Matolo v Attorney General & 2 others (Civil Appeal 422 of 2018)
[2024] KECA 1425 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1425 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 422 OF 2018

DK MUSINGA, MSA MAKHANDIA & S OLE KANTAI, JJA

OCTOBER 11, 2024

BETWEEN

ROBERT MULI MATOLO ..... APPELLANT

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

PETER NZESYA MAITHYA ..... 2ND RESPONDENT

ROBERT MUTHIANI VULI ..... 3RD RESPONDENT

(Being an appeal from the whole of the ruling of the Environment and Land Court at Makueni (Mbogo, J.) dated 29th November 2017 in ELC Case No. of 2017 now Machakos ELC Case No. 196 of 2018)

JUDGMENT

1. The appellant, by way of a plaint dated 18th February 2013, sued the respondents in the Environment and Land Court, ("ELC") at Nairobi as the Administrators of the Estate of the late Philip Kilonzo Moki by virtue of a grant of letters of administration issued by the High Court at Machakos. The late Philip Moki Matolo was the eldest son of the late Moki Matolo, who died in l976 and was the registered owner of Plot No. 803 Kivani Adjudication Area, from which Plot No. 1000 Kivani Adjudication section was illegally excised. When Philip Moki Matolo died intestate, he left behind 3 widows and 13 children. The appellant alleged that according to Kamba Customary Law, the property of the deceased became vested in the brothers of the deceased, Wallace Mutungwa Matolo, Wilfred Kivanga Matolo and Isika Matolo, and or in his eldest son. Prior to his death, the late Moki Matolo had not subdivided the property amongst his 3 wives as required by Kamba Customary Law, which onus now fell upon his 3 surviving brothers and or his eldest son to protect and preserve the property until subdivision is undertaken amongst the 3 wives and their children.

2. The appellant further averred that sometime in September 1976, Mrs. Ndinda Moki, one of the late Moki Matolo's wives, without any reference to the 3 surviving brothers of the late Moki Matolo and or the eldest son, and their consent, allegedly sold a portion thereof to the 2nd respondent. Upon purchasing the portion, the 2nd respondent, in 1978, secretly and fraudulently, with total misrepresentation and undue influence, curved out a portion of the land and had it registered in his name and now known as LR No. Makueni/Kivani/1000 ("the suit property"). The appellant thus prayed for a permanent injunction restraining the 2nd and 3rd respondents from dealing with the suit property in any way. Secondly, the eviction of the said respondents from the suit property with the aid of the Kenya Police Service. Lastly, an order directing the 1st respondent's officer namely, the Chief Land Registrar, to cancel the title deed to the suit property registered in the name of the 2nd respondent and have the records regularized to reflect the position before the issuance of the title deed, general damages against the 2nd and 3rd respondents jointly and severally for trespass and loss of use of the suit property.

3. The suit was defended by the respondents. According to the 1st respondent, the court had no jurisdiction to entertain the suit. That in any event, if adjudication took place, it was carried out in accordance with the law.

4. The 2nd and 3rd respondents on their part denied the appellant's allegations as contained in the plaint and stated that Philip Kilonzo Moki was never the personal representative of the Estate of the late Moki Matolo and therefore the suit had no basis. They disputed the jurisdiction of the trial court to entertain the suit as he had not exhausted the appellate process under the *Land Adjudication Act*. It was averred that the register in respect of the suit property had not been declared final, and no consent of the Land Adjudication Officer had been obtained before filing the suit in accordance with section 30 of the *Land Adjudication Act*, and that being the case, the suit was null and void and should be dismissed.

5. The 2nd and 3rd respondents subsequently filed notices of preliminary objection dated 10th April, 2013 and 10th March, 2014 respectively. The one dated 10th March 2014 was the one that was argued by the parties and it was in the following terms: that the appellant had no locus standi to file the suit in respect of the Estate of Moki Matolo; he had no Letters of Administration to the Estate of the late Isika Matolo, Wallace Matolo and Kivanga Matolo; the suit is time-barred since the cause of action is alleged to have taken place in 1976, 36 years ago; the suit is res judicata because High Court Civil Case No. 599 of 2013 which was decided on 21st February 2014 was on the same subject matter, same parties and the same issues; there was no consent of the Land Adjudication Officer as provided for by section 30 of the *Land Adjudication Act* to give the court jurisdiction to hear the suit if what the appellant stated was correct that there is still a pending appeal before the Minister of Lands in which he is a party; the suit was filed after the appellant had filed Machakos HCC App. No. 193 of 2012 which was subsequently given HCC No. 599 of 2013 which was determined on 21st February 2014 in which all the issues raised were dealt with; the appellant was a busy body who should not be complaining on behalf of the Estate of Moki Matolo who had no complaint at all; and finally, that all the issues raised were exhaustively dealt with in 1976 through the Land Adjudication process and the same issues cannot be opened after a period of 36 years by the appellant.

6. The court heard the preliminary objection and came to the conclusion thus:

> "I have read the notice of preliminary objection and the submissions filed by the plaintiff's counsel. I have also read the ruling in Nairobi ELC no. 599 of 2013 Robert Muli Matolo vs. Director of Land Adjudication and 2 others. In my view, this suit is res judicata as it is on the same subject matter, same parties and same issues that were decided in ELC no. 599 of 2013. On that ground alone and without considering the other grounds in the notice

of preliminary objection, I hereby strike out the suit with costs to the second and the third defendants."

