



Durham (Suing as the Legal Representative of the Estate of the Late Reuben Mutuku Kiva - Deceased) v Mutuku & 5 others (Environment & Land Case E001 of 2023) [2024] KEELC 677 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E001 OF 2023
CA OCHIENG, J
FEBRUARY 15, 2024**

BETWEEN

ELEANOR MUTUKU DURHAM (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE REUBEN MUTUKU KIVA - DECEASED) PLAINTIFF

AND

**JUSTUS KAVITA MUTUKU 1ST DEFENDANT
MAKERRYL COMPANY LIMITED 2ND DEFENDANT
EVEREDY CONCRETE LIMITED 3RD DEFENDANT
MACHAKOS COUNTY LAND REGISTRAR 4TH DEFENDANT
DIRECTOR OF SURVEYS KENYA 5TH DEFENDANT
OFFICE OF THE ATTORNEY GENERAL 6TH DEFENDANT**

RULING

1. What is before Court for determination are two Notices of Preliminary Objection filed by the 1st and 2nd & 3rd Defendants respectively, all dated the 26th July, 2023. The said Notices of Preliminary Objection are premised on similar grounds wherein they claim the instant suit and Notice of Motion Application dated the 5th July, 2023 should be dismissed as they amount to an abuse of the court process since there have been several suits in respect to the suit land. Further, that this suit is statute barred by dint of the [Limitation of Actions Act](#).
2. The Plaintiff opposed the two instant Notices of Preliminary Objection by filing a Replying Affidavit where she confirms that she had filed a similar Application seeking injunctive orders in Machakos ELC Case No. 38 of 2023 in response to which the Defendant also filed a Notice of Preliminary Objection



but she subsequently filed a Notice of Withdrawal of Suit dated the 30th May, 2023 that was adopted in court on 4th July, 2023. She explains that there is pending at the Machakos High Court Succession Cause No. 39 of 2016 In the Matter of the Estate of the Late Reuben Mutuku Kiva, where she had filed Summons dated the 30th October, 2020 seeking injunctive orders amongst other reliefs, but the court dismissed her Application on a technicality and ordered her to file her claim at the Environment and Land Court. She referred to the Learned Judge's Ruling and argued that from the holding by the Judge in the aforementioned Succession Cause, the issues of the trespass and illegalities committed by the Defendants' in respect to the suit land were never heard substantively but dismissed on a technicality by the court essentially for want of jurisdiction hence the issues being raised herein were not fully heard as well as determined by a competent court. She reiterates that Machakos ELC Case No. 38 of 2023 and the Summons dated 30th October, 2020 filed in Succession Cause No. 39 of 2016 were not substantially heard on merit. She sought for the two Notices of Preliminary Objection to be dismissed with costs.

3. The two Notices of Preliminary Objection were canvassed by way of written submissions but the same was only filed by the 2nd and 3rd Defendants.

Analysis and Determination

4. Upon consideration of the two Notices of Preliminary Objection both dated the 26th July, 2023, Plaintiff's Replying Affidavit and parties' submissions, the issue for determination is whether this suit including the Notice of Motion Application dated the 5th July, 2023 should be dismissed with costs.
5. The 2nd and 3rd Defendants in their submissions reiterated their averments as per their Notice of Preliminary Objection and contended that this suit is an abuse of the court process. They further submitted that this suit is statute barred by dint of Section 26 of the *Limitation of Actions Act* as well as res judicata. To support their arguments, they relied on the following decisions: *Satya Bhama Gandhi v The Director of Public Prosecutions & 3 Others* (2018) eKLR; *Iga v Makerere University* (1972) EA; *Bosire Ongero v Royal Media Services* (2015) eKLR; *Edward Moonge Lengusuranga v James Lanaiyara & Another* (2019) eKLR; *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR; *The Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR and *Lotta v Tanaki* (2003) 2 EA 556.
6. In the Plaint dated the 5th July, 2023, the Plaintiff sought for the following Orders:-
 1. A declaration order that the transfer of the parcel of land Machakos/Nguluni/811 from the name of Reuben Mutuku Kiva (deceased) to the Defendant and its subsequent sub-division to title deeds Nos. Machakos/Nguluni/3881 and 3882 was and/or is illegal and therefore null and void.
 2. An order for cancellation directing the 4th and 5th Defendants to cancel title deeds Machakos/Nguluni/3881 and 3882 registered in the name of the 2nd Defendant and directing that the title deeds to revert to land title deeds No. Machakos/Nguluni/811 to be registered in the name of the deceased Reuben Mutuku Kiva.
 3. An order of eviction of the 2nd and 3rd Defendants and demolition of any illegal structures in the suit properties.
 4. A permanent injunction restraining the 2nd and 3rd Defendants, their agents, servants and employees from entering, remaining or developing or in any way interfering with the parcels of land known as Machakos/Nguluni/3881 and 3882 (formerly Machakos/Nguluni/811).
 5. Damages for trespass.



