



REPUBLIC OF KENYA



**Osoro v Charo & 5 others (Environment & Land Case E011 of 2021)
[2023] KEELC 16413 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E011 OF 2021**

**MAO ODENY, J
MARCH 22, 2023**

BETWEEN

JOHN NYAGAKA OSORO PLAINTIFF

AND

REYNOLD KARISA CHARO 1ST DEFENDANT

ISMAIL ENGE CHARO 2ND DEFENDANT

MRABU CHARO BAHA 3RD DEFENDANT

THE COUNTY GOVERNMENT OF KILIFI 4TH DEFENDANT

THE CABINET SECRETARY, MINISTRY OF HEALTH 5TH DEFENDANT

THE HON. ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. This Ruling is in respect of a Notice of Motion dated June 22, 2022 by the Plaintiff and the 1st to 3rd defendants' Notice of Motion dated September 13, 2021. The Plaintiff's application is seeking the following orders; -
 - a. Court is pleased to transfer and consolidate Kilifi PMCC No 248 of 2018 with this file for hearing as one, with this file as the lead file.
 - b. The Honourable Court do make such order and further orders as it may deem fit, necessary and expedient in the interest of justice.
 - c. That costs of this application be in the cause.
2. The 1st to 3rd defendants sought the following orders; -
 - a. Spent



- b. Spent
 - c. That upon hearing this application *inter partes* this suit be stayed as the issues therein are directly and substantially the same issues in Kilifi Misc Land Case No 1 of 2021 John Osoro Nyagaka vs Reynold Karisa Charo which was determined on merit and Kilifi Civil Suit No 248 of 2018 John Nyagaka Osoro Vs Kadzo Charo Baha & 3 others that is still pending hence *sub judice* and *res judicata* rules apply.
 - d. That in the alternative the Amended Complaint dated March 22, 2021 be struck out with costs for being an abuse of court process and this suit be dismissed with costs
3. The court directed that the two applications be heard together vide written submissions which were duly filed.

Applicant's Case

4. The Applicant relied on his supporting affidavit where he deposed that he is also the Plaintiff in Kilifi PMCC No 248 of 2018 where he has sued the Defendants for trespass and that the suits raise similar questions of law and facts while the Defendant's Statement of Defence and Counterclaim is founded on the doctrine of adverse possession in both suits.
5. It was the Applicant's case that this court ought to consolidate the two suits with a view to disposing them expeditiously and proportionately and in the best interest of justice so as to save on costs, judicial time and to avoid conflicting decisions.

Respondent's Case

6. The Respondents in opposition to the application filed a Replying Affidavit sworn on February 9, 2022 by Reynold Karisa who deposed that the suit herein is *sub judice* and or *res judicata* which is the subject of the Notice of Motion dated September 13th September, 2021 to address the issue hence the current application is an abuse of court process.
7. The Respondent further deposed that the suit having been filed while there were already suits on the same subject matter by the Plaintiff is incompetent and incurably defective and cannot be consolidated with the previously filed suit.
8. It was the Respondent's case that the suit filed at Kilifi Law Court was determined on merit and the same dismissed with costs on March 16, 2021. That another suit was filed in Kilifi in Civil Suit No 248 of 2018 and when the matter came up on March 10, 2021 for hearing of an application, the matter was stayed for being *sub judice*.
9. The Respondent also stated that the Plaintiff is therefore barred from instituting a further claim and litigating on the same issues raised in another suit that has been determined on merit.

Plaintiff/applicant's Submissions.

10. Counsel for the Applicant gave a background to the suit and stated that the Plaintiff initially filed a plaint dated February 23, 2021 and sought a declaratory order that he was the owner of Kilifi/Mtwapa/1749 and an injunction, to bar the original Defendants from interring the remains of M/s. Kadzo Charo Baha (deceased) on the suit land. That the plaint was amended on April 14, 2021 to



introduce three (3) other Defendants, as the 1st, 2nd and 3rd Defendants hurriedly interred the remains of their mother on the suit land on March 12, 2021.

11. Counsel submitted that the 1st, 2nd and 3rd Defendants filed a defence on April 7, 2021 and applied for leave to further amend their already amended statement of defence and counterclaim which was filed on January 14, 2022 by consent of the parties.
12. Mr S M Kimani submitted that the defendants in Kilifi PMCC [ELC] No 248 of 2018, successfully applied to set aside judgment obtained in default and have filed a statement of defence and counterclaim founded on the doctrine of adverse possession.
13. Counsel submitted on the issue of consolidation and relied on the case of *Stumberg & Another v Potgieter* (1970) EA 323 where the court held that where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.
14. Mr Kimani further cited the case of *Ethics and Anti-Corruption Commission v Charles Nderitu Maitai & 13 Others* [2021] eKLR the court held that the situation in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: - i) Some common question of law or facts arises in both or all of them, or ii) the right to relief claimed in them are in respect of, or arise out of the same transaction or series of transactions; or iii) for some other reason it is desirable to make an order for consolidating them’.
15. It was counsel’s submission that main purpose of consolidation is to save costs, time, and effort and to make the conduct of several actions more convenient by treating them as one action and relied on the case of *Korean United Church of Kenya and 3 Others v Seng Ha Sang* [2014] eKLR.
16. On the issue of transfer counsel relied on the case of *Elizeba Mboci Titima v Stephen Njeru Titima* [2019] eKLR and urged the court to transfer Kilifi PMCC No 248 of 2018 to Malindi and try it alongside this matter as the issues of law and fact in both cases are the same, and between the same parties.
17. Counsel submitted that this suit is not *res Judicata*, as the 1st, 2nd and 3rd Defendants moved the court on September 16, 2021 seeking an order to stay of Malindi ELC No 011 of 2021 on the ground that it is *res judicata* which was dismissed as it was filed without a plaint on which to ground an application for an injunction. Counsel further submitted that where a matter or application is dismissed for want of jurisdiction, the matter cannot be said to have been heard and determined on merit.

