



REPUBLIC OF KENYA



KENYA LAW
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**Ochere v Achuono & 6 others (Environment and Land Case Civil Suit
E007 of 2022) [2023] KEELC 18047 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18047 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND CASE CIVIL SUIT E007 OF 2022
GMA ONGONDO, J
JUNE 13, 2023**

BETWEEN

JOSEPH OTIENO OCHERE PLAINTIFF

AND

LAMECK OTIENO ACHUONO 1ST DEFENDANT

KAJWANG OGOLA ISAAC 2ND DEFENDANT

LUKAS WERE 3RD DEFENDANT

CHRISTINE ACHIENG OWUOR 4TH DEFENDANT

WILSON OGEDA AGIT 5TH DEFENDANT

FREDRICK MBWAYO DENGA 6TH DEFENDANT

JOSEPH AKONG'O OWINO 7TH DEFENDANT

RULING

1. The present ruling is with regard to a preliminary objection dated January 9, 2023 by the defendants through GM Nyambati and Company Advocates based on the grounds *infra*;
 - a. That the present suit made vide the plaint dated December 16, 2022 is *res judicata* contrary to the provision of section 7 of *Civil Procedure Act* Chapter 21 Laws of Kenya vide determination in Kisii High Court Civil 177 of 1991 now HomaBay ELC No 11 of 2021.
 - b. That the present suit made vide the plaint dated December 16, 2022 is *sub judice* contrary to the provision of section 6 of the *Civil Procedure Act* Chapter 21 Laws of Kenya by dinct of Counter claim in Homa Bay Chief Magistrate's Court ELC No 19 of 2020.



- c. That the Honourable court lacks jurisdiction to hear and determine this suit by reason of it being *res judicata* and *sub judice* contrary to law.
2. On March 23, 2023, the court directed that the preliminary objection be heard by written submissions.
3. By submissions dated March 2, 2023, learned counsel for the defendant termed this suit *res judicata* and *sub judice* in light of the decision in Kisii HCC No 177 of 1991 now, Homa Bay ELCC No 11 of 2021 and the pending counter claim in Homa Bay Chief Magistrate’s Court ELCC No 19 of 2020 respectively. Counsel relied upon *Mukisa Biscuit Manufacturing Co Ltd-West End Distributor’s Ltd* (1969) EA 696, *Owners of Motor Vessel “Lillian S”-vs-Caltex Oil (Kenya) Ltd* (1989) KLR 1 and *David Ndii & others-vs-Attorney General and others* (2021) eKLR, among others, to buttress the submissions. Thus, counsel implored the court to strike out the suit with costs to the defendants.
4. The plaintiff failed to file submissions regarding the application.
5. In this suit, the plaintiff in person has sued the defendants by way of a plaint dated December 16, 2022 seeking a permanent injunction, general damages for trespass and eviction order in respect of the suit land, Gem/Kajulu/17. Clearly, paragraphs 9 and 20 of the plaint show the suit land and that the plaintiff sued the 7th defendant in Kisii HCC No 177 of 1991 now, Homa Bay ELCC 11 of 2021. Paragraph 31 thereof reveals that some of the defendants instituted Homa Bay Chief Magistrate’s Court ELCC case No 19 of 2020 which was determined in favour of the plaintiff.
6. The defendants denied the plaintiff’s claim in their statement of defence dated February 9, 2023. At paragraphs 23, 24 and 25 thereof, they stated that the plaintiff sued the 7th defendant vide Kisii HCC No 177 of 1991 over the ownership of the suit property and the matter was heard and determined on merit.
7. In a reply to statement of defence dated March 21, 2023, the plaintiff implored the court to dismiss the statement of defence and enter judgment as per the plaint. He referred to the suit land, Kisii High Court Civil Case No 177 of 1991 and HomaBay Chief Magistrate Environment and Land Case No 19 of 2020 which was dismissed on August 6, 2020.
8. I have thoroughly considered the entire preliminary objection, the rival submissions and the parties’ respective pleadings. So, is the preliminary objection tenable?
9. It is important to note that in the case of *Mukisa Biscuit Manufacturing Co Ltd-West End Distributor’s Ltd* (1969) EA 696, the court held thus;

“..... 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 objection may dispose of the suit....”
10. This court is not unaware of sections 6 and 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya regarding stay of suit (sub judice) and *res judicata* respectively. Further, I am conscious of the terms “*res judicata*” and “*sub judice*” as defined in *Black’s Law Dictionary* 10th Edition at pages 1504 and 1654 respectively.
11. Notably, in HombaBay Chief Magistrate’s Court Environment and Land case No 19 of 2020, the 5th defendant and 4 others sued the plaintiff over the suit property. The entire suit was dismissed with costs to the 1st defendant/Plaintiff herein on August 6, 2020.



12. Furthermore, it must be noted that in HomaBay ELCC No 11 of 2021 (Formerly Kisii HCC No 177 of 1991), the plaintiff sued the 7th defendant concerning the suit property. Rulings were rendered therein on January 25, 2022, July 18, 2019 and May 25, 2021.
13. In the circumstances, this suit is an abuse of the process of this court. In *Muchanga Investments Ltd vs-Safaris Un-Limited (Africa) Ltd and 2 others* (2009) KLR 229, the Court of Appeal described the term abuse of the process as follows;

“.....a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.....”
14. The cardinal principle is that litigation has to come to an end; see *Halsbury’s Laws of England* (4th Edition) Volume 22 page 273.
15. To this end, I find that the instant suit is *res judicata* in view of Kisii HCC No 177 of 1991 now, Homa Bay ELCC No 11 of 2021 and Homa Bay Chief Magistrate’s Court ELC No 19 of 2020. I thus, proceed to uphold the preliminary objection dated January 9, 2023.
16. *A fortiori*, this suit, be and is hereby dismissed in entirety with costs to the defendants.
17. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 13TH DAY OF JUNE 2023.

G. M. A ONG’ONDO

JUDGE

Present

- a. Mr. Njoroge instructed by Omollo learned counsel for the plaintiff (virtually)
- b. Mr. Kirianki instructed by Mr. Nyambati learned counsel for the defendants (virtually)
- c. Plaintiff
- d. Terrence, court assistant.

