



**Franceso v Mbugua & another (Environment & Land Case
E019 of 2023) [2024] KEELC 738 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E019 OF 2023
EK MAKORI, J
FEBRUARY 14, 2024**

BETWEEN

MANCA FRANCESCO PLAINTIFF

AND

AGNES WANJIRU MBUGUA 1ST DEFENDANT

MARY WAITHERA 2ND DEFENDANT

RULING

1. Application dated 21st of March 2023 sought the following orders:
 - a. Spent.
 - b. Injunctive orders issue directed to the defendants or their agents or servants from alienating, sud-dividing, renovating, demolishing, walls and or floors of their rooms, collecting monthly rent from any of the tenants in respect to the premises erected on Plot No. 1074 at Watamu (Orig. 21/23) Watamu till the current application is heard and determined.
 - c. The respondents be restrained from entry and exit of Plot No. 1074 at Watamu (Orig. 21/23) Watamu, till the current application is heard and determined.
 - d. BPRT Case No. E041 of 2023 filed by the defendants be stayed pending the hearing and determination of this suit.
 - e. That costs be provided
2. The application was opposed with notice of Preliminary Objection filed and dated on 11th April 2023 and a replying affidavit sworn by one Mary Muthoni Waithera and filed on 26th April 2023.
3. The Court directed the parties to canvass the application and the Preliminary Objection through written submissions.



4. In the Preliminary Objection, dated 11th April 2023 opposing the applicant's application and the entire suit, the respondent raised the issue of res judicata, that the current suit is similar in all respects with the Malindi CMCC No. 35 of 2011. In the former suit, the applicant is alleged to have litigated with the husband of the 1st respondent Mr. Manganelli Roberto leading to a consent filed and adopted by the Court altering and settling the issue of ownership over the suit property. The issue of ownership was said to have been fully settled by the said consent judgment. The respondents have cited the case of *E.T v Attorney General & Another* [2001] eKLR, which cited with approval several other authorities in this realm, on the elements of *res judicata*.
5. On the Preliminary Objection, the applicant is of the view that the issue of ownership was not settled since currently he is the duly registered owner of the suit property having bought it from Mr. Ali Suleiman Ali on 29th October 2013, paid the decretal sum in instalments, completing the purchase and acquiring title on 26th of August 2013.
6. The applicant asserted that the respondents are masquerading as landlords without ownership documents and they need to be injected and stopped from receiving rent from the tenants now in the occupation of the suit property. The BPRT Case they have filed ought to be stayed pending the determination of this suit. The respondents were his tenants and have no colour of right taking rent from other tenants taking advantage of the applicant's old age and being a foreigner, a practice rampant within Malindi which ought to be stopped.
7. The applicant avowed that stemming from the forgoing the test in *Giella v Cassman Brown & Company Limited* [1973] EA 360 has been achieved to warrant the issuance of an injunction to avoid hardship visited on him since this is the only property earning him an income to afford him paying monthly bills and food as well as medical expenses at his old age.
8. The respondents are of the view that as stated above in the Objection raised, the suit property is owned by the husband of the 1st respondent, who permitted her to rent it out and is now being managed by her sister the 2nd respondent. It is already rented out, hence if any injunction is to be issued it will incline to deprive the respondents of the right to own property the 1st respondent's husband having purchased it from the applicant vide sale agreement dated 22nd February 2010 and therefore has been in constructive ownership of the property for a decade or so and to issue an injunction at this stage will mean the deprivation of ownership of property by dint of Section 40 of the *Constitution*. The applicant has not achieved the test for issuance of an injunction as laid in the *Giella Case (supra)*.
9. From the materials and submissions placed before me the issues to determine are whether the Preliminary Objection is sustainable by operations of the doctrine of res judicata and whether if the foregoing is ruled in the negative the application for an injunction is maintainable.
10. A Preliminary Objection as held in *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] EA 696: where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, consists of:

Law, J.A. :

“ So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the Court or a plea of limitation or submission that the



parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“ 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.”

11. The Court of Appeal in [Nitin Properties Ltd v Singh Kalsi & Another](#) [1995] eKLR also captured the legal principle when it stated as follows:

“ A Preliminary Objection 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.”

