



Nguku v Maundu & 4 others; Land Registrar, Machakos (Interested Party) (Environmental and Land Originating Summons 57 of 2020) [2024] KEELC 4305 (KLR) (27 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 57 OF 2020**

CA OCHIENG, J

MAY 27, 2024

**IN THE MATTER OF AN APPLICATION FOR RECTIFICATION OF A BOUNDARY
AND**

IN THE MATTER OF LR. NUMBER KALAMA/KATANGA/629

**IN THE MATTER OF SECTION 80 OF THE LAND REGISTRATION ACT (2012) AND
SECTIONS 3A OF THE CIVIL PROCEDURE ACT, CAP 21 (REVISED 2018) AND
ORDER 37 RULES 8 AND 14 OF THE CIVIL PROCEDURE RULES (REVISED 2020)**

BETWEEN

STEPHEN KIMEU NGUKU APPLICANT

AND

KIOKO MAUNDU 1ST RESPONDENT

JOHNSTONE MULI MAUNDU 2ND RESPONDENT

MESHACK MUTUNGA MAUNDU 3RD RESPONDENT

MUASYA MAUNDU 4TH RESPONDENT

KYALO MAUNDU 5TH RESPONDENT

AND

THE LAND REGISTRAR, MACHAKOS INTERESTED PARTY

RULING

1. What is before Court for determination is the Respondents' Notice of Preliminary Objection dated the 15th September, 2023 based on the following grounds:-



1. This suit is res judicata because the Applicant had filed similar suits in Machakos CMCC No. 20 of 2006, Machakos Misc. 243 of 2006 and Machakos Misc. No. 9 of 2018 against the Respondents on the same issues and all the matters have been dismissed.
 2. The issue present in this case or are similar to the cases as they all relate to a boundary issue and they have already been decided and therefore the matter is *res judicata*.
 3. Litigation must come to an end and this unending battles by the Applicant are prejudicial to the Respondents who have spent almost all their lives in court.
2. The Applicant filed a response to the Notice of Preliminary Objection on 23rd October, 2023, where it provided the background of this miscellaneous cause. He sought for the Preliminary Objection to be struck off, as he was likely to suffer irreparable loss and damage. He claimed that Justice Angote dealt with his application for review and on 21st May, 2019 ordered the Machakos Land Registrar together with Machakos Land Surveyor to visit the parcel known as Kalama/ Katanga/629 and fix the boundary of the said land, pursuant to the Judgement of 5th April, 2006 in Miscellaneous Case No. 20 of 2006. Further, that the order in the aforementioned Miscellaneous Cause was that, the boundaries were to remain as established by the Akitondo Clan and should be adopted as Judgment of the Court. He insisted that the Surveyor confirmed the wrong boundary of parcel No. Kalama/ Katanga/629 registered area as 6.872 Ha which differed with the Registrar's record of 7.8 Ha. He reiterated that the Registry Index Map needs to be amended, to be in conformity with the boundary as was established by the Akitondo Clan in 1970 and demarcated in 1972.
 3. The Notice of Preliminary Objection was canvassed by way of written submissions which was only filed by the Respondents.

Analysis and Determination

4. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether the said Preliminary Objection is merited.
5. The Respondents in their submissions insist that this suit is res judicata since the Applicant had filed similar suits in Machakos CMCC No. 20 of 2006, Machakos Misc. No. 243 of 2006 and Machakos Misc. No. 9 of 2018 against the same Respondents on the same issues and all matters have been dismissed. Further, that the issue in the previous cases are similar to the present case where the issue on the boundary rectification was handled. To support their averments, they relied on the following decisions: *Njangu vs Wambugu & Another* Nairobi HCCC No. 2340 of 1991 (unreported) and [*John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others*](#) (2015) eKLR.
6. On the doctrine of *res judicata*, Section 7 of the [*Civil Procedure Act*](#), stipulates that:-

“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.”



7. 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.”

8. In the instant Originating Summons dated the 21st July, 2020, the Applicant sought for the following Orders:-

1. That this Honourable Court be pleased to direct the Land Registrar Machakos County to rectify the Boundary to LR Number Kalama/Katanga/629 as per the directives of the director of land adjudication and settlement dated 30th December, 1987 and all subsequent further directives to this effect.
2. That the costs of carrying out the rectification exercise be met by the Defendant’s as per the order of the District Commissioner dated 20th December, 1985 in Land Appeal Number 88 of 1982.

9. I wish to reproduce here below the order issued in Machakos Misc. Application No. 9 of 2018 on 21st May, 2019, which also dealt with the suit land:-

“1) That the Machakos Land Registrar together with the Machakos Land Surveyor to visit the parcel of land known as Kalama/Katanga/629 and fix the boundary of the said land pursuant to the Judgement of 5th April, 2006 in Miscellaneous Case No. 20 of 2006.

2) That the Land Registrar and the Surveyor to implement this order within 45 days and file their report.

3) That the matter be mentioned on 4th July, 2019.”

10. Upon perusal of the annexures in the respective affidavits, I note the fulcrum of the dispute herein which revolves around land parcel number Kalama/Katanga/629 had been heard and determined in Machakos High Court Misc. Application No. 243 of 2006 vide its Ruling dated the 10th December, 2012 and Machakos Misc. Application No. 9 of 2018 through an Order issued on 21st May, 2019.



11. In *Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another* (2017) eKLR the Court referred to the case of *Uhuru Highway Development Ltd V Central Bank & Others*, CA No. 36 of 1996 where the Court of Appeal stated thus:-

“In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

12. While, 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), it was 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 Githae & 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.”

13. In relying on the legal provisions, I have cited above as well as associating myself with the decisions quoted, while applying them to the circumstances at hand, I note that in Misc. Application No. 20 of 2006, the Court adopted the decision of the Tribunal and ordered that boundaries to remain as they were. While in Machakos Misc. Cause No. 243 of 2006 the Applicant herein applied for review of the orders made in Misc. Application No. 20 of 2006 but the said application was dismissed. Further, in Machakos Misc. No. 9 of 2018, the Applicant made a fresh application asking for the Surveyor to be compelled to restore the boundary and the same was dismissed as *res judicata* since the issues raised therein had been handled by another court. From the foregoing, I find that the fulcrum of the dispute in all the three cases revolved around a boundary dispute; the parties in each of the suits was litigating under the same title Kalama/Katanga/629, which the courts, heard and determined. The Applicant has once more raised the same issues in the instant Originating Summons. In the circumstances, I find that, this suit is hence *res judicata*.

14. In the foregoing, I find the instant Notice of Preliminary Objection merited and will allow it.

15. I will proceed to strike out this suit, with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE



In the presence of:

Kaloki for Respondent

Applicant in person

Court Assistant – Simon/Ashley