7. Being aggrieved by the said ruling and order, the appellant has now moved to this Court on appeal on the grounds, inter alia, that the learned Judge erred in law and in fact when: he found that the suit was res judicata in respect of Nairobi ELC No. 599 of 2013 - Robert Muli Matolo vs. Director of Land Adjudication, yet the parties and the subject matter of the two suits were distinct, and that he erred in law and in fact in striking out the suit.

8. The appeal was canvased by way of written submissions with limited oral highlights. During the plenary hearing of the appeal on 1st July 2024, Mr. Kibuki, learned counsel appeared for the appellant, whereas Mr. Kirina appeared for the 1st respondent.

9. Mr. Kibuki submitted that the only issue for determination in the appeal is whether the trial court erred in holding that the suit was res judicata. Relying on the case of Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 69, counsel submitted that the preliminary objections raised did not fall within the perimeters set out in the above authority. That Nairobi ELC 599 of 2013 was never heard and determined on merits. That the court only handled the preliminary issues raised therein and proceeded to strike it out; and that when a suit has been struck out it can be revived by regularizing the issues raised by filing another suit. It therefore means that the issue regarding locus standi was properly before the trial court. Citing the cases of The Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Ltd [2005] KLR 97 and Moses Mbatia & Another vs. Joseph Wamburu Kihara, Murang'a ELC No. 37 of 2020 (UR) he submitted that the court made a grave mistake in striking out the suit on the basis of res judicata since the dispute had never been heard and finalized by any competent court of law.

10. Mr. Kirina, relying on the cases of Accredo AG & 3 others vs. Stefano Uccelli & Another [2019] eKLR, Kenya Commercial Bank Limited vs. Muiri Coffee Estate Limited & Another [2016] eKLR and Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR, submitted that the suit before the ELC was res judicata for it met the criteria outlined in the aforementioned cases in that, the parties were similar in both cases; the dispute involved same subject matter the suit property; that similarly, the issues for determination in both cases were the same. The 1st respondent submitted that the learned Judge in Makueni ELC Case No. 51 of 2017 was correct to strike out the suit, taking into consideration the ruling in Nairobi ELC Case No. 599 of 2013 which had addressed the issues brought before it. Citing the case of Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR, counsel submitted that the foundations of res judicata rest in the public interest for swift, sure, and certain justice.

11. The 2nd respondent through his submissions dated 15th December 2023 equally submitted that the parties in both cases were similar, involved the same subject matter being the suit property, and both cases had the same issues for determination. That the learned Judge therefore did nothing wrong by striking out the suit for being res judicata. Counsel submitted that in light of the foregoing, this appeal had no merit and ought to be dismissed with costs.

12. This is a first appeal against the ruling and order by Mbogo, J. in respect of Environment and Land Court ("ELC") Case No. 196 of 2018. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. This duty was stated in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123.

13. The main issue for determination in this appeal is whether the suit before the trial court was res judicata and whether, therefore, the learned Judge was right in striking it out. Res judicata is defined by Section 7 of the *Civil Procedure Act* 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."

14. This fundamental doctrine is anchored on the premise that there should be an end to litigation. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

15. Ideally, res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence, if the issue(s) in dispute in the previous litigation or suit were between the same parties; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.

16. Explaining the same, this Court held in The Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others, [2017] eKLR, that:

> " [F]or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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 Court went on to state on the role of the doctrine:

> "The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

17. We have already set out what was before the trial court in this judgment. The suit was declared to be res judicata when subjected to the earlier suit of ELC Case No. 599 of 2013 - Robert Muli Matolo vs. Director of Land Adjudication. The suit in Nairobi ELC Case No. 599 of 2013 was between Robert Muli Matolo vs. Director of Land Adjudication and the 1st and 2nd respondents. According to the facts of the case, the appellant sought an order of certiorari to remove into the High Court and quash the decision of the Director of Lands Adjudication and Settlement dated 2nd August 2012, and consequential actions by the Chief Land Registrar and District Land Registrar directing that the restriction imposed on the suit property be removed to facilitate the issuance of title and re-opening of the road of access. Further, the application sought a prohibition order directed against the aforesaid officers prohibiting them from interfering with the suit property and or adversely dealing with the land to the detriment or the rights of the appellant and his family members till the Minister's Appeal No. 342 of 1989 is heard and determined. The 2nd and 3rd respondents were parties to the application. Indeed, they raised a preliminary objection to the application on the grounds that the applicant lacked the locus standi to bring the application; the application was defective and incompetent; the application had been overtaken by events in that title had already been issued to Peter Nzesya, the interested party and that the same is indefeasible; that the Chief Land Registrar whose decision is challenged had not been joined as a party to the suit and no decision can be made against him when he is not a party; and finally that the decision under challenge had not been annexed to the application.

18. The court, Mutungi, J. after considering all the grounds of the preliminary objection, came to the conclusion that indeed the preliminary objection was well taken and sustained it.

19. Having considered the two sets of cases and the principles that underscore the doctrine of res judicata, we are satisfied, just like the trial court, that the subsequent suit was res judicata. The issues in the current suit were directly and substantially the issues in the previous suit; the two suits involve the same parties and the decision was made by a competent court and related to the same suit property. The inclusion of the Attorney General in the current suit other than the Director of Land Adjudication as in the previous suit, we believe, was a way to twist and tinge the suit so as to avoid the doctrine of res judicata catching up with the appellant. As stated in the case of Omondi vs. National Bank of Kenya [2001] EA 177, parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. This is exactly what has happened here!

20. To this extent, we are satisfied that the appeal lacks merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF OCTOBER 2024.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR