



Margrove Investments Limited v Chief Land Registrar & 3 others (Environment & Land Case 105 of 2021) [2024] KEELC 2 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 2 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 105 OF 2021
SM KIBUNJA, J
JANUARY 17, 2024**

BETWEEN

MARGROVE INVESTMENTS LIMITED PLAINTIFF

AND

THE CHIEF LAND REGISTRAR 1ST DEFENDANT

THE CABINET SECRETARY MINISTRY OF LANDS 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

THE NATIONAL LAND COMMISSION 4TH DEFENDANT

RULING

1. The 1st to 3rd defendants moved the court vide the notice of preliminary objection dated 4th April 2023 raising the following three grounds;
 - a. That the suit herein is res judicata as it contravenes the mandatory provisions of section 7 of the *Civil Procedure Act* Cap 21, Laws of Kenya.
 - b. That the issues herein have been heard and determined both in Mombasa High Court Civil Suit No. 103 of 2009; Mangrove Investments Limited vs the Attorney General and National Water Conservation and Pipeline Corporation and Mombasa Civil Appeal No. 50 of 2019; Mangrove Investments Ltd vs The Attorney General & Another (2020) eKLR.
 - c. That by dint of it contravening the provisions of section 7 of the *Civil Procedure Act* Cap 21, this Honourable Court lacks the jurisdiction to entertain the suit herein as the same is an abuse of the court process and should be struck out with costs to the Defendants.



2. The court issued directions on filing and serving submissions on the preliminary objection on the 5th October 2023. The learned counsel for the 1st to 3rd defendants and the plaintiff filed their submissions dated the 31st October 2023 and 10th November 2023 respectively, which the court has considered.
3. The issues for the determinations by the court are as follows:
 - a. Whether the issues raised in this suit are res judicata the two mentioned suits.
 - b. Conversely phrased, whether this court has jurisdiction in this suit in view of the decisions in the two other suits mentioned.
 - c. Who pays the costs?
4. The court has considered the grounds on the notice of preliminary objections, submissions by the two learned counsel, superior courts decisions cited thereon and come to the following findings:
 - a. From the pleadings filed, the plaintiff had purchased L.R No. 3615/VI/MN, suit property, from Scleraca Limited on 22nd February 2002 for an alleged consideration of Kshs. 6,000,000. In a sudden twist of events, the plaintiff came to know in 2008 that the suit property had been reserved for the National Water Conservation and Pipeline Corporation. The plaintiff filed a suit against the Attorney General and National Water Conservation & Pipeline Corporation being Mombasa HCCC 103 of 2009 which was later transferred to this court and became Mombasa ELC 103 OF 2009. The suit was heard and the plaintiff's title to the suit property was cancelled in the judgement of 20th September 2018. The plaintiff filed Mombasa Civil Appeal No. 50 of 2019 that was dismissed on the 3rd April 2020 and this court's decision upheld. The plaintiff then filed this suit seeking for inter alia:
 - i. Kshs.175 million being the market value of the suit property.
 - ii. Kshs.8,966,306 being monies spent by the plaintiff as purchase price, land rates and land rents.
 - iii. Interest and costs,
 - b. The learned counsel for the 1st to 3rd defendants submitted that the plaintiff's pleading, especially paragraph 40 of the plaint has acknowledged that the subject matter in this suit and the previous one, ELC No. 103 of 2009 are the same. The counsel submitted this suit is therefore res judicata. The counsel cited section 7 of the *Civil Procedure Act* chapter 21 of Laws of Kenya and several decisions from the superior courts including the case of IEBC vs Maina Kiai & 5 Others (2017) eKLR where the Court of Appeal explained the doctrine of res judicata as follows:

“ Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

 - (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.



- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

The counsel further submitted that that the plaintiff has acknowledged that the subject matter in ELC 103 of 2009 is the same in the instant suit and had already been determined. Counsel further argued that the parties are the same and that the court that determined the previous suit was competent. Finally, counsel argued that the ownership of the suit property was determined in the previous suit, while in this suit the plaintiff is seeking compensation and costs after losing the suit property. That those issues were addressed in both this court and at the Court of Appeal where both courts ordered costs in favour of the 1st, 2nd & 3rd defendants.

- c. The learned counsel for the plaintiff opposed the preliminary objection and submitted that the doctrine of res judicata does not arise for reason that the said preliminary objection does not meet the legal threshold. That the parties in this suit are different from the parties in ELC 103 of 2009 and that the issues herein are different from the issues in ELC 103 of 2009.
- d. Section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya provides as follows:

“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.

Explanation. —(1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

The counsel for the 1st to 3rd defendants has taken the position that the parties in this suit, and the previous suit, ELC 103 of 2009, are the same while counsel for the plaintiff argued that they are not. He added that the plaintiff is not seeking for compensation against National Water



Conservation and Pipeline Corporation, but against the Land Registrar and the 4th defendant for ‘misleading’ it into believing the suit property was available for allocation.

