



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CIVIL SUIT NO 166 OF 2014

MATHIAS DZOMBO JUMAA.....1ST PLAINTIFF

BABU PATRICK DZOMBO.....2ND PLAINTIFF

Suing as the personal representative of the estate of

PATRICK KWESHA DZOMBO (deceased)

VERSUS

CRISPIN MWANGOLO SANGA.....1ST DEFENDANT

LAND REGISTRAR KILIFI.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The Plaintiffs, Mathias Dzombo Jumaa and Rabu Patrick Dzombo, suing as the personal representatives of the estate of Patrick Kwesha Dzombo (deceased) sued the 3 defendants, Crispin Mwangolo Sanga, Land Registrar, Kilifi and the Attorney General seeking various reliefs as appears in the plaint dated 26th June 2014. The 1st Defendant filed his defence dated 12th November 2014 in which he denies Plaintiffs' claim and averred, *inter alia* that the Plaintiffs suit is fatally defective and misconceived as it raises similar and/or same issues that are before Court in **Miscellaneous Application No. JR 26 of 2011** and further that the Suit was time barred by dint of the provisions of Section 22 of the Limitation of Actions Act. The 1st Defendant hinted that on those grounds he would raise a preliminary objection to have the entire suit struck out. On 27th July 2016, the 1st Defendant filed a Notice of Preliminary Objection in which he raised objection against the Plaintiffs' suit for the reasons that the suit is *res judicata* as the suit raises similar and/or same issues that were determined by the Court in Mombasa High Court **Miscellaneous Application No.26 of 2011 (JR)** and that the suit was filed in contravention of the provisions of Section 22 (iii) of the Limitation of Actions Act, Cap 22 Laws of Kenya. He prayed that the Plaintiffs' suit be struck out with costs.

2. On 9th May 2017 directions were granted that the Preliminary Objection be canvassed by way of Written Submissions. The 1st Defendant filed his submissions on 4th July, 2017 while the Plaintiff' filed theirs on 10th July 2017. In his submissions, the 1st Defendant has submitted that the Plaintiffs have in paragraph 17 of the Plaint admitted the existence of **Judicial Review No.26 of 2011** and the proceedings

before the Land Disputes Tribunal between the parties herein and over the same subject matter. He has submitted that the Plaintiffs having elected to file a complaint against the 1st Defendant before the Chonyi Land Disputes Tribunal in Kilifi RMC Land Case No.2 of 2001 which was later concluded in **Miscellaneous Application No.26 of 2011 (JR)**, they cannot again purport to file a fresh suit over the same subject matter. He further submitted that the Plaintiffs suit is an attempt to circumvent the mandatory provisions of the Land Adjudication Act, Cap 284 Laws of Kenya which prohibits courts from hearing or determining disputes arising from an Adjudication process. In addition, the 1st defendant has submitted that the Plaintiffs claim is time barred, the same having been filed after the expiry of twelve years after the alleged cause of action arose. The 1st Defendant's submission is that the entire suit is bad in law and fatally defective and urged the Court to have it struck out with costs.

3. On their part, the Plaintiffs have submitted that the decision of the Court in Mombasa High Court **Miscellaneous Application No. 26 of 2011 (JR)** did not determine the issue of ownership of the Suit Property and that the Court actually directed the interested party to file a case for that purpose before the Environment and Land Court. They therefore submitted that the suit herein is not *res judicata* as the issues before Court were not determined in the Judicial Review case. Regarding the 1st Defendant's objection that the suit is caught up by limitation of time, the Plaintiffs have submitted that the same is not a pure point of law as it would require the Court to investigate on evidence as to when the cause of action arose and this would constitute a mini trial. They relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors Ltd**. Further, the Plaintiffs submitted that the issues at hand are weighty since the case concerns a dispute of ownership of land between brothers and it would be draconian for the Court to strike out the entire suit on a technicality. They cited the provisions of Article 159 of the Constitution and urged the Court to dismiss the Preliminary Objection with costs.

4. I have considered the rival submissions filed and the authorities placed before me. In his submissions, the 1st Defendant states that these proceedings are *res judicata*. Sections 5 and 7 of the Civil Procedure Act provided as follows:

5 Any Court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

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 a 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.

5. 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 issue previously and finally determined by any court of competent jurisdiction.

6. The essential ingredients of the doctrine of *res judicata* have been expounded in many cases. See for example, **Bernard Mugo Ndegwa -v- James Nderitu Githae & 2 Others (2010) eKLR**, **Nancy Mwanig t/a Worthlin Marketers -v- Airtel Network (K) Ltd (formerly Celtel Kenya Ltd) & 2 Others (2014)eKLR**, **Kamunye & Others -v- Pioneer General Assurance Society Ltd (1971) EA 263**, **John Florence Maritime Services Ltd & Another -v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015)eKLR** and **MWK -v- 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

It has also been stated that the principle applies to Applications with the same force whether the application be final or interlocutory.

7. In his ruling in **Garden Square Ltd –v- Kogo & Another (2002) KLR 1695**, Ringera, J (as he then was) said that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the decision of the then Court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Ltd –v- West End Distributors Ltd (1969)EA 696** in which Sir Charles Newbold, the president of that Court stated:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the otherside are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by ways of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

8. The Preliminary Objection by the 1st Defendant is mainly that the suit is res judicata and that the same is time barred by virtue of the Limitation of Actions Act. I have perused the pleadings and the documents filed herein. In the Judgment in Mombasa High Court **Misc. Civil Application No.26 of 2011**, the court, (Mureithi, J) after considering the matter in paragraph 28 stated that the interested party is at liberty to move the Environment and Land Court for a determination of his interest, if any, in the suit property. It is clear therefore that the High Court did not make a finding on the issue of the Plaintiffs interest or otherwise and stated that the duty lies with Environment and Land Court. In my view, the issues in this suit were never canvassed and determined to conclusion in **Misc. Civil Application No.26 of 2011**, and indeed the learned Judge in his judgment left it for determination in this Court. It is undisputable that the Court in **Misc. Civil Application No.26 of 2011** expressly stated that it would not determine the Plaintiffs 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. 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.

9. The other ground of the 1st Defendant’s preliminary objection is on limitation of time. In his submissions, the 1st Defendant has submitted that it is clear that the cause of action arose in 1972. In my view, this is a matter of fact that requires to be proved in evidence. I agree with the Plaintiffs submissions that the Court cannot properly make a finding on whether the suit is caught by limitation of time unless it investigates on evidence when the cause of action arose. The moment a Court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. In my view, this cannot be regarded as a pure point of law as it requires investigations of some facts. Instead, these are matters that are fit and proper for arguments in the substantive suit.

10. For the foregoing reasons, I am inclined to dismiss the preliminary objection and decline to dismiss the suit in limine as requested by the 1st Defendant. The Plaintiffs shall have costs.

Ruling dated, signed and delivered at Mombasa this 4th day of December 2017

C. YANO

JUDGE