



REPUBLIC OF KENYA



**Ogola v Alila (Environment & Land Case E025 of 2022)
[2023] KEELC 21959 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E025 OF 2022
AY KOROSS, J
NOVEMBER 30, 2023**

BETWEEN

JOHN OWITI OGOLA PLAINTIFF

AND

JARED ODONGO ALILA DEFENDANT

RULING

Defendant's case

1. The ruling is in respect of the defendant's notice of motion dated 24/05/2023 in which by the provisions of Sections 1A, 1B, 3, 3A and 7 of the *Civil Procedure Act* and Order 2 rule 15(1)(a)(d) of the *Civil Procedure Rules*, the defendant sought the following prayers: -
 - a) The plaintiff's suit be struck out for being res judicata.
 - b) The costs of this application be provided for.
2. The motion was supported by grounds on its face and on the supporting affidavit deposed on 24/05/2023 by counsel Ms. Agnes Akinyi who is on record for the defendant.
3. It was averred, the plaintiff had failed to disclose he had saddled the defendant with previous proceedings to wit Kisumu ELC OS No. 170 of 2016 and Siaya ELC OS No. 28 of 2016 wherein the plaintiff in these previous suits was the plaintiff herein whilst the defendant was the defendant in the previous suits.
4. Additionally, there was another application filed by the plaintiff in Siaya CM Succession Cause 25 of 2018 in which he had filed objection proceedings against distribution of the estate of Richard Alila Ojee. Counsel asserted in all these cases, the plaintiffs suits or objection as the circumstances be, were dismissed with costs and consequently, the plaintiff's instant suit was res judicata.



Plaintiff's case.

5. By his grounds of opposition filed by his counsel Mr. Ashioya, the plaintiff raised two grounds of opposition: -
- a) That the application was made in bad faith and an afterthought.
 - b) That the application was frivolous, vexatious, an abuse of court process and should be dismissed.

Defendant's submissions

6. The motion was canvassed by written submissions. M/s Akinyi who appeared for the defendant filed written submissions dated 17/08/2023. It was submitted that being guided by Section 7 of the *Civil Procedure Act*, the plaintiff's suit was res judicata. Counsel relied on the Court of Appeal decision of *Independent and Electoral Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR where the court delineated the criteria for determining if a suit was res judicata as follows;

“Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

- a) The suit or issue was directly and substantially in issue in the former suit.
 - b) The former suit was between the same parties or parties under whom they or any of them claim.
 - c) Those parties were litigating under the same title.
 - d) The issue was heard and finally determined in the former suit.
 - e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
7. Juxtaposing the principles of res judicata against this provision of law and decision, it was submitted the issue in the present and previous suits were on adverse possession, involved the same parties, the titles were the same being land parcel no. East Gem/Anyiko/496 (suit property), previous suits were heard on merits and by competent courts.

Plaintiff's submissions

8. Mr. Ashioya, who appeared for the defendants filed written submissions dated 3/10/2023. It was submitted that even though there were previous proceedings between the same parties over the suit property and for the reason they were not heard and determined on merits, the defendant's allegations were farfetched.

Issues for determination

9. Having carefully considered the motion, affidavit, grounds of opposition, rival submissions and well cited provisions of law and precedents, I frame the following issues as falling for determination:-
- a) Whether the instant suit met the threshold of res judicata.



- b) If the answer to (a) above is in the negative, whether the plaintiff was barred from filing a subsequent suit against the defendant.

Analysis and determination.

10. Before I delve into the issues for determination, I find it worthwhile to address certain preliminary issues that emerged from the plaintiff's submissions.
11. By filing grounds of opposition which raised issues of law, the plaintiff did not counter the defendant's averments and as it were, these court takes the defendant's averments as true and uncontroverted.
12. It must be noted submissions are arguments and not evidence and the plaintiff having chosen not to file a replying affidavit could not introduce evidence in his submissions. I adopt the position taken in *Kennedy Otieno Odiyo & 12 others v Kenya Electricity Generating Company Limited* [2010] eKLR which held:-

“Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.”

13. Furthermore, the plaintiff did not submit on his grounds of opposition. Nonetheless, I have scrutinized the motion and there is nothing to support the plaintiff's grounds of opposition and, in my view, they were unwarranted. I now turn to the issues for determination.

a) Whether the instant suit met the threshold of res judicata.