- e. In the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & Another* [2020] eKLR, the court held that:

“In the case *Henderson vs Henderson* (1843) 67 ER 313 res-judicata was described as follows;

“...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 parties to open the same subject of litigations 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 the 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.

Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”

I am in agreement with the holding in the above case. Could the plaintiff herein have reasonably foreseen losing title to the suit property that was in contestation in the previous suit, to make it consider seeking for compensation in the alternative?

- f. In *Mombasa ELC No. 103 of 2009*, the plaintiff had sought for various prayers including declaratory orders, injunction and prayer (f) which was as follows;

“(f) In the alternative to prayers (d) and (e) above and only in the event that prayers (d) and (e) cannot be granted, an order against the defendants jointly and severally to pay the plaintiff a sum of Kshs.100,000,000.00 or such other proved value of its leasehold interest in the suit premises”.

At paragraph 25 of the judgement delivered on the 20th September 2018, the court held as follows;

“25. Are the orders sought in the amended plaint available to the plaintiff? My answer is NO. in regard to prayer (a), there was no forfeiture or re-entry as the 2nd defendant never parted with physical possession. Prayer (b), the grant No. CR 44221 is not void since the allocation to Scelara was the one that was null & void and the plaintiff having failed to prove that it was an innocent purchaser for value without notice is not entitled to the declaration as owner of leasehold interest in the suit premises as sought in prayer (c). Consequently the prayers



(d) – (f) cannot issue. Instead, this court directs the Registrar of Titles Mombasa to record an entry of cancellation of title in the plaintiff’s parcel file under grant No. 356200. The plaintiff’s interest and title in plot No. MN/V1/3615 is hereby cancelled. The plaintiff’s suit is dismissed with costs to the defendants”.

The plaintiff moved to the Court of Appeal in CACA No. 50 of 2019, which was determined vide the judgement delivered on 3rd April 2020. The Court of Appeal inter alia held as follows;

- “ 39. In the foregoing circumstances, we are in agreement with the learned trial judge, beyond waving the Grant, the appellant was duty bound to demonstrate that it had exercised due diligence prior to acquiring the property.
43. The judge did not therefore err in ordering the cancellation of the appellant’s title having concluded that the same was irregularly obtained. As already stated, the protection of the right to property under Article 40 of *the Constitution* does not extend to any property found, as is the case here, to have been unlawfully acquired.
44. The upshot of the foregoing is that we find no merit in this appeal. The conclusion reached by the learned judge is well supported by evidence and we have no basis for interfering with it. Accordingly, this appeal is dismissed with costs to the respondents.”

There is doubt that the plaintiff herein had sought for compensation for the suit property were it to fail to retain title to the same. That was in prayer (f) in the plaint but as seen at paragraph 25 of the judgement it was not granted.

- g. The parties in Mombasa ELC No. 103 of 2009 were Mangrove Investment Limited as the plaintiff, the Attorney General and National Water Conservation & Pipeline Corporation as the 1st and 2nd defendant respectively. In the instant suit, the plaintiff is suing in the same capacity as in the previous suit while the Attorney General is now the 3rd defendant. The Chief Land Registrar, the Cabinet Secretary Ministry of Lands and the National Land Commission appear as the 1st, 2nd and 4th defendants respectively. That as there is no dispute that the suit property in Mombasa ELC No. 103 of 2009 was the same as the subject matter in this suit, the addition of the 1st, 2nd and 4th defendants herein does not make this suit any different from the previous one. As pointed out in the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & Another [supra]*,

“ ... Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of *res judicata*. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”

The issue of compensation of the suit land having been previously raised and determined by this court, which undoubtedly is a court of competent jurisdiction, in Mombasa ELC No. 103 of 2009 means that same issue being raised in the instant suit ie *res judicata*. It matters not that the amount of compensation sought in the previous suit and in this suit are different, or



that one party in the previous suit is not a party in the current one, or that three other new parties have been joined as the 1st, 2nd and 4th defendants in this suit. The preliminary objection therefore has merit.

- h. That the court having found merit in the preliminary objection, and as under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya costs follow the events unless for good cause otherwise ordered, I award the defendants the costs.
5. From the foregoing, the court finds merit in the defendants preliminary objection and orders as follows:
- a. That the defendants' preliminary objection dated the 4th April 2023 on re judicata is hereby upheld.
 - b. That the plaintiff's suit commenced through the plaint dated the 4th June 2021 be and is hereby struck out with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JANUARY 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : Mr. Kilonzo for Odunga.

DEFENDANTS: M/s Lenjo for Ambetsa for 1st to 3rd Defendants.

WILSON – COURT ASSISTANT.

S. M.Kibunja, J.

