



REPUBLIC OF KENYA



KENYA LAW
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**Ethics and Anti Corruption Commission v Kensko Agro Produce
Limited & 4 others (Environment & Land Case E051 of 2023)
[2023] KEELC 20068 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E051 OF 2023
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION PLAINTIFF

AND

KENSKO AGRO PRODUCE LIMITED 1ST DEFENDANT

FRANCIS WAIGANJO KIMANGA 2ND DEFENDANT

LUCY WANJIRU KIMANGA 3RD DEFENDANT

SILVER CLOUDS INVESTMENT LIMITED 4TH DEFENDANT

WILSON GACHANJA 5TH DEFENDANT

RULING

1. The 1st defendant has raised a notice of preliminary objection on grounds that:
 - a. This suit is a gross abuse of the court process and the court lacks jurisdiction to hear and determine the Application dated June 7, 2023 and the main suit since there is prevailing judgment issued by courts of competent jurisdiction in respect of the same subject property i.e Mombasa ELC 282 of 2013 and Civil Appeal 82 of 2018', thus, the suit offends the mandatory provisions of section 7 of the *Civil Procedure Act*, cap 21 Laws of Kenya.
 - b. That this suit is filed in bad faith and it should be dismissed with costs.
2. The 1st defendant stated that the suit herein is res judicata since the issues in dispute which are the subject matter of the suit herein were heard and determined in ELC No. 282 of 2013 - Mombasa, and Civil Appeal No. 82 of 2018 Mombasa, thus the suit herein is a gross abuse of the court process and the court herein does not have jurisdiction to hear and determine the application and the main suit



for being res judicata. The 1st defendant herein was a third party and Housing Finance Corporation was the Plaintiff who had purchased L.R. Nos. Mombasa / Block XXI/ 580, Mombasa Block xx1/581 and Mombasa / Block XXI/ 582 which were a subdivision of Mombasa/ block XXI/577 from the 1st defendant herein.

3. That based on the foregoing the dispute as to the procedure of issuing, granting and registration of all that property formally registered as Mombasa/ Municipality BlockXXI/577 and the resultant subdivisions i.e. Mombasa / Block XXI/ 580, Mombasa Block XXI/581 and Mombasa /Block XXI/ 582, Mombasa / Block XXI/ 583 and Mombasa / Block XXI/ 584 was heard and determined with finality and all the appellate remedies available to the aggrieved parties exhausted.
4. This court has considered the preliminary objection and the submissions therein. *Res judicata* is a jurisdictional doctrine which is underpinned by section 7 of the [Civil Procedure Act](#) which provides thus;
 7. 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.”
5. The Court of Appeal in [John Florence Maritime Services Limited & ano v Cabinet Secretary for Transport and Infrastructure & 3 others](#) (2015) e KLR cited with approval the following holding in [Henderson v Henderson](#) (1843) 67 ER 313 in relation to the tenor and import of the doctrine of res-judicata:

“where a given matter becomes the subject of litigation in any 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 litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a 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.....”
6. The Court of Appeal summarized the rationale behind the doctrine of res judicata in the following words;

“The rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. 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.”
7. With regard to the doctrine of jurisdiction, it cannot be gainsaid that jurisdiction is what gives courts and other adjudicatory bodies the mandate to determine disputes presented before them. Without jurisdiction, they labour in vain. The Supreme Court of Kenya underscored the centrality of



jurisdiction in dispute resolution in the case of *Samuel Kamau Macharia v Kenya Kenya Bank Ltd* (2012) eKLR in the following words:

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

8. Prior to the above pronouncement by the Supreme Court of Kenya, the Court of Appeal stated the following on jurisdiction in *Owners of Motor Vessel Lillian “S” v Caltex Oil (Kenya) Limited*;

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. The plaintiff avers that dispute in ELC 282 of 2013 was instituted by Housing Finance Company Ltd vs Kenya Broadcasting Corporation and Kesko Agro Products as third Party and the issue revolved around the sale and purchase of Mombasa Block XXI/580, 581 and 582. In the said proceedings the 1st defendant denied any correlation between the mentioned suit properties and the said Mombasa Block XXI/577. Further the dispute therein challenged the titles held by Housing Finance. The present suit touches on Mombasa Block XXI/577 and the process of obtaining it was never impugned. The Plaintiff in this suit challenges the validity of the said title. This suit is Ethics and Anti-Corruption Commission vs Kensko Agro Products and others. The court is yet to pronounce itself with regard to the referenced title. The suit does not therefore offend the provisions of section 7 of the Act.
10. This court has to ascertain facts raised above by both counsel as it is their word against each other. I find that where there are disputed facts to the existence of certain facts then the court must call for evidence to prove the same. I find that this preliminary objection is not merited and it is dismissed with costs.
11. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

