



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
CIVIL APPEAL NO. 224 OF 2013

MAKAU MULIKO KIVINDA.....1ST APPELLANT
ONESMUS MUTUA MUTUKU.....2ND APPELLANT
MULEKYE MUTUKU KYUL.....3RD APPELLANT
VERUS
MUSYOKI MUTUKU.....RESPONDENT

(Being an Appeal from the Ruling of Machakos Chief Magistrate's

Court in Civil Case No. 528 of 2013 delivered on

11th October, 2013 by Hon. M. K. Mwangi - (Ag. SPM))

JUDGMENT

1. In the suit that was filed in the lower court, the Respondent herein averred that since the 1980's, he was in occupation and use of all that parcel of land which during adjudication within Kalongo Adjudication Section became to be known as plot number 1208.
2. According to the Plaint that was filed by the Respondent, he had been gifted the suit property by his father, the late Mutuku Kyui; that on 6th November, 2002, his father transferred to him the entire land and that Plot No. 1208 was illegally transferred to the 3rd Appellant who excised a portion thereof and sold it to the 1st Appellant.
3. It was the case of the Respondent in the lower court that the 1st and 2nd Appellants are not the sons, heirs or dependants of the deceased and that they had no rights at law to litigate upon or be awarded plot number 1208 or a portion thereof.
4. While the suit was subsisting, the Appellants filed a Notice of Preliminary Objection in which they averred that the suit is *res judicata* Kilungu CMCC No. 19 of 2011; that the Respondent was guilty of non-disclosure of material facts and that plot numbers 1208 and or 4620 were still under the jurisdiction of the Land Adjudication Officer as per the provisions of the Land Adjudication Act.
5. In the said Notice of Preliminary Objection, the Appellants further averred that having not paid the

costs that were awarded in Kilungu PMCC No. 19 of 2011, the Respondent's suit could not be entertained.

6. After hearing submissions in respect to the Notice of Preliminary Objection, the learned Magistrate delivered a Ruling which is the subject of this Appeal.

7. The Memorandum of Appeal has raised the same issues that the Appellants raised in their Notice of Preliminary Objection.

8. The Appeal proceeded by way of written submissions. The Appellant's and the Respondent's advocates relied on the submissions that they filed in the lower court.

9. The Appellants' counsel submitted that on 21st February, 2012, the Respondent herein filed a Notice of Motion in Kilungu PMCC No. 19 of 2011 against the Appellants seeking for a declaration that Plot No. 4610 in Kalongo Adjudication Section was his property.

10. Counsel submitted that when the matter came up for hearing, the learned Magistrate dismissed the whole suit on the ground that Plot Nos. 4620, 4610 and 1208 were in an Adjudication Section and therefore no suit could lie.

11. Instead of appealing against the decision of the Magistrate in Kilungu PMCC No. 19 of 2011, counsel submitted that the Respondent filed a fresh suit in the High Court, which suit was transferred to the Magistrate's court.

12. The Appellants' counsel submitted that in any event, the court was not clothed with jurisdiction to entertain this matter because the Respondent never appealed over Plot No. 4620 through the provided mechanism under Cap 284 and that a person who does not exhaust the provided machinery for adjudication of disputes has no remedy in the courts.

13. In his submissions, the Respondent's counsel submitted that the trial court identified the suit property to be different from the suit property in Kilungu PMCC No. 19 of 2011; that the issues raised in the Appellant's Preliminary Objection were not pure points of law and that the trial court had jurisdiction to deal with the suit.

14. In his Ruling, the learned Magistrate agreed with the submissions of the Respondent that the suit in Kilungu PMCC No 19 of 2011 was distinct from the suit property that was before it and therefore the suit was not *res judicata*.

15. It was the position of the magistrate that in any event, the issue of which property was being litigated upon could only be determined after the tendering of *viva voce* evidence.

16. On the issue of whether the court had jurisdiction to deal with the issues, the learned Magistrate held that evidence will have to be called. On that basis, the learned Magistrate dismissed the Appellant's Preliminary Objection.

17. The claim by the Respondent in Machakos CMCC No. 528 of 2013 was that the Appellants unlawfully excised parcel of land number 4620 from Plot No. 1208 which belongs to him.

18. In his prayers in the Complaint in Machakos CMCC No. 328 of 2013, the Respondent sought for a declaration that Plot No. 4620 within Kalongo Adjudication Sections is his property.

19. The Respondent further sought for an order to have Plot No. 4620 which was "*wrongfully, unprocedurally and illegally excised out of the Plaintiffs' Plot No. 1208*" be retransferred and registered in his name.

20. In the same Complaint, the Plaintiff averred that he had applied and was issued with the consent of the

District Land Adjudication and Settlement Officer, Makueni to institute the suit.

21. It would appear that while filing the Complaint in Machakos CMCC No. 528 of 2013, the Plaintiff had anticipated that the issue of *res judicata* will be raised.

22. I say so because in his Complaint at paragraph 14, the Respondent pleaded as follows:

“14. The Plaintiff avers that there is no other suit pending and that there have been no previous proceedings in any court between the Plaintiff and the Defendants over the same subject matter i.e. Plot No. 4620 Kalongo Adjudication Section.”

23. Although the issue of whether a suit is *res judicata* is a point of law which can be taken up by way of raising a Preliminary Objection, the issue should be raised by way of a formal Application.

24. I say so because the court can only determine if a suit is *res judicata* after perusing the pleadings in the previous suit and the judgment or Ruling that was delivered in the suit.

25. Such pleadings can only be availed to the court by way of Affidavit evidence and not otherwise.

26. I have perused the Record of Appeal and I have not come across the pleadings and the Ruling in respect to Kilungu PMCC No. 19 of 2011. I am therefore unable to determine if indeed the issues that were before the court in Kilungu PMCC No.19 of 2011 were directly and substantively in issue in Machakos CMCC No. 528 of 2013 and that the suit property in the two suits was the same. I have also not seen the Ruling that was delivered in Kilungu PMCC No. 19 of 2011.

27. Even if it is true that the suit properties in the two matters are the same and that the Magistrate in Kilungu PMCC No. 19 of 2011 dismissed the matter because the plots in question was in an adjudication area, the said suit was not heard and finally decided.

28. It is trite that under the provisions of Section 7 of the Civil Procedure Act, a matter is *res judicata* only if the previous matter has been heard and finally decided by a competent court and in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.

29. Considering that the Magistrate in Kilungu PMCC No. 19 of 2011 dismissed the suit because the area under litigation was still under adjudication, and therefore the court did not have jurisdiction (*according to the Appellant's submissions*), it follows that the Respondent could file a similar suit after obtaining the consent of the Land Adjudication Officer.

30. The Respondent has pleaded in the Complaint that it filed Machakos CMCC No. 528 of 2013 after obtaining the consent of the District Land Adjudication and Settlement Officer, Makueni, pursuant to the provisions of the Land Adjudication Act to recover Plot No. 4620 Kalongo Adjudication Section.

31. Whether the above averment by the Respondent is true or not can only be ascertained at trial. Again, whether Plot No. 4620 Kalongo Adjudication Section is the same as the suit property in Kilungu PMCC No. 19 of 2011 can only be ascertained after trial.

33. In the circumstances, the learned Magistrate did not err when he dismissed the Appellant's Notice of Preliminary Objection.

33. For those reasons, I dismiss the Appellant's Appeal with costs to the Respondent.

DATED AND DELIVERED AT MACHAKOS THIS 31ST DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE