



Makitoni & 2 others v Mukhwana (Suing as the Administrator of the Estate of Teresina Musebe) & 3 others; Masinde (Suing as the Administrator of the Estate of Michael Watamba) (Interested Party) (Environment & Land Case 109 of 2000) [2023] KEELC 772 (KLR) (14 February 2023) (Ruling)

Neutral citation: [2023] KEELC 772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 109 OF 2000
FO NYAGAKA, J
FEBRUARY 14, 2023**

BETWEEN

**JAMES MAYEKU MAKITONI 1ST PLAINTIFF
PAULINE KHISA MAKITONI 2ND PLAINTIFF
FRANCSIS SIMIYU MAKITONI 3RD PLAINTIFF**

AND

**WENSLAUSE MUKHWANA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF TERESINA MUSEBE) 1ST DEFENDANT
TOM MACHABE 2ND DEFENDANT
CHRISPINUS WEKESA 3RD DEFENDANT
URBANUS M. WEKESA 4TH DEFENDANT**

AND

**LUTUKAYI J. MASINDE (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF MICHAEL WATAMBA) INTERESTED PARTY**

RULING

1. By a Notice of Motion dated 24/01/2022 the Interested Party, moved this Court for a number of prayers. The Application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 1 Rule 10(2) and Order 51 Rule 1 of the *Civil Procedure Rules* together with all enabling provisions of the law. He filed it on 25/01/2022. In it he sought the following orders:-

a. ...spent



- b. ... Compromised by consent on 18/05/2022.
 - c. This Honourable Court be pleased to issue directions regarding the 4 acres that was vested in the late Michael Watamba now forming part of his estate pursuant to vesting orders issued in Chief Magistrate's Court Civil Miscellaneous Application No 51 of 1997.
 - d. Costs of this Application be provided for.
2. The Application was based on 11 grounds and supported by an Affidavit sworn by one Lutukayi Joseph Masinde, on 24/01/2022. Since prayer (b) of the Application, which was to the effect that this Court orders the joinder of the Estate of Michael Watamba represented by Lutukayi J. Masinde, was agreed upon and the said administrator enjoined vide the orders of 18/05/2022, I now summarize the grounds and depositions regarding the outstanding issues in the Application.
 3. The grounds of the application were that Michael Watamba died on 25/05/2009 and Lutukayi J. Masinde was appointed the administrator of his estate; at the time of his death, the said Michael Watamba had already obtained title in 2001 to that parcel of land known as East Bukusu/North Nalondo/2550 measuring approximately 1.6 Ha; the title was hived off from land parcel No East Bukusu/North Nalondo/1658 vide a vesting order issued in Bungoma SPMC Miscellaneous Application No 51 of 1997; that the 1st Defendant appealed against decision of the Magistrate vide Bungoma High Court Civil Appeal No 18 of 1999; the Appeal was dismissed for want of prosecution on 20/06/2008; on 14/08/2013 this Honourable Court cancelled the title East Bukusu/North Nalondo/2550 without according him and his estate a hearing; this Court determined the Application dated 25/09/2018 by a Ruling delivered on 06/02/2019 by which it affirmed the interest of the said Michael Watamba in the 4 acres consisted in all that parcel of land known as East Bukusu/North Nalondo/4939 as vesting in his estate; that on 06/11/2019 the Court once again and on its own motion set aside the earlier orders of affirmation on account of the fact that the said Michael Watamba had not been party to the instant suit until the commencement of the Application; by the Ruling of 06/11/2019 the Court ordered the maintenance of the status quo on all parcels of land resulting from the curving out of land parcel No East Bukusu/North Nalondo/1658 and that included the 4 acres in issue; there was need to give directions on the 4 acres awarded to the late Michael Watamba being part of the parcel of land known as East Bukusu/North Nalondo/1658 that parties here are litigating over; the application was made in good faith and no prejudice would be occasioned anyone if the orders herein were granted.
 4. As stated above, the Application was supported by the Affidavit of Lutukayi J. Masinde, filed together on the same date. He repeated the contents of the grounds but in deposition form. But to the affidavit he annexed and marked as LJM-1 a copy of the Grant of Letters of Administration issued in Bungoma High Court Succession Case No 126 of 2012; LJM-2 a copy of the Death Certificate of Michael Masinde, LJM-3 a copy of the title deed to land parcel No East Bukusu/North Nalondo/2550, LJM-4 a copy of the vesting order issued in Bungoma SPMC Misc. Civ. Application No 51 of 1997, LJM-5 a copy of the proceedings in Bungoma High Court Civil Appeal No 18 of 1999, LJM-6 a copy of the order of 14/08/2013 cancelling the title to land parcel No East Bukusu/North Nalondo/2550, LJM 6 (a), (b) and (c) copies of the Application dated 25/09/2018, Ruling on 06/02/2019 and of 06/11/2019 respectively.
 5. The Applicant then deponed that by the Ruling of 06/11/2019, the Court ordered the status quo in respect of all title deeds resultant from or curved out of land parcel No East Bukusu/North Nalondo/1658 which included 4 acres which form part of the estate of the late Michael Watamba to allow the suit to start de novo. He referred this Court to paragraph 47 of annexure LJM-6(c). He then deponed that for reason that the interest of the late Michael Watamba had been adjudicated upon