6. Costs of the suit.
7. Any further or other relief this court may deem just to grant.
7. On raising of a Preliminary Objection, the Court in *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696 held that:-

"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 other side 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 way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

As to whether this suit is res judicata.

8. The doctrine of res judicata is set out in the [Civil Procedure Act](#) at Section 7 that stipulates thus:-

"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 can 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."

9. The [Civil Procedure Act](#) provides explanations with respect to the application of the res judicata rule. Explanations 1-6 states thus:

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."

10. In Mulla, [Code of Civil Procedure](#), 18th Ed 2012 at page 293, it describes the doctrine res judicata as follows:

"The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction



is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

11. In the Supreme Court of Kenya case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), they held that:-

“Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Gitbae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

12. On the claim that the dispute herein had been determined in the aforementioned succession cause, I note in the impugned Ruling by Justice Odunga (as he then was), he held that:

“It is clear, whether lawfully or not, that the property is now registered in the name of the company. The process through which that registration was effected will need to be investigated since the company is not a beneficiary to the Estate of the deceased herein... In my view, the issues regarding the manner in which the Interested Parties acquired the said properties ought to be properly dealt with by the Environment and Land Court.”

13. From this excerpt alone, I opine that it is actually Justice Odunga, (as he then was) while dealing with the Summons dated the 30th October, 2020 filed in aforementioned Succession Cause No. 39 of 2016, that directed that this matter be filed in ELC because of lack jurisdiction. Since the Machakos ELC Case No. 38 of 2023 was withdrawn while Justice Odunga (as he then was) directed in his decision on the Summons dated 30th October, 2020 filed in Succession Cause No. 39 of 2016, that the issues therein were to be filed in the ELC, I find that the two matters were not substantially heard on merit as claimed by the 1st to 3rd Defendants. In the circumstances, while relying on the legal provisions I have quoted and decision cited, I find that this suit and Notice of Motion Application dated 26th July, 2023 are not res judicata.

As to whether the suit is statute barred.

14. The Defendants have claimed this suit is statute barred. Section 26 of the *Limitation of Actions Act* provides that:-

Where, in the case of an action for which a period of limitation is prescribed, either—

- a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- b. the right of action is concealed by the fraud of any such person as aforesaid; or
- c. the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.” Emphasis mine



15. I note the disputed land belonged to a deceased person's estate and succession proceedings being Machakos High Court Succession Cause No. 39 of 2016 In the matter of the estate of the late Reuben Mutuku Kiva (deceased) is still pending. Further, there are allegations of fraud raised in the Plaint and the period of limitation does not begin to run until the Plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. It is trite that where allegations of fraud are raised, it requires parties to present oral evidence before the same can be determined. I hence disagree with the 1st to 3rd Defendants that this suit is statute barred.
16. As to whether the Plaintiff lacks locus standi to institute this suit, I note the Plaintiff was issued with Letters of Administration Ad Litem on 14th June, 2023 in the aforementioned succession cause, permitting her to file and prosecute a suit.
17. From the court record it is evident that the Defendants though duly served did not file any Defence to controvert the Plaintiff's averments but the 1st, 2nd and 3rd Defendants opted to file the instant two Notices of Preliminary Objection. In the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the Court held that:-

"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained." Emphasis Mine
18. I note the Plaintiff has raised issues of fraud including illegality in acquisition of title in her Plaint as well as trespass to land. Further, from the Plaint it is evident the root of the title in dispute emanated from a deceased person's estate. The Defendants on the other hand did not rebut the Plaintiff's averments. It is trite that where a Defendant fails to file a Defence expressly rebutting the Plaintiff's averments, the claim remains unopposed.
19. From the foregoing while associating myself with the decisions cited, I will decline to find that this suit is statute barred or res judicata as claimed. In my view, the Defendants should have filed a Defence first to controvert the Plaintiff's averments before lodging their Notices of Preliminary Objection.
20. In the circumstance, I find the two Notices of Preliminary Objections dated the 26th July, 2023 respectively premature and will disallow them.
21. I direct the Defendants to file and serve their Statements of Defence within twenty - one (21) days from the date hereof.
22. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

