



Shiroya (Substituted with Ronald OM’Mira Shiroya) v Khatete (Substituted with Samuel Khatete Omukulu) & 3 others (Environment & Land Case 317 of 2015) [2023] KEELC 16622 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16622 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 317 OF 2015
DO OHUNGO, J
MARCH 28, 2023**

BETWEEN

RUFUS WESHBINGA SHIROYA (SUBSTITUTED WITH RONALD OM’MIRA SHIROYA) PLAINTIFF

AND

YUSUF ASHIMALA KHATETE (SUBSTITUTED WITH SAMUEL KHATETE OMUKULU) 1ST DEFENDANT

FANUEL ESHIRAMA OKWARO (SUBSTITUTED WITH EVERLINE ESHIRIMA) 2ND DEFENDANT

THE LAND REGISTRAR, KAKAMEGA 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. By Notice of Motion dated December 29, 2022, the plaintiff seeks the following orders:
 1. [Spent]
 2. That the 1st and 2nd respondents, their agents, servants, employees be restrained from making entry, occupation, fencing, working or in any other manner interfering with the applicant’s peaceful use and occupation of the parcel No Marama/Shianda/817 pending the hearing and final determination of this suit.
 3. That any other further orders be made as the Honourable court may deem just and expedient.



4. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by the applicant Ronald Om'mira Shiroya who deposed that his late father Rufas Weshibanga Shiroya was in occupation of land parcel number Marama/Shianda/817 (suit property) at the time of filing this suit and that upon his demise, the applicant continued to live therein. That his late father had filed an application dated December 22, 2015 seeking to restrain the respondents from interfering with his occupation of the suit land and that the court made an order on April 11, 2017 with a finding that his father was in occupation. That the first and the second respondents moved into the suit property on December 24, 2022 and forcefully started placing fencing posts and fencing wire. He concluded by deposing that he stands to suffer irreparable loss in case the respondents are not restrained.
3. In response to the application, a replying affidavit sworn by Everline Eshirima was filed. She deposed that she has tilled and cultivated maize on the land ever since it was purchased by her husband from the late Yusuf Ashimala Khatete and that the plaintiff has never used or occupied the suit property as alleged. That the only structures on the suit property are a kiosk and a pit latrine which she constructed and as such the applicant's allegations that he occupies the suit property are false. She further deposed that she also planted trees on the suit property which have since matured and that on December 18, 2022, a family friend noticed two suspicious individuals surveying the suit property which prompted her to fence it off to avoid intruders.
4. The application was canvassed through written submissions. The plaintiff and the second defendant filed submissions. The third and fourth defendants opted neither to file any response to the application nor participate in its hearing.
5. I have considered the application, the affidavits, and the submissions. The issues that arise for determination are whether the court has jurisdiction and whether the orders sought should issue.
6. The parties have not addressed the court on jurisdiction. Nevertheless, jurisdiction is key in any proceedings. It is everything, the be-all and end-all, without which the proceedings come to a certain end and the court cannot make any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.
7. The Court of Appeal also addressed the issue of jurisdiction in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR where it stated:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ...
8. Thus, the question of jurisdiction is one that exists in every suit, regardless of whether the parties raise it. Even where parties proclaim in unison that the court has jurisdiction, the court must satisfy itself that it actually has jurisdiction.
9. There is no dispute that at the inception of this suit, the plaintiff filed an application dated December 22, 2015 seeking inter alia to restrain the defendants from interfering with his occupation and use of the suit property pending hearing and determination of the suit. The application was determined through ruling delivered on April 11, 2017 by NA Matheka, J The court found that the plaintiff had established a prima facie case and ordered that pending hearing and determination of the suit, an order of prohibition be registered against the suit property. Having addressed its mind to all the prayers that



were before it, the court in its wisdom declined to grant the prayers sought, save for the one seeking an order of prohibition.

10. In the face of the silence by the parties, I have grappled with the question of whether the court is deprived of jurisdiction in the present application by virtue of the doctrine of *res judicata*.

11. The doctrine of *res judicata* has found statutory expression at Section 7 of the [Civil Procedure Act](#) which provides 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.

12. For *res judicata* to be upheld, there must have been a previous suit or application in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR.

13. From the foregoing, it is apparent that the question of whether the court could issue an injunction against the defendants was raised in this suit by the plaintiff through the application dated December 22, 2015 and was determined through ruling delivered on April 11, 2017. Indeed, the plaintiff deposed at paragraph 11 of the affidavit in support of the application dated December 22, 2015 that the second defendant had started planting trees on the suit property hence interfering with his peaceful possession and use thereof. In Notice of Motion dated December 29, 2022, the plaintiff has sought to relitigate the issue of injunction, this time on the ground that the first and second defendants have moved into the suit property and forcefully started placing fencing posts and fencing wire.

14. The minor change of circumstances does not aid the plaintiff to escape the dragnet of *res judicata*. I see them as cosmetic facelift to the old claim. See [ET v Attorney General & another](#) [2012] eKLR. If any party was dissatisfied with the ruling that was delivered on April 11, 2017, they ought to have appealed. It cannot be permissible that every slight change of circumstances in a suit yields a fresh application for injunction. Litigation would never end if that were the case. I find that Notice of Motion dated December 29, 2022 is *res judicata*.

15. Even if I had not found that Notice of Motion dated December 29, 2022 is *res judicata*, I would not have granted the orders sought in any case. The decision of whether to grant an interlocutory injunction is one made in exercise of discretion. The plaintiff filed this case almost 10 years ago. There is no valid reason why the hearing of the plaintiff's case is yet to take off. On September 26, 2022, I ordered the parties to comply with Order 11 of the [Civil Procedure Rules](#) within 60 days and scheduled the matter for mention on November 28, 2022 to fix a hearing date. Instead of prosecuting the suit, the plaintiff filed the present application. Granting an interlocutory injunction at this point in time is hardly the right exercise of discretion. The plaintiff must prosecute his case without any further delay.

16. In view of the foregoing discourse, Notice of Motion dated December 29, 2022 is struck out for being *res judicata*. Costs to the first and second defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF MARCH 2023.

D. O. OHUNGO



JUDGE

Delivered in open court in the presence of:

Mr Indimuli holding brief for Mr Mukavale for the plaintiff

No appearance for the first defendant

Ms Mburu for the second defendant

No appearance for the third and fourth defendants

Court Assistant: E. Juma