and determined, and since it formed part of the suit land, namely, East Bukusu/North Nalondo/1658 being litigated over, it was incumbent that the Court gave directions over the same. Lastly, he deponed that if the orders sought were not granted, the estate and beneficiaries of the estate of Michael Watamba would be greatly prejudiced and there would be an absurdity in the matter as their 4 acres would be taken away by the Court without according them a hearing.

6. The Application was opposed strongly. One Francis Simiyu Makitoni swore an Affidavit on 03/02/2022. He did not state whether or not he swore the Affidavit on behalf of the other Plaintiffs. He did not annex any authority in that behalf. But in the Affidavit, he kept using the pronoun “us” meaning he was not alone in the response. But that was not in accordance with what the law requires.
7. Be that as it may, in the Relying Affidavit, he deponed that land parcel No East Bukusu/North Nalondo/2550 was not hived off from East Bukusu/North Nalondo/1658. He deponed further that the dispute between Michael Watamba and Teresia Musebe did not involve them when he filed Bungoma SPMC Misc. Civ. Appl. No 51 of 1997 and Bungoma Civil Appeal No 18 of 1999. He deponed that the dispute never involved their parcel of land.
8. The 3rd Respondent then swore that land parcel No East Bukusu/North Nalondo/1658 ceased to exist upon sub-division hence the argument that the litigation in this matter is over the same is untrue. He annexed to the Affidavit as FSM1 a copy of a Mutation Form to show the sub-division. He asked that the application be dismissed.

Submissions

9. The Interested Party submitted on limb (c) of the Application since, on 18/05/2022 the parties compromised prayer (b) by recording a consent that he be enjoined as an Interested Party. He submitted that only one issue remained, namely, whether the 4 acres interest that was vested in the late Michael Watamba now forming part of his estate pursuant to the vesting orders issued in Chief Magistrate’s Court Civil Miscellaneous Application No 51 of 1997 could be litigated upon in this case and what orders the court should make.
10. On the issue, he submitted that the 4 acres vested in the estate of Michael Watamba pursuant to the vesting order issued in Bungoma CMC Civil Miscellaneous Application No 51 of 1997. The vesting order was issued on 30/10/2000. He summed it that the parcel of land cannot therefore be litigated upon in this case. His argument was that the Court should ring-fence the 4 acres awarded to the estate and exclude it from the litigation herein.
11. He submitted further that the 4th Respondent having appealed against the vesting order in Bungoma Civil Appeal No 18 of 1999 but which was dismissed on the 20/06/2008, it followed that since the issue of 4 acres was litigated on as between the Defendants herein and the Interested party, the same cannot be reintroduced in the suit herein since the matter was Res Judicata. If it happened, it would amount to reopening a decision that has never been set aside. He relied on the decision of Kamau J. in the case of *Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR where he held as thus:

“The learned Trial Magistrate erred in that the law did not allow the Trial Magistrate to reopen the case by way of entertaining a similar Application when his predecessor in the station had already dealt with the matter conclusively... On the basis that pursuant to section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya the lower court lacked jurisdiction to deal with a matter which had already been decided by the same court earlier, the latter Application was therefore not only res judicata but also an abuse of the court process.”



