Board of Management Visa Oshwal Primary School, Nairobi v Shree Visa Oshwal Community Nairobi Registered Trustees; Ministry of Education & 2 others (Interested Parties) (Environment & Land Case E176 of 2022) [2023] KEELC 22246 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22246 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E176 OF 2022

MD MWANGI, J

NOVEMBER 30, 2023

BETWEEN

THE BOARD OF MANAGEMENT VISA OSHWAL PRIMARY SCHOOL, NAIROBI ..... PLAINTIFF

AND

SHREE VISA OSHWAL COMMUNITY NAIROBI REGISTERED TRUSTEES ..... DEFENDANT

AND

MINISTRY OF EDUCATION ..... INTERESTED PARTY

THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ..... INTERESTED PARTY

(In respect of the Defendant's Notice of Motion Application dated 16th March, 2023 seeking the striking out of the suit for offending the rule against res judicata)

RULING

Background

1. What is before me for determination is the Defendant's Application dated 16th March, 2023 seeking that the Plaintiff's suit be struck out for offending the rule against res judicata. The Applicant further prays that it be awarded the costs of the application and of the entire suit.

2. The grounds upon which the application is grounded are on the face of the application as well as in the supporting affidavit of Jinit Shah, sworn on 16th March, 2023. In a nutshell, the Applicant asserts that

the issue brought before this Court for hearing and determination have conclusively been heard and determined in Nairobi HCCC 1474 of 2005 (*Shree Visa Oshwal Community & another v City Council of Nairobi)*, & Nairobi Civil Appeal NO. 126 of 2014 (*Shree Visa Oshwal Community and Another v Attorney General and 3 others*). The Applicant asserts that this Court lacks the requisite jurisdiction to re-open the said issues, re-consider and re-determine them as proposed by the Plaintiff in the instant suit. Further that in view of the foregoing, the Plaintiff's suit is frivolous and vexatious and amounts to an abuse of the process of Court.

3. The Applicant avers that no useful purpose will be served by this matter proceeding to trial. Litigation must come to an end.

Response by the Plaintiff:

4. The Plaintiff in response to the application by the Defendant filed grounds of opposition dated 22nd June, 2023 and a replying affidavit sworn by Ephantus Njoroge Ithagu on 23rd June, 2023.

5. In its grounds of opposition, the Plaintiff termed the application as misconceived and devoid of merit. The Plaintiff alleged that the Plaintiff had never before directly or indirectly litigated against the Defendant on the subject matter herein or at all. The application was therefore an abuse of the process of Court, and seeks to obstruct the Plaintiff's access to justice as guaranteed by Article 48 of *the Constitution*.

6. In the replying affidavit, the deponent who is the Principal of Visa Oshwal Primary School and Secretary to the Board of Management deposes that the Applicant is seeking to terminate the proceedings at this stage, contemptuous of the Plaintiff's right to present its cause and be heard on the merits. He avers that the Plaintiff has not previously approached the Court as against the Defendant on the issues raised in this case or at all.

7. The Deponent asserts that the Plaintiff's claim on ownership is not limited to the plea that the public school stands on the subject land but also on the plea that government has never at any one time alienated the suit property by putting the Defendant in possession; hence the suit land is essentially public property.

8. The Deponent admits that there have been other proceedings but the issue in paragraph (7) above has never been canvassed before a Court of law. Further, the order sought by the Defendant is draconian and seeks to obstruct the Plaintiff from seeking justice through an open and fair hearing on merits. The Plaintiff argues that the two interested parties in this case should also be allowed to canvass their respective positions in a full trial. He urges the Court to dismiss the application.

Court's Directions

9. The Court's directions were that the application be canvassed by way of written submissions. Both the Plaintiff and the Defendant complied. I have had an opportunity to read through the submissions which now form part of the record of this court. The Interested Parties did not participate in the application; they expressly indicated through their Advocates before the court that they did not intend to participate in the current application and the previous one where the court rendered a ruling on 24th November 2022.

Issues for determination:

10. The only issue for determination is whether the Plaintiff's suit offends the doctrine of res judicata.

Analysis and Determination:

11. In the Plaint filed in this case, the Plaintiff states that Visa Oshwal Primary School is a Public Institution situated on LR No. 209/5996. The Land is however registered in the name of the Defendant Shree Visa Oshwal Community Nairobi Registered Trustees. Amongst the orders that the Plaintiff seeks in this suit is:

    i. A declaration that the Defendant is a trustee holding title for LR 209/5996 as trustee for the benefit of the Public.

    ii. A declaration that Visa Oshwal Primary School, Nairobi, operating on LR No. 209/5996 is a Public School.

    iii. A declaration that LR 209/5996 is Public Land which is not available for alienation.

    iv. An order for rectification of the register directing the Chief Land Registrar to recall and cancel the grant issued to the Defendant and revert the Property, that is to say LR 209/5996, to Ministry of Education and or the Plaintiff.

