Kathubu (Suing on her own behalf and on behalf of the Estate of Kazungu Karisa Tsuma) v Salim & 2 others (Civil Suit EO55 of 2023) [2024] KEELC 13829 (KLR) (11 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13829 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

CIVIL SUIT EO55 OF 2023

EK MAKORI, J

DECEMBER 11, 2024

BETWEEN

TABU KALUME KATHUBU (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF KAZUNGU KARISA TSUMA) ..... PLAINTIFF

AND

BAHATI SALIM ..... 1ST DEFENDANT

MUTAWALI SALIM ..... 2ND DEFENDANT

LAND REGISTRAR, KILIFI ..... 3RD DEFENDANT

RULING

1. Before the Court for determination is the Preliminary Objection dated 5th July 2024 filed by the 1st and 2nd Defendants set out as follows:

    a. This suit is res-judicata as the cause of action raised herein, and the subject matter of the suit herein title number LR No. 1705/79 C.R. 22257) was heard and determined conclusively in Malindi High Court ELC No. 25 of 2013 Joseph Nzaro T/a Smokeyland Enterprises v Salim Kayaa, Bahati Salim, Mtawali Salim, Kipigo Salim and judgment delivered.

    b. The Court is functus officio since the Decree in ELC No. 25 of 2013 was implemented.

    c. The Plaintiff has no locus standi since she divorced the said Kazungu Karisa Tsuma long before he passed on, so she cannot invoke the provisions of the Succession Act Cap—160 of the Laws of Kenya.

    d. Kazungu Karisa Tsuma sold the land to Joseph Katana Nzaro and withdrew the suit over it in Kilifi SPMCC No. 513 of 2009.

e. The proceedings are a clear abuse of the court process, ill-founded, and lacking merit, and should be dismissed with costs to the first Defendant.

2. The Plaintiff /Respondent responded to the preliminary objection. The Court directed the objection be canvassed through written submissions, and the parties complied.

3. I frame the issues for this Court's determination from the materials and submissions placed before me. These include whether the preliminary objection has met the threshold as set by the law and precedents, whether the suit herein is res judicata, whether the Plaintiff/Respondent has no locus standi to sustain the suit, whether the suit herein is an abuse of the Court process, and who should bear the costs of this proceedings.

4. The Plaintiff filed this suit with a primary objective: to nullify the 1st and 2nd Defendants' title due to ostensibly an irregularity and to have the title deed registered in their names and two others cancelled and registered in the joint names of the Plaintiff and the 1st and 2nd Defendants.

5. The Plaintiff's action concerns Plot No. 1705/79, CR. No. 22257 measuring 2.007 acres. The suit property is registered in the 1st and 2nd Defendants name and two others not before the Court. The registration of the suit property into the 1st and 2nd Defendants names are as a result of the decision in Malindi ELC No. 25 of 2013 Joseph Katana Nzaro T/a Smokyland Enterprises v Salim Kayaa, Bahati Kayaa, Mutawali Kayaa and Tipigo Kayaa.

6. In the above-stated suit, the Court directed that the property be registered in the family names. Plaintiff alleges that the 1st and 2nd Defendants registered the land in one family's name to deny other family members. The registration was done in the name of Salim Kayaa, who died in 2013, making the registration irregular and illegal.

7. The Plaintiff seeks to nullify a title deed issued irregularly and illegally, excluding family members from the ownership. As the estate administrator of the late Kazungu Karisa Tsuma, one of the beneficiaries of the suit property.

8. The 1st and 2nd Defendants aver that the dispute concerns the same subject matter, approximately 3 acres, which was claimed by the Plaintiff's husband, Kazungu Karisa Tsuma, and the said Joseph Katana Nzaro, which is in contravention of the doctrine of res judicata as enunciated in Section 7 of the *Civil Procedure Act*.

9. The Plaintiff contends that the doctrine of res judicata aims to prevent Courts of concurrent jurisdiction from adjudicating with respect to the same cause of action, subject matter, parties, and the same relief claimed that has been heard and determined by a competent Court.

10. The Plaintiff believes that the doctrine of res judicata cannot be applied in this case. The present suit and Land Case No. 25 of 2013 have different parties, meaning that the doctrine of res judicata under Section 7 of the *Civil Procedure Act* cannot apply here.

11. Whether a matter was directly and substantially in issue in a former suit is to be determined by reference to the plaint, the written statement, the issues, and the judgment. The test of res judicata is to identify the issues and not the identity of the property in the former suit.

12. Plaintiff states that to determine whether a matter is or is not res judicata, the court must look at the cause of action and relief claimed. A matter cannot be directly and substantially an issue unless it was alleged by one party and denied or admitted expressly or impliedly by the other.