12. He relied further on the holding of Oundo J. in the case of *Mukesh Kumar Kantilal Patel v Charles Langat & 4 others* [2021] eKLR the learned judge stated:-

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.’ 45. Addressing my mind to the orders sought in the present Application, I find that regardless of the terms or words employed thereunder, the same touched on the ownership and/or proprietorship of land parcel No Sotik Town/667 measuring 0.2627 hectares which in my view, had been conclusively determined by the judgment in Kericho ELC No 37 of 2014 dated 6th July 2018 and the judgment of the Court of Appeal dated 3rd October, 2019”.

13. He prayed that prayer (c) the application dated the 24th day of January 2022 be allowed and the 4 acres awarded to the estate of Michael Watamba be ring-fenced by excluding it from the litigation herein.
14. The 3rd Respondent submitted that they relied on the Replying affidavit of Francis Simiyu Ma Kitoni sworn on 3/2/2022. But they went on to submit about why the applicant ought not to be enjoined in this suit as an interested party. They must have forgotten very fast that the prayer had been consented to hence already granted.
15. Thereafter, they submitted that the vesting orders in Bungoma Chief Magistrate’s Court Civil Miscellaneous Application No 51 of 1997 were totally unrelated to this matter. Their view was that the parcel of land No East Bukusu/North Nalondo/2550 and East Bukusu/North Nalondo/1658 were different parcels of land and had no relationship whatsoever between them. Their further submission was that land parcel No East Bukusu /North Nalondo/1658 ceased to exist upon subdivision in September, 2018 as shown by the mutation form marked as annexure ‘FSM1’. In those circumstances they prayed that the Application be dismissed.

Issue, Analysis And Determination

16. I have considered the Application, the facts thereto, the law and the submissions of the rival parties. I am of the opinion that the following are the issues for determination:
- a. Whether Land Parcel Number East Bukusu/North Nalondo/2550 is related to East Bukusu/ North Nalondo/1658;
 - b. Whether the issue of ownership of Land Parcel No East Bukusu/North Nalondo/2550 is Res Judicata;
 - c. What orders to issue and who to bear the costs of the Application.
17. The Application was brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 1 Rule 10(2) and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. Since the parties compromised prayer (b) of the Application about joinder of the Interested parties as one, I will not determine the relevance or otherwise of the Application of Order 1 Rule 10(2) of the *Civil Procedure Rules*. As for the other provisions, except Sections 3 and 3A of the Act, the rest are basically formal citations in relation



to this Application as I understand them. Whether cited or not that does not make any difference on the competence or legality of the Application. For instance, Section 1A is on the objective of the Act, 1B is on the duty of the Court, 3 is on saving the special jurisdiction and powers of the Court, 3A on the inherent powers of the Court, while Order 51 Rule 1 of the *Civil Procedure Rules* is on the format of the Application.

a. Whether Land Parcel Number East Bukusu/North Nalondo/2550 is related to East Bukusu/North Nalondo/1658

18. The parties herein, contended that the issue herein about ownership of East Bukusu/North Nalondo/2550 is Res Judicata. The Applicant argued that the parcel of land was created following the subdivision of land parcel No East Bukusu/North Nalondo/1658. To him that was after the Court in Bungoma SPMC Misc. Civil Application No 51 of 1997 was determined in favour of the later Michael Watamba and the Court issued a vesting order of the 4 acres in him. Following that decision, the 1st Defendant herein Appealed therefrom to the High Court in Bungoma HCCA No 19 of 1999 which was then dismissed for want of prosecution on 20/06/2008. The said Michael Watamba had already obtained title to the 4 acres by virtue of the vesting order in the subordinate Court.
19. The 3rd Plaintiff/Respondent submitted that Land Parcel No East Bukusu/North Nalondo/2550 and East Bukusu/North Nalondo/1658 have no correlation. In my view, to argue that way is one way of vexing the Court with arguments over straight forward matters. It is clear from Annexures LJM3 which is a copy of title to parcel No 2550, LJM4 being the vesting order in Bugoma CMC Misc. Civ. Appl. No 51 of 1997, LJM5 being the proceedings in Bungoma HCCA No 18 of 1999 and particularly LJM6 being the order of this Court of 17/02/2014 restoring title No 1658 and cancelling title No 2550. They all relate to the titles in that are being said not to be the same. The argument that they are not related is frivolous.

