



**Muthengi v Agriculture Syndicate Limited & 2 others (Miscellaneous Application 058 of 2022) [2023] KEELC 21679 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21679 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
MISCELLANEOUS APPLICATION 058 OF 2022  
A NYUKURI, J  
NOVEMBER 22, 2023**

**BETWEEN**

**ALEXANDER MUEMA MUTHENGI ..... APPLICANT**

**AND**

**AGRICULTURE SYNDICATE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GIMU DEVELOPMENT COMPANY LTD ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS MBURU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated December 14, 2022 filed by the applicant seeking an order that Machakos CMCC No 136 of 2019 Agriculture Syndicate Limited v Gimu Construction Ltd be transferred to the Environment and Land Court at Machakos for hearing and determination. They also sought the costs of the application.
2. The basis of the application is explained in the Affidavit sworn on December 12, 2022 by the applicant. He stated that on September 21, 2005, the plaintiff in the aforesaid suit filed the suit in the High Court being Civil Suit No 1153 of 2005 seeking injunction against the defendant. That the matter was later transferred to the Environment and Land Court at Nairobi and finally to the Chief Magistrates Court at Machakos on July 15, 2019. He stated that the matter is beyond the pecuniary jurisdiction of the lower court as the counterclaim seeks to transfer 25 acres of LR No 10426/28 with a value of over 20 million per acre. That after filing suit, the applicant separated from the defendant and entered into agreement dated May 26, 2016 granting him a third of the defendant company. That on April 30, 2021, this court declined to transfer this matter from the lower court as the applicant was not a party, but that by the ruling of the lower court dated December 15, 2021, the applicant was joined as an interested party to the suit.



3. He further deponed that the applicant is apprehensive that justice will not be served if the matter is heard by a court that lacks jurisdiction. He attached his Affidavit dated June 2, 2021, the Ruling of this court of April 30, 2021 and the ruling of the lower court of December 15, 2021.
4. The application is opposed. Martin Mutisya Muthengi, a director of the 2<sup>nd</sup> respondent filed a Replying Affidavit sworn on January 17, 2023. He stated that the origin of the suit in issue was a sale agreement for 25 acres out of LR No 10426/3 and 104426/8 Mavoko Municipality. That that agreement was frustrated by the plaintiff who sold off the property to other parties in 2005 and therefore ownership thereof changed hands. That the 2<sup>nd</sup> respondent having paid the plaintiff a sum of Kshs 11,600,000/=, the former sought for refund of the said amount in their counterclaim. That the 2<sup>nd</sup> respondent's efforts to stop the sale by the plaintiff was dismissed vide the ruling of the High Court on December 13, 2005 in the presence of the 2<sup>nd</sup> respondent's directors including the applicant, who was in contempt of court and had attended court to purge the contempt.
5. That therefore the 2<sup>nd</sup> respondent's prayer for specific performance was overtaken by the order of court made on September 30, 2005. He stated that the valuation report showing a value of Kshs. 80,000,000/= was in regard to a different parcel of land being LR 10426/24 and that the 2<sup>nd</sup> respondent has no interest in that land, and if the applicant has an interest he can file a separate suit.
6. He stated that the defendant's counterclaim in the lower court is for refund of Kshs. 11,600,000/= which is within the pecuniary jurisdiction of defendant the lower court. He maintained that the suit before the lower court is for breach of contract where the applicant was not party to and is not a in the lower court but merely an interested party and therefore the instant application is misplaced.
7. In a rejoinder, the applicant filed a Supplementary Affidavit dated April 20, 2023. He stated that it is impossible to obtain valuation for the suit property as he never got title thereto, but that advertisements in the area in 2014 show that one acre is sold at Kshs. 30,000,000/= and that a similar property was sold at Kshs. 10,000,000/= per acre. That, part of the suit property is vacant and the court will therefore not be making orders in vain. He attached an advertisement in the Daily Nation newspaper of October 8, 2014, a valuation report dated July 17, 2013 and satellite pictures of the suit property.
8. The application was disposed by way of written submissions. On record are the applicant's submissions dated April 19, 2023 and supplementary submissions dated May 23, 2023 as well as the respondent's submissions dated April 12, 2023.