12. In its ruling of 24th November 2022, this court noted the decision by the Court of Appeal in Nairobi Civil Appeal No. 126 of 2014 which found that: -

    i. The suit property (LR 209/5996) is private land.

    ii. Nothing in the grant specified that the school to be erected on the suit property would or ought to be a public school and whether the school erected thereon was run as private or public was immaterial.

    iii. The categorization of the school by the Ministry of education as 'public' in the year 1997 was unilateral and without reference to the Defendant.

    iv. The Commissioner of Lands 6 months' Notice of revocation of the Defendant's grant was erroneous to the extent that it was based on the purported conversion of the school from public to private.

    v. The Commissioner of Land therefor breached on the Defendant's right to property, fair administrative action and access to justice.

13. By seeking the orders enumerated in paragraph 11 (i)-(iv) above, the Plaintiff is seeking to re-litigate of an issue that has already been determined. The Defendant indeed points out that there an unsuccessful attempt to appeal against the decision of the Court of Appeal to the Supreme Court.

14. Section 7 of the *Civil Procedure Act* is the substantive law in regard to the doctrine of res judicata. It provides that:

> " 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 can 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."

15. The said Section goes further to provide explanations with respect to the application of the doctrine of res judicata rule in the following terms:

> " Explanation (1)—The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
>
> Explanation (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.
>
> Explanation (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."

16. In the case of *Christopher Kenyariri v Salama Beach* (2017) eKLR, the court clearly stated the ingredients to be satisfied when determining res judicata thus:

> " ...the following elements must be satisfied...in conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit;
>
> b) Former suit between same parties or parties under whom they or any of them claim;
>
> c) Those parties are litigating under the same title; and
>
> d) The issue was heard and finally determined.
>
> e) The court was competent to try the subsequent suit in which the suit is raised."

17. In order therefore to decide whether a case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain:

(i) what issues were really determined in the previous case;

(ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case.

(iii) whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

18. As I already stated in my earlier ruling, the ministry of Education under whom the Plaintiff is constituted and the Visa Oshwal Primary School is registered (like all other public schools under the law), was a party in both cases that the Defendant has referred to. The Plaintiff claims under the same title as the Ministry of Education. In deed one of the prayers that the Plaintiff seeks in this suit demonstrates the point. The Plaintiff prays for an order for rectification of the register directing the Chief Land Registrar to recall and cancel the grant issued to the Defendant and revert the Property, that is to say LR 209/5996, to Ministry of Education and or the Plaintiff. The allegation by the Plaintiff therefore that it has never before directly or indirectly litigated against the Defendant on the subject matter herein or at all holds no water.

19. There is an interesting argument in the Plaintiff's submissions to the effect that its suit raises 'novel issues'. The argument by the Plaintiff is that its suit brings to the fore the issue of implied trust. It is the Plaintiff's case that the government did not alienate the suit property; that the government's intention was not to rid the public of the land but rather to put the Defendants in position of trust in favour of

the public. This, according to the Plaintiff is not an issue that has been litigated on previously. It has not been substantively in issue in any of the previous suits hence cannot be res judicata.

20. The Plaintiff's argument reminds me of the old case of *Siri Ram Kaura v M.J.E. Morgan* (1961) EA, where the East African Court of Appeal while addressing the issue of res judicata was categorical that it was not permissible for parties to evade the doctrine of *res judicata* by 'simply conjuring up parties or issues with a view to giving the case a different complexion.' I think it appropriate to quote verbatim the rather long quote for its full tenor and effect. The Court at page 462 stated that:

> " The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

21. I have no doubt in my mind that the Plaintiff's suit as currently framed offends the doctrine of *res judicata* in view of the decisions in Nairobi HCCC 1474 of 2005 (*Shree Visa Oshwal Community & another v City Council of Nairobi*), & Nairobi Civil Appeal NO. 126 of 2014 (*Shree Visa Oshwal Community and Another v Attorney General and 3 others*).

22. There is a second issue that I need to discuss in this ruling. Under the principle of stare decisis, this court is bound by the decision of the Court of Appeal. The Plaintiff's suit as framed and in view of the highlighted decision by the court of appeal is an attempt to seek 'review' the decision of the court of appeal before this court. That decision is binding on this court in as far as the title to the suit property LR 209/5996 is concerned.

23. In the case of *Dodhia v National & Grindlays Bank Limited and ano* [1970] EA 195, Duffus, V.P. expounded the principle of stare decisis stating that:

> " The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of

judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State."

24. In *Kidero & 5 Others vs. Waititu and Others*, Sup. Ct. Petition No. 18 of 2014 (Consolidated with Petition No. 20 of 2014), Njoki Ndungu, SCJ, stated as follows on the doctrine of stare decisis:

> "The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Court's vital essence and the decisions of this Court protect settled anticipations by ensuring that *the Constitution* is upheld and enforced, and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy, and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms."

25. The upshot from the foregoing is that the Defendant's application is allowed as prayed. The Plaintiff's suit herein is struck out with costs to the Defendant as it offends the doctrine of *res judicata*. The Defendant shall also have the costs of this application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2023.

M. D. MWANGI

JUDGE