b. Whether the issue of ownership of the 4 acres alleged to comprise in land parcel No East Bukusu/North Nalondo/2550 is Res Judicata

20. The Applicant argued that the issue about the 4 acres vested in the estate of Michael Watamba vide Bungoma CMC Misc. Civil Application No 51 of 1997 was a matter res judicata and they should be ring-fenced hence not litigated over in the instant suit. The 3rd Respondent opposed the Application stating that land parcel No 1658 ceased to exist and it does not have any correlation to parcel No 2550. I have made a finding on the relationship between the two parcels of land. What remains of this Court to determine is whether the issue over the 4 acres of land said to comprise in East Bukusu/North Nalondo/2550 is res judicata.
21. The principle of res judicata is provided for under Section 7 of the *Civil Procedure Act*. The provision 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 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.”
22. Under the concept of res judicata, the underlying thread is that a court of competent jurisdiction shall have made findings on the merit of issues between same parties litigating under same title. It is immaterial that a party excludes or includes one or more parties in a subsequent suit.



23. In *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR the Court of Appeal stated as follows:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

24. I have considered the issues herein and the parties in comparison with those in Bungoma CMC Misc. Civ. Application No 51 of 1997 which vested the 4 acres in Michael Watamba and was appealed from in Bungoma HCCA No 18 of 1999. In my view, while the subject in this matter is the larger parcel of land from which the 4 acres were to be hived off through the vesting order, the parties in the two matters are different and are not litigating under the same title. The Plaintiffs herein are totally different from the Applicant or Respondents in Bungoma CMC Misc. Civ. Application No 51 of 1997. This is clearly seen from the title of the suit herein as compared with the title in Annexures LJM4 and LJM5, and even LJM6.

25. Moreover, I have considered the Ruling delivered by my brother Judge on 6/11/2019 wherein he rendered himself that the reason why he set aside the orders issued on 6/02/2019 and further directed that the suit be readied afresh for hearing in presence of all parties was that the Applicant in the application dated 25/09/2018, namely, Lutukayi Joseph Masinde, who was the same in it. He did not appeal against the Ruling of 06/11/2019. He never applied to set it aside. As of now the orders stand and are to be complied with. By the instant Application the Applicant subtly wants to go around the orders of this Court as were issued on the 06/11/2019. He is indirectly seeking a review of the said orders or wants this Court to indirectly sit on appeal of the same. His application is therefore frivolous and vexatious. I find the issue of res judicata unmeritorious.

c. What orders to issue and who to bear the costs of the Application

26. As the Application dated 24/01/2022 has not succeeded in entirety, the directions I give is that the parties have to prove their respective claims over the suit land in a full hearing. The Interested Party having been enjoined to this suit as one, by the orders of this Court, is required to file his Pleadings, witnesses' statements and any documentary evidence on the Claim he holds herein and serve the same within fourteen (14) days of this order.

27. As the Plaintiffs/ Respondents attempted to mislead this Court that land parcel numbers East Bukusu/ North Nalondo/1658 and East Bukusu/ North Nalondo/2550 are not related, and also having not submitted as directed by the Court on the prayer (c) which was outstanding, the Application is hereby dismissed, but with costs only to the Defendants.

28. Each party is now required and directed to comply with Order 11 of the *Civil Procedure Rules* within thirty (30) days of this decision. For avoidance of doubt, this applies to the Interested Party also. The suit shall be mentioned on 16/03/2023 to confirm that parties shall have filed their trial bundles in accordance with the Rules.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 14TH DAY OF FEBRUARY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