### **Applicant's submissions**

9. Counsel for the applicant submitted that the Magistrates Court has no jurisdiction to hear and determine the suit herein as the counterclaim runs into hundreds of millions of shillings. Counsel argued that if the magistrates court makes a decision outside its pecuniary jurisdiction, the same shall be null and void. Reliance was placed on the case of *Owners of Motor vessel Lillian v Caltex Oil (Kenya) Limited* (1989) to argue that jurisdiction is everything and where a court lacks jurisdiction, its subsequent orders are null and void.
10. Counsel also referred to sections 7 (1) (a) and 9 (a) of the *Magistrate's Court Act*, and article 169 of the *Constitution of Kenya, 2010* to argue that a Magistrate Court can only hear and determine disputes where the subject matter does not exceed Kshs. 20,000,000/=. To buttress this argument, counsel relied on the case of *Re Interim Independent Electoral Commission*, Supreme Court Advisory Opinion, Constitutional Application No 2 of 2011 [2012] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR for the proposition that jurisdiction



emanates from the Constitution, statute or principles laid down in judicial precedent and a court ought not to arrogate itself jurisdiction that it does not have.

11. Further, counsel relied on section 18 of the Civil Procedure Act and cited the cases of John Mwangi Karanja v Alfred Ndiangui [2011] eKLR and EKM v PKM [2021] eKLR to argue that this court has the requisite jurisdiction to transfer the suit from the magistrates court to this court. Counsel relied on article 162 of the Constitution and section 13 of the Environment and Land Court Act to argue that this court is the one vested with jurisdiction to hear and determine their counterclaim.

### **Respondent's submissions**

12. Counsel for the respondent submitted that the suit before the lower court should not be transferred to this court as the applicant is neither a plaintiff or defendant in that suit. That the applicant was joined to that suit because he ceased from being the defendant's director and that therefore he is entitled to a share of the counterclaim made by the defendant of Kshs. 11,600,000/=. That the applicant therefore has no direct claim before the lower court and cannot force the plaintiff and defendant in the lower court to transfer their suit. It was further contended for the respondent that there is no claim in the lower court for land as the suit property already changed hands from the 1<sup>st</sup> and 2<sup>nd</sup> respondents and that that fact is acknowledged in the applicant's affidavit, paragraph 12. Counsel maintained that the only issue for determination before the chief magistrate's court is a refund of Kshs. 11,600,000/= which the court has jurisdiction as its pecuniary jurisdiction is capped at Kshs. 20 million. That the applicant is not a director with the defendant and if he thinks he has a claim for land against the plaintiff, he should file a separate suit in the ELC based on allegations of fraud as he alleges. He stated that the applicant had filed a similar application which was dismissed *vide* ELC Misc. No. 20 of 2020.
13. In the supplementary submissions, counsel for the applicant argued that the defendant had sought for a counterclaim for transfer of 25 acres in lieu of part payment of Kshs. 11,600,000/=. Counsel further argued that this application was not *res judicata*, as the decision in ELC Misc. 20 of 2020 was to the effect that the applicant was not party to the lower court when he sought for transfer but that he had now been joined pursuant to the lower court decision.

### **Analysis and determination**

14. The court has carefully considered the application, the response thereto and rival submissions. The issues that arise for determination are;
  - a. Whether this application is *res judicata* in view of the decision in ELC Miscellaneous Application No. 20 of 2020, and
  - b. Whether there is justification to transfer Machakos CMCC 136 of 2019 to this court.
15. The doctrine of *res judicata* bars the court from trying an issue or a suit which has already been determined by a competent court with finality, where the parties or their privies and the issue in contention in the previous suit are the same as those in the current suit.
16. The Black's Law Dictionary 10<sup>th</sup> edition defines *res judicata* to mean;

“A thing adjudicated.” An issue that has been definitely settled by judicial decision. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been -



But was not - raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a trial judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

17. Section 7 of the [Civil Procedure Act](#) provides for the doctrine of *res judicata* as follows;

Res Judicata

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.

Explanation.—The expression “former suit” means a suit which has been decided before the (1) suit in question whether or not it was instituted before it.

Explanation.—For the purposes of this section, the competence of a court shall be determined (2) irrespective of any provision as to right of appeal from the decision of that — court.

Explanation.—The matter above referred to must in the former suit have been alleged by one (3) party and either denied or admitted, expressly or impliedly, by the other.

Explanation.—A matter which might and ought to have been made ground of defence or (4) attack in such former suit shall be deemed to have been a matter directly and — substantially in issue in such suit.

