



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**CIVIL CASE NO 284 OF 2015**  
**PENGUIN HOLDINGS LIMITED.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**IDD IBRAHIM.....1<sup>ST</sup> DEFENDANT**  
**YUSUF NEVU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff in the Plaint dated 3<sup>rd</sup> November, 2015 prays for judgment against the Defendants for the following orders:

**a) THAT judgment entered by this Court in HCCC NO.328 of 2010 on the 8<sup>th</sup> February 2013 in favour of Iddi Ibrahim and Yusuf Nevi, vesting in them through Adverse Possession property known as plot No.885 (Section VI and 288 Section V) comprised in Title No.3591 located in Mazeras area, be set aside.**

**b) A declaration that the judgment referred to in (a) above was procured by Iddi Ibrahim and Yusuf Nevi through unorthodox method including, albeit not limited to fraud, misrepresentation and improper presentation of pertinent material facts to the Court pursuant to which the judgment of 8<sup>th</sup> February 2013 was obtained.**

**c) A declaration that the Plaintiff herein, Penguin Holdings Limited, is the absolute and indefeasible registered proprietor as Grantee from the Government of Kenya of property known as MN/V/2427, CR 527222 being a portion of property previously registered as Plot No.885 (Section VI and 288 Section V) CR 3591, which by operation of law, escheated to the Government of Kenya.**

**d) Costs of this Suit together with interest thereon.**

2. In their statement of defence dated 1<sup>st</sup> February 2016 the Defendants have denied the Plaintiff's claim and aver that this Honourable Court lacks jurisdiction to try this matter by virtue of Section 7 of the Civil Procedure Act as the matter is *Res Judicata*, the same having been heard and finally determined in **HCCC No.328 of 2010**. The interested parties in their statement of defence dated 14<sup>th</sup> June 2017 also deny the Plaintiff's claim.

3. By a Notice of Motion dated 10<sup>th</sup> March 2016 and which is the subject of this ruling, the Defendants seek an order that the Suit as against the Defendants be struck out on the main ground that the same is an

abuse of the Court process by virtue of the Suit being *res Judicata* as the Court in **HCCC No.328 of 2010** entered a judgment vesting the land in question on the Defendants and an Application made by the Plaintiff in that Suit seeking for orders to set aside the judgment of the Court was dismissed. The Defendants aver that the Suit is an afterthought and is aimed at circumventing a decree of the Court in **HCCC No.328 of 2010(OS)**. The Application is supported by the Affidavit of Yusuf Nevi, the 2<sup>nd</sup> Defendant sworn on 10<sup>th</sup> March 2016. Briefly, the Defendants state that they filed a representative Suit being **HCCC No.328 of 2010 (OS)** for Adverse Possession against Ainsley Leverrai Dopwell in which judgment was entered on 8<sup>th</sup> February 2013 by the Honourable Lady Justice Odero and a decree was issued on 15<sup>th</sup> February 2013. That the Plaintiff herein filed an Application in that Suit seeking to be enjoined as an Interested Party and to set aside the judgment, an Application which was dismissed via a ruling of the Court on grounds that the Plaintiff's purported title of the Suit Property was acquired unprocedurally and during the pendency of that Suit. It is the Defendants contention that this Suit is *res judicata* by virtue of the issues having been heard and determined in **HCCC No.328 of 2010** and the same addressed in the ruling dated 20<sup>th</sup> November 2014, and that it is an abuse of the Court Process as the Plaintiff is seeking to revisit a matter that has already been settled. The Defendants aver that it is in the interests of justice that litigation must come to an end.

4. The Application is opposed by the Plaintiff through a Replying Affidavit of Abdulhakim Abdalla the Plaintiff's Managing Director sworn on the 10th November, 2016 and grounds of opposition dated 24<sup>th</sup> October 2016. It is the Plaintiff's contention that the Application is incompetent and fatally defective as it is not brought under the correct provisions of the law. The Plaintiff avers that the current Suit is based on fraud and not a claim for Adverse Possession as it was the case in **HCCC No.328 of 2010 (OS)**. The Plaintiff further states that they were not parties in High Court **Civil case No.328 of 2010 (OS)** as their attempt to join the proceedings in that case was declined by the Court. It is the Plaintiff's contention therefore that this suit is not *res judicata*.

5. When the Application came up before me for hearing on 20<sup>th</sup> June 2017, Counsel agreed to file Written Submissions which submissions were duly filed, the 2<sup>nd</sup> Defendant having filed his on 5<sup>th</sup> July 2017 and the Plaintiff on 28<sup>th</sup> August 2017. The Interested Parties filed theirs on 10<sup>th</sup> July 2017 in which they basically adopted the 2<sup>nd</sup> Defendant's submissions in totality.