14. The legal framework of the doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act* which stipulates as follows: -

“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.”

15. As stated earlier in this ruling, the defendant's facts were undisputed. Nevertheless, since res judicata is a matter of fact, I am called to revisit and interrogate previous cases and determine if the instant case falls on all fours on the doctrine of res judicata. I will investigate the two ELC cases conjunctively and later, deal with the succession cause since it falls on a different paradigm.
16. While writing this ruling, I called for Siaya ELC OS No. 28 of 2021 from the registry and I also interrogated the originating summons in Kisumu ELC OS No. 170 of 2016 which was tendered by the defendant to this court.
17. On analysis, they are more or less a replica of each other and meet most of the ingredients of res judicata, however, even if both were handled by competent courts and their respective dismissals deemed their outcomes as judgments, they did not qualify as having been heard and determined the suits on merits.



Accordingly, and only to that extent, the motion fails and to buttress my position, I rely on the Court of Appeal decision of *Michael Bett Siror v Jackson Koech* [2019] eKLR which stated: -

“We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the *Civil Procedure Act*, as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout.

Thus, we reject the appellant’s contention and find that the application of the doctrine of res judicata was very contentious and required full investigation at the trial...”

18. Now, as to Siaya CM Succession Cause 25 of 2018, I have not had an opportunity to peruse the pleadings, but what can be gleaned from the ruling dated 24/03/2021, the plaintiff had by a notice of motion, merely sought to stay proceedings in the probate court pending determination of Siaya ELC OS No. 28 of 2021. The motion was allowed; however, it is evident the issues in the two suits were entirely different. I find and hold the plaintiff’s instant suit is not res judicata.

b) Whether the plaintiff was barred from filing a subsequent suit against the defendant.

19. Having perused Siaya ELC OS No. 28 of 2021, it emerges it was dismissed for want of attendance. To refresh parties’ minds, I will rehash the circumstances under which the plaintiff’s suit was dismissed because it is only upon determining such circumstances whilst applying relevant provisions of law, that this court will determine if the instant suit is barred or not.

20. Order 12 Rule 3 of the *Civil Procedure Rules* provides as follows: -

- “(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.
- (2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.
- (3) If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.”

21. Order 12 Rule 6 (2) further states that: -

- “(2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.”

22. In the case of Siaya ELC OS No. 28 of 2021, this court dismissed the plaintiff’s case for want of attendance on 26/01/2022. On the fateful day, the plaintiff was absent whilst the defendant was present and at no time did his counsel allude he had admitted the plaintiff’s claim. In the circumstances, it follows the plaintiff’s claim was dismissed in accordance the provisions of Order 12 Rule 3 (1).

23. On application of the provisions of Order 12 Rule 6(2), it is obvious and apparent that once a suit has been dismissed under Rule 3 of the said Order, no fresh suit may be brought in respect of the same cause of action. The door was shut and the plaintiff could not institute a fresh suit over the same cause of action and I must find that the plaintiff’s suit is barred.



24. Before I pen off, I must entertain no doubt that the plaintiff has long abused the court process. The defendant has been encumbered with court proceedings in the same court for close to 7 years to no end.
25. As a court, we are called to balance between public interest by bringing litigation to an end vis a vis ensuring private citizens gain access to justice. Where one abuses the process, the courts have a mandate to end such transgression. I place reliance in the Court of Appeal decision of *Kivanga Estates Limited v National Bank of Kenya* (2017) eKLR where when faced with similar circumstances obtaining in this case, the court held:-

“The court will look closely at the conduct of the party bringing subsequent proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to ex debito justitiae prevent it.

There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both the *Constitution* and the law to assist the court to further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties

...the fact that they were abandoned before determination and fresh ones brought was in itself an abuse of the process of the court sufficient under order 2 rule 15 (1) (b) and (d) to justify striking out.”

26. Utmost, the plaintiff's entire suit is hereby dismissed with costs to the defendant.
27. It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 30TH DAY OF NOVEMBER 2023.

HON. A. Y. KOROSS

JUDGE

30/11/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Ashioya for the plaintiff

Miss. Akinyi for the defendant

Court assistant: Ishmael Orwa