Respondent’s Submissions

18. Counsel submitted that the current suit is *res-judicata* Kilifi Miscellaneous Land Case No 1 of 2021 having been decided conclusively on March 16, 2021 and relied on the cases of *Philes Nyokabi Kamau v Industrial & Commercial Development Corporation* (2017) eKLR and that of *Kenya Commercial Bank Limited vs Benjob Amalgamated Limited* (2017) eKLR and stated that the Plaintiff ought to have raised the issues in the defence and not file a new suit.
19. Counsel further relied on the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport & Infrastructure & 3 Others* [2015] eKLR where the court held that 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.
20. On the issue of consolidation of suits counsel submitted that the law on consolidation of suits is as correctly set out in the case of *Elizabeth Mboci Titima vs Stephen Njeru Titima* (2019) eKLR pointing



out that in that case the Plaintiffs were not one and the same person and that the Plaintiff in one of the suits was also a Defendant in the other apart from the issues being the same and as such the cases were neither *subjudice* nor *res judicata*.

21. Counsel submitted that in the instant case all the three cases have been instituted by one Plaintiff John Nyagaka Osoro hence his case falls under Section 6 and 7 of the [Civil Procedure Act](#) and urged the court to dismiss the application for transfer and consolidation.

Analysis And Determination

22. The issues for determination are whether this suit ought to be struck out for being *res-judicata* and whether this court ought to transfer and consolidate Kilifi PMCC No 248 of 2018 with this file for hearing and determination.

23. Section 7 of the [Civil Procedure Act](#) provides for the principle of *res judicata* in the following terms; -

‘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.’

24. Counsel for the Respondent hinged the application that this suit is *res judicata* on the fact that Kilifi PMCC No 01 of 2021 which application was dismissed on ground that the said application did not establish a *prima facie* case as no plaint was attached to the application.

25. It is on record that the 1st, 2nd and 3rd Defendants moved the court on september 16, 2021 seeking an order to stay of Malindi ELC No 011 of 2021 on the ground that it is *res judicata* which application was dismissed as it was filed without a plaint on which to ground an application for an injunction. It is also trite that where a matter or application is dismissed for want of jurisdiction, the matter cannot be said to have been heard and determined on merit.

26. In the case of *Henderson vs Henderson* (1843)67 ER 313 *res judicata* was described as follows: -

“...where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from genuine, inadvertence or even accident omitted part of their case. The pleas of *res judicata* applies except in special cases not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time”

27. I find that this case does not meet the threshold of *res judicata* as submitted by counsel for the Respondents.



28. On whether this court should consider transfer and consolidation of Kilifi PMCC No 248 of 2018 with the present file, in the Allahabad High Court of India in *P P Gupta vs East Asiatic Co*, Air 1960 All 184, the Court also adopted the position of consolidation in the following terms: -

“The very nature of the principle of consolidation implies that there is a similarity or identity of the matter in issue in different suits between the same parties which should be decided by the court once and for all. The object of consolidation is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same.”

29. The two causes of revolve around the same subject matter and therefore raise substantially common issues of law and fact and this would be in the interest of justice for the court to exercise its discretion in favour of an order for consolidation as was held by the Supreme Court of Kenya in the case of; *Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others* (2014) eKLR that: -

“...in the circumstances, would it serve the interests of justice to consolidate the appeals in which the parties are the same, and the central issue is the same even if worded differently? The irresistible conclusion is in the affirmative.....”

30. Similarly, in the case of *Joseph Okoyo vs Edwin Dickson Wasunna* (2014) eKLR in which the Court cited with approval the case in *Korean United Church of Kenya & 3 Others vs Seng Ha Sang* (2014) eKLR, and observed as follows: -

“Consolidation of suits is done for the purpose of achieving the overriding objection of the *Civil Procedure Act*, that is, for the expeditious disposal of Civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”

31. I have considered both applications, submission by counsel and find that the application for transfer and consolidation has merit and is therefore allowed as prayed. The Respondent’s application for striking out on the grounds of *res judicata* and *subjudice* is hereby dismissed. Each party to bear their own costs,

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF MARCH, 2023

M A ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