6. I have considered the Application, the Affidavits filed in support and in opposition to the Application. I have also considered all the annexures exhibited by the parties as well as the pleadings, the submissions and authorities cited in support and in opposition to the Application. The Plaintiffs in the High Court at Mombasa **Civil Application No.328 of 2010 (OS)** were **IDDI IBRAHIM and YUSUF NEVI** suing on behalf of all the 127 members of the Mabirikani Village Land Committee while the Defendants were Ainsley Leveratt Dopwell and Municipal Council of Mombasa. After hearing the parties, the High Court, (Odero J) on February 2013 entered judgment in favour of the Plaintiffs vesting in them through Adverse Possession the Suit Land which, according to the decree issued on 15<sup>th</sup> February 2013 comprised title **No.3590 and 3591 sub division Number 885 Section V Mainland North** and **subdivision Number 288 Section V Mainland North at Mazaras, Mombasa District.**

7. The Plaintiff filed an Application in **HCCC No.318 of 2010(OS)** by way of Notice of Motion dated 10<sup>th</sup> September 2013 seeking *inter alia* the following orders:

**"1. THAT there be a stay of the judgment of 8<sup>th</sup> February, 2013 entered by the Honourable Lady Justice Odero and a subsequent decree dated 15<sup>th</sup> February, 2013 pending the hearing and determination of this Application.**

**2. THAT the Applicant Penguin Holdings Limited be enjoined as a Defendant for the better and determination of all the issues in this matter**

**3. THAT the judgment of 8<sup>th</sup> February, 2013 and Decree dated 15<sup>th</sup> February, 2013 and all consequential orders be set aside."**

8. After considering the submissions made by Counsel for the parties and the materials placed before the Court, the Honourable Judge dismissed the said Application.

9. The law pertaining to the doctrine of *res judicata* is captured under the provisions of Section 7 of the Civil Procedure Act which states:

**“7 No Court shall try any suit or issue in which the matter is 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.”**

Section 28 of the Environment and Land Court 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.

10. The essential ingredients of the doctrine of *res judicata* have been expounded in many cases. See, for example, ***Bernard Mugo Ndegwa –vs- James Nderitu Githae and 2 others (2010)eKLR, Nancy Mwangi T/A Worthlin Marketers –vs- Airtel Networks (K) Ltd. (Formerly Celtel Kenya Ltd) and 2 other (2014)eKLR, Kamunye & others –vs- Pioneer General Assurance Society Ltd (1971) EA 263, John Florence Maritime Services Ltd & another vs- Cabinet Secretary for Transport and Infrastructure & 3 others (2015)eKLR and MWK –vs AMW (2016)eKLR.*** These ingredients are:

*1) Whether there was previous litigation in which identical claims were raised or in which identical claims could have been raised; 2) Whether the parties in the present suit are the same as those who litigated in the original claim; 3) whether the Court which determined the original claim had jurisdiction to determine the claim; 4) whether the original action received a final judgment on the merits.*

There is also no doubt that the principle applies to Applications with the same force whether the Application be final or interlocutory.

11. I have already outlined the prayer sought in the Plaint herein as well as the orders sought by the Plaintiff in the Notice of Motion dated 10<sup>th</sup> September 2013 in **HCC NO.328 of 2010 (OS)**. In both the Notice of Motion and this Suit, the Plaintiff is seeking to set aside the judgment entered by the Court in **HCC No.328 (OS)**. In the Application in **HCC No.328 of 2010 (OS)**, the Plaintiff was also seeking to be enjoined as a Defendant in that Suit for the better and just determination of all the issues in that matter. As already stated, the Court dismissed the Plaintiff's Application in **HCCC No.328 of 2010 (OS)** and declined to set aside the judgment or enjoin the Plaintiff. Among the reasons the Court gave in dismissing the Plaintiff's Application in **the HCCC NO.328 of 2010 (OS)** are that the Court was *“functus officio”* and that notice of that suit was published in the Standard Newspaper, a newspaper of wide circulation and it was incumbent upon the Plaintiff to have gone to Court upon seeing the Notice and to seek to be enjoined if indeed it had an interest in the Suit Land. The Court did not make a finding on the legality or otherwise of the title held by the Plaintiff and stated that, that duty lies with the Environment and Land Court. In this Suit, the Plaintiff is also seeking a declaration that the Plaintiff is the registered proprietor of the Suit Property. In my view, these are issues that were never canvassed in **HCCC NO.328 of 2010 (OS)** and indeed the learned Judge in her ruling left it for determination in this Court.

12. The parties in **HCCC NO.328 of 2010 (OS)** were **IDD IBRAHIM AND YUSUF NEVI (suing on behalf of 127 members of Mabirikani village committee) –vs- AINSLEY LEVERATT DOPWELL AND MUNICIPAL COUNCIL OF MOMBASA**. The Application by Penguin Holdings Ltd to be enjoined as a Defendant was unsuccessful, hence never became a party in that suit.

13. From the ingredients of *res judicata* restated above, it is clear that the claim in **HCCC NO.328 of 2010 (OS)** was not identical with the present case. It is clear also that the parties in the present case are not the same ones who litigated in **HCCC NO.328 of 2010 (OS)**. Additionally, it is undisputable that the

Court in **HCCC NO.329 of 2010 (OS)** expressly stated that it had no jurisdiction to determine the Plaintiff's claim, hence the issues raised in this Suit did not receive a final judgment on merits. A suit will only be deemed to be barred by *res judicata* when it has been heard and determined on the substantive merits of the case.

14. By reason of the foregoing I find that the present suit is not barred by the plea for *res judicata* as there has been no determination of the claim between the parties on merits. It will not be struck out as prayed for by the Defendants. The upshot is that the Defendants Application dated 10<sup>th</sup> March 2016 is dismissed with costs to the Plaintiff.

**Ruling dated, signed and delivered at Mombasa this 2<sup>nd</sup> day of November 2017**

**C. YANO**

**JUDGE**