12. The point of law raised is that the current matter is similar to the former suit which is Malindi CMCC No. 35 of 2011. It is alleged that the former suit resolved the issue of ownership in favour of the husband of the 1st respondent.

13. As correctly stated by the respondents, res judicata is a doctrine based on the principles that if a suit has been heard and issues fully and finally settled, the reopening of another matter on the same issues is untenable because litigation has to come to an end in one way or another. It saves costs to parties and lessens the rigmaroles of seeking redress in our justice system. It abhors abuse of the Court process by decreeing that litigation replays over and over again on already litigated and settled issues and has to be halted by the Courts once raised and proven - see the case of [E.T v Attorney General & Another](#) [2001] eKLR:

“The rationale behind the said doctrine of res judicata and issue estoppel is that if the controversy in issue is finally settled or determined or decided by the court, it cannot be reopened. The rule of res-judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause.

52. The general principle of res-judicata is captured in section 7 of the [Civil Procedure Act](#) which provides that:-

7. 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.

53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom



they or any of them claim, litigating under the same title (see the case of *Karia and Another v The Attorney General and Others* [2005] 1 EA 83, 89).”

14. The consent adopted by the Court in Malindi CMCC No. 35 of 2011 was between the applicant and the husband of the 1st respondent, with several clauses that were self-regulating in nature with default clauses attached if any of the parties failed to comply.
15. As at the filing of this suit, the husband of the 1st respondent has not been romped in this matter. The plaintiff has title to the suit property which he claims to have gotten through the purchase of the said property from one Ali Suleiman Ali in the year 2013, paying the purchase price in instalments until 2015 when he cleared the same and was duly registered the owner of the property. He holds the title to date.
16. The respondents on the other hand craved that the former suit Malindi CMCC No. 35 of 2011 passed constructive ownership to the husband of the 1st respondent, hence the right to rent it out under the authority of the said owner .
17. For an injunction to be attained as held in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA 360, the following threshold has to be surmounted:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”
18. Firstly, this Court has to check whether the applicant had established a *prima facie* case with the probability of success as held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125:

“A *prima facie* case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”
19. And that the principles stated in the *Giella case (supra)* are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd Afraba Education Society* [2001] 1 EA 86 as cited in *Karen Bypass Estate Ltd v Print Avenue and Company Ltd* [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed”.
20. After considering the materials before me. I could not establish the ‘real’ owner of the suit property. The literature we have on ownership takes us back to Malindi CMCC No. 35 of 2011, each of the parties here, lays claim over the property with the plaintiff alleging he is currently the registered owner. At the same time, the defendants claimed that the property belonged to the husband of the 1st defendant by means of purchase in an agreement with the applicant dated 22nd February 2010 and the issue had been litigated in Malindi CMCC No. 35 of 2011. As indicated earlier there were a raft of performances to be effected by the parties to fulfill the consent judgment in that case. Mr. Manganelli Roberto who litigated with the applicant has not been joined in this suit to tell us whether he fulfilled his part of the bargain. The applicant has now the title to the property, another 3rd party has been introduced in the name of Ali Suleiman Ali as the one who owned the property and sold it to the applicant. This is quite a different detour from the allegations by the respondents who claimed that the



suit property was subject to Malindi CMCC No. 35 of 2011. Are we talking about the same property? Was it that Mr. Manganelli Roberto failed to fulfill his part which is why the applicant proceeded and obtained title to the suit property? Is the fraud in the acquisition of the title by the applicant alleged real given the introduction of another 3rd party? From the averment of the parties, the Court could not ascertain the extent of execution of the decree in the aforementioned case. There is also the allegation that if the plaintiff holds the title deed, it must have been through fraud. That then brings me to the conclusion that the issues obtained here were not the same as those litigated in the year 2011 since I see mutation of the suit property and mention of other 3rd parties who never litigated in the former suit.

21. A hearing on merit will be necessary. At this point, I need not discuss the other yardsticks enunciated in the *Giella Case (supra)*, the application for an injunction and the Preliminary Objection are both dismissed, and each party is to bear own costs at this point.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 14TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the presence of:-

Mr. Sausi for the Applicant

Mr. Matini for the Respondent.

Court Assistant: Happy

