



**Achungo v Nortis Investments Ltd & others (Environment & Land Case
E216 of 2022) [2023] KEELC 17943 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E216 OF 2022**

**AA OMOLLO, J
JUNE 15, 2023**

BETWEEN

MARY ABONDO ACHUNGO PLAINTIFF

AND

NORTIS INVESTMENTS LTD & OTHERS DEFENDANT

RULING

1. For determination is the application dated October 14, 2022 brought by the 1st and 2nd defendants. The application is premised on the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 2 R.15(1) of the *Civil Procedure Rules*. The defendants/applicants seek to be granted the following orders:
 - a. The suit be struck off
 - b. The costs of the suit and the application be awarded to the applicants.
2. The application was supported by the grounds listed on its face and the affidavit of Engineer Eric Nyamunga who is the director of both the 1st and 2nd defendants. The applicants plead that the subject matter in dispute was fully and substantially heard and determined in ELC Case no 591 of 2011 vide a judgement rendered on July 27, 2022. That the present suit is vexatious as it seeks to launch a counter-claim against the applicants which should have been properly done in the former suit. They contend that the present suit is time-barred under the doctrine of res judicata.
3. The application was opposed by the plaintiff/respondent who filed a replying affidavit sworn on November 10, 2022. The applicant narrated the prayers sought in the former case and the prayers being sought in the current suit and stated that this application is misconceived because it has failed to appreciate the law on res judicata. She deposes that the parties, matters in issue and prayers are not directly the same. She added that the application is intended to cause a delay in the prosecution of this case.



4. The parties opted to argue the application by filing written submissions. The 1st and 2nd defendants defined *res judicata* as a principle of law that a litigant shall not be vexed twice over the same subject matter. That it arises from the acknowledged public policy position which holds that litigation must come to an end. They cited several cases *inter alia Mburu Kinyua v Gachina Tuti* (1978) KLR 69-72 where the Court of Appeal held as per LAW, J.A thus;

“To sum up my views of this aspect of the case he can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as *res judicata*, as happened here. The position otherwise would be intolerable. A decree - holder could be deprived of the benefits of his judgment by a succession of applications to set aside the judgment, and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges. As regards Madan J A expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view.”

5. The applicants argue that *res judicata* applies to this case because: the parties in the two cases are the same to wit Mary Achungo and Nortis Investments Ltd; the subject matter of litigation is the same, Nairobi L.R. No 209/9680, and the previous matter was substantially heard and conclusively decided by a court of competent jurisdiction. They urged the court to strike out the suit with costs to them.
6. The plaintiff/respondent submitted that ELC 591 of 2011 was dismissed and the trial judge found that the retransfer of the respondents property into the name of the applicants was illegal. That this necessitated the filing of the present suit to obtain orders to have the suit title revert to the name of the respondent as well as claim rents unlawfully earned by the applicants. The respondent further submits that although courts have power to strike out cases, that power ought to be exercised in clear and obvious cases where the pleadings do not reveal any arguable case.
7. In support of her submissions, the respondent cited the case of *Mistry Javda Parbat & Co v Ameer Kassim Lakha & others*, Milimani Civil Case no 2513 of 1997 stating that her plaint raises serious arguable points *inter alia*, that the prayers in the current suit were never canvassed in ELC 591 of 2011 hence the same cannot be said to be scandalous or vexatious. It is her submission that if this suit is struck out, the Plaintiff will be blocked from a forum where she can legally recover her property defrauded by the Applicants or recover rents and general damages.
8. The issue before the court is not whether or not the current suit is scandalous or vexatious. The court is called to determine whether it offends the doctrine of *res judicata*. Both parties have quoted the provisions of section 7 of the *Civil Procedure Act* which explains in detail the principles of *res judicata*. There is no dispute that the former suit ELC 591 of 2011 was heard and determined on merits. There is evidence that the property in dispute in the former suit and the current suit is the same being land referenced as 209/9680. The current plaintiff was sued as the 1st defendant in the former suit. It appears on the face of the pleadings herein and the contents of the judgement in ELC 911 of 2011 annexed that the matters in issue in this case have been directly and substantially in issue in the former suit.
9. In contesting the application, the plaintiff argued that the prayers being sought in her plaint were never dealt with in ELC case no 591 of 2011. She does not explain why the said prayers were not introduced in the former suit by way of counter-claim.
10. The plaintiff's argument that if this suit is struck out, she will be closed from a forum where she recovers her property which has been fraudulently taken by the applicants. Unfortunately, that is no



basis to keep litigating over the same matter and which is the reason res judicata was legislated to cure as piecemeal litigation amounts to abuse of the court process and is an expense to the parties involved, see the decision in *Mburu Kinyua v Gachina Tuti supra*.

11. It is my considered view and I so hold that the current suit is res judicata ELC 591 of 2011 which was heard and determined on merits. The Plaintiff argued that her cause of action arose after the determination of the previous/former suit. However, at the time the former suit was filed (on October 28, 2011 as per date stamp on copy of plaint), the title to the suit property was in the name of the 3rd defendant and the 1st and 2nd defendants were in occupation as seen by the prayer for special damages in terms of rent owed from the September 2011 to date.
12. The Plaintiff/Respondent did not exercise her right to claim the present orders and is barred by the doctrine of res judicata from filing a claim that could have been determined in the former suit. This position finds anchor in explanation 4 of section 7 of the *Civil Procedure Act* states that, “any matter which might and ought to have been made a 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.”
13. Accordingly, I find that the application dated October 14, 2022 is merited. It is allowed with the consequence that the Plaintiff’s suit is struck out with costs to the 1st and 2nd defendants. They are also awarded the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JUNE 2023

A. OMOLLO

JUDGE