13. Plaintiff avows that in their submissions, the Defendants stated that Kilifi PMCC No. 513/2009, wherein the deceased had sued the 1st and 2nd Defendants, was withdrawn. That situation is not envisaged under Section 7 of the *Civil Procedure Act*. That suit was never heard and determined.

14. Plaintiff asserts that the 1st and 2nd Defendants have not pleaded res judicata in their statement of defence. Consequently, the preliminary objection breaches Order 2 Rule 4 (1) of the Civil Procedure Rules.

15. On the import of a preliminary objection, in *Gladys Pereruan v Betty Chepkorir* [2020] eKLR, Githinji J. citing several authorities, held as follows:

> " The purpose of a preliminary objection was broadly discussed in *Charles Onchari Ogoti v. Safaricom Ltd & Anor* [2020] eKLR as follows:
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> "[9] This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:
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> Law, JA.:
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> "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 matter. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the matter to refer the dispute to arbitration."
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> Newbold, P.:
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> "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."
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> [10] The Supreme Court of Kenya, now the highest court in the land, has broadly confirmed and extended the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of *the Constitution* of Kenya 2010.
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> (11) In the case cited by the 1st Respondent, David Nyekorach Matsanga & Another v. Philip Waki & 3 Others [2017] eKLR, the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on the question of Preliminary Objection held as follows:
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> "We quickly turn to the question of whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. 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."

In *Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR, the Supreme Court stated that:

"A preliminary Objection consists of a 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 matter."

The preliminary objection if allowed may dispose off the entire matter without allowing parties to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.

The court is guided by Order 2 rule15 of the Civil Procedure Rules on when a matter can be struck out as provided below:

(1) At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that:

a. it discloses no reasonable cause of action or defence in law; or

b. it is scandalous, frivolous, or vexatious; or

c. it may prejudice, embarrass, or delay the fair trial of the action; or

d. it is otherwise an abuse of the process of the court, and may order the matter to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

16. The doctrine of res judicata has been cited as the basis for the preliminary objection. This doctrine is based on the principle that if a suit has been heard and issues have been tried thoroughly and finally settled, reopening another matter on the same issues is untenable because litigation has to end in one way or another. It saves costs for parties and lessens the rigmaroles of seeking redress in our justice system. It abhors abuse of the Court process by decreeing that litigation replayed over and over again on already litigated and settled issues 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 doctrine of res judicata and issue estoppel is that if the controversy in issue is finally settled, 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)."

17. In the former suit, this Court (Olola J.) found that the suit property CR No. 22257 belonged to the Defendants, Salim Kayaa, Bahati Salim, Mutawali Salim, and Tigo Salim. An order was issued that they be registered as proprietors and in trust for the whole family. A registration was effected, representing what the Court decreed. Bahati Salim and Mutawali Salim are sued as 1st and 2nd Defendant in the current suit.

18. In this suit, Plaintiff has sued the 1st and 2nd Defendant, claiming that the Court directed that the property be registered in the family names, the 1st and 2nd Defendants proceeded to register the land in one family's name to deny other family members the right to the said property. The registration was done in the name of Salim Kayaa, who died in 2013, making the registration irregular and illegal.

19. The dispute in both the former and current suits concerns the same property, LR No. 1705/79 (CR 22257), measuring approximately 3 acres, which was claimed by the plaintiff's husband, Kazungu Karisa Tsuma, and the said Joseph Katana Nzaro. The issues are the same.

20. In *Abukar G. Mohammed v Independent Electoral and Boundaries Commission* [2017] eKLR, Odunga J. differentiated judgments/orders in rem and judgments/orders in personam as follows:

"However, there are other orders or judgements which bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. In Conflict of Laws (7th Edn. 1974), at page 98 by R H Graveson, it is stated:

"An action is said to be in personam when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action in personam." See Black's Law Dictionary, 9th Edn. Page 862.

7. With respect to a decision in rem it was held in *Kamunyu And Others vs. Attorney General & Others* [2007] 1 EA 116:

"In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."

21. Although the former suit appears to have decided the rights of parties in personam, the court's orders were fully implemented. The Plaintiff's husband had sold a portion to the plaintiff in the former suit—Joseph Nzaro—and it was extensively discussed by Olola J. in his considered judgment—constructive res judicata crops in. Relitigating this matter will mean 'revising' the orders in the former suit—it will not sit well. Litigation must come to an end.

22. The Preliminary Objection herein succeeds with costs without going to the other issues raised.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 11TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms Okumu, for the Plaintiff

Mr. Mtana, for the Defendants

Abdrashid: Court Assistant