are the same or substantially the same. The issues raised in this case ought to have been made in the earlier proceedings. By virtue of Section 7 of the Civil Procedure Act this Suit and application are barred by the doctrine of *res judicata*.

10. By reason of the foregoing, I find that the Preliminary Objections are merited and the same are upheld. I also find that the Notice of Motion dated 13<sup>th</sup> September 2017 and indeed the entire Suit is an abuse of the court process. The same are struck out with costs to the Defendants.

**Delivered, signed and dated at Mombasa this 10<sup>th</sup> July, 2018.**

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**C. YANO**

**JUDGE**