Explanation.—Any relief claimed in a suit, which is not expressly granted by the decree shall, (5) for the purposes of this section, be deemed to have been refused.

Explanation.—Where persons litigate bona fide in respect of a public right or of a private (6) right claimed in common for themselves and others, all persons interested in — such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

18. The elements of *res judicata* were stated in the case of [Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company & another \(Interested Parties\)](#) [2020] eKLR, at Paragraph 44 the court held as follows;

A close reading of section 7 of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine five essential elements which are stipulated in the conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that;

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.



- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

19. The purpose of the doctrine is to have finality in litigation where a matter between the same parties has already been determined on merit so that a defendant is not vexed with unnecessary litigation. In the case of the *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, [2017] eKLR the court stated that;

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.

20. The doctrine of *res judicata* frowns upon the escalation of litigation horizontally by filing a fresh suit instead of seeking review in the court that made a previous decision or escalating litigation vertically by way of appeal.

21. I have considered the decision of this court made on April 30, 2021, in ELC Misc. No. 20 of 2020, concerning an application for joinder and transfer of Machakos CMCC No. 136 of 2019 to this court. In that matter, the parties were the same and the issue being transfer of suit was the same as the issue now before court. However, that previous suit was struck out for want of locus on the part of the applicant as he was not a party to the suit that he was seeking to transfer. As that suit was not heard on merit but struck out for lack of standing on the part of the applicant, I find and hold that the instant application is not *res judicata*.

22. On the issue of transfer of suit, section 18 of the *Civil Procedure Act* provides for transfer of suits as follows;

Power of High Court to withdraw and transfer case instituted in subordinate court

1. On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
  - a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
  - b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
    - i. try or dispose of the same; or
    - ii. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
    - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.



2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.
23. Therefore, this court has power to transfer any suit pending before the lower court to this court, where the interest of justice would require transfer. The reason why the transfer is sought by the applicant herein is that there is a counterclaim for transfer of 25 acres to the defendant and that one acre is valued at over 20 million shillings and that therefore the magistrates court has no pecuniary jurisdiction to hear and determine the suit.
24. By virtue of section 9 of the *Magistrates Courts Act*, a Chief Magistrate who is at the apex of the magistracy has jurisdiction to determine disputes whose value of the subject matter does not exceed 20 million. Therefore, the issue herein is whether the value of the subject matter in the dispute in Machakos CMCC No 136 of 2019 is more than Kshs. 20 million. For purposes of determining jurisdiction, the value of the subject matter can be deduced from the pleadings.
25. It is trite, and provided in section 107 of the *Evidence Act*, that whoever alleges is under duty to prove their allegations. In the instant application, the applicant did not attach pleadings filed before the lower court in Machakos CMCC No. 136 of 2019. He only states that there is a counterclaim for transfer 25 acres and that each acre of land has a value of over Kshs. 20 million. However, it is not disputed that the applicant is neither a plaintiff nor defendant in the lower court. He is merely an interested party, who lays claim on a third of the defendant's assets, having ceased from the defendant's directorship. Therefore, the applicant has no claim or counterclaim in his own right before the lower court but merely interested in the outcome or decision that will come from that court, because according to him, either way, he will be affected by that decision in view of his claim of a third of the defendant's assets. On the other hand, the defendant in the suit before the lower court insists that their counterclaim is for Kshs. 11,600,000/= as the suit property already changed hands from the plaintiff to third parties and their request for injunction to stop the transfer was dismissed, hence their prayer for specific performance was overtaken by events and became moot.
26. In view of the foregoing circumstances, the defendant being the owner of the counterclaim, is the only one who determines what he wants from court, and the applicant a mere interested party and who has not filed any claim before the lower court cannot be heard to insist that there is a counterclaim for transfer of 25 acres, when he himself does not have any claim before that court. If indeed he wants to make a claim for transfer of land as he states, he is at liberty to file that claim before the ELC at Machakos, otherwise, there is no basis for the application herein and there is no evidence by the applicant that the subject matter in Machakos CMCC No. 136 of 2019 is more than 20 million.
27. In the premises, I find no merit in the application dated December 14, 2022 and the same is hereby dismissed with costs to the respondent.
28. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Sultani holding brief for Mr. Gaita for 1<sup>st</sup> and 3<sup>rd</sup> respondents



Mr. Muindi for 2<sup>nd</sup> respondent

No appearance for applicant

Josephine - Court Assistant

