



REPUBLIC OF KENYA



Telposta Pension Scheme Registered Trustees v Sing'oei & another (Environment & Land Case E085 of 2024) [2025] KEELC 3475 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3475 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E085 OF 2024**

**CG MBOGO, J
APRIL 30, 2025**

BETWEEN

TELPOSTA PENSION SCHEME REGISTERED TRUSTEES PLAINTIFF

AND

CHARLES SING'OEI 1ST DEFENDANT

BEATRICE CHELIMO 2ND DEFENDANT

RULING

1. Before me is the notice of motion dated 19th November, 2024, filed by the defendants/applicants, and it is expressed to be brought under Article 159 of *the Constitution* of Kenya, Sections 1A, 1B, 3A, 7 and 8 of the *Civil Procedure Act* and Order 2 Rule 9 & 15 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:-
 - i. That the suit herein instituted vide plaint dated 1st March 2024 be dismissed for being res judicata and/or an abuse of court process, and discloses no cause of action.
 - ii. That the costs of this application and the main suit be borne by the plaintiff/respondent.
2. The application is premised on the grounds on its face. The application is further supported by the affidavit of the 1st defendant/applicant sworn on even date. In his affidavit, the 1st defendant/applicant deposed that together with the 2nd defendant/applicant, they purchased unit no. 56 on LR. No. NRB/Block No. 69/117, the suit property vide an amended sale agreement dated 14th August, 2005. He deposed that as a result of the agreement, they moved to court vide Civil Suit No. 161 of 2008 Charles Sing'oei and Beatrice Chelimo v Telposta Pension Scheme Registered Trustees, where the matter was heard and judgment delivered on 30th July, 2020.
3. The 1st defendant/applicant deposed that pursuant to the judgment, the sum decreed became a judgment due to the plaintiff/respondent, and a demand for the same could only be found on the



- decree resulting from the judgment. Further, that it is evident that the plaintiff/respondent frustrated the completion of the transaction, and declined to give effect to the order of specific performance. The 1st defendant/applicant deposed that the issues in contention were determined with finality through the court's judgment.
4. The application was opposed vide the replying affidavit of Peter K Rotich, the trust secretary of the plaintiff/respondent sworn on 21st January, 2025. In his affidavit, the plaintiff/respondent deposed that following the judgment delivered by the court on 30th July 2020, the defendants/applicants were ordered to pay rent from 7th July, 2005 to 1st August 2008, but they failed to do so. In finding that the sale agreement was still valid, the plaintiff/respondent enforced the terms of the agreement by issuing a 21 day's completion notice upon the defendants/applicants through registered post and by hand delivery. The plaintiff/ respondent deposed that the defendants/applicants did not remedy the breach within the notice period, and the sale agreement was terminated upon expiry of the notice on 9th November, 2020.
 5. The plaintiff/respondent deposed that following the termination of the sale agreement, a new cause of action against the defendants/applicants arose. He deposed that the cause of action in this suit is different from the previous suit, and thus a claim of res judicata does not lie. Further, that while judgment in the previous suit was on merit, the same was conditional, and since the defendants/applicants did not pay the balance of the purchase price, they had to fall back to the sale agreement which the court found was valid. In conclusion, the plaintiff/respondent deposed that the cheques were prepared long after the completion notice had lapsed.
 6. The application was canvassed by way of written submissions. The defendants/applicants filed their written submissions dated 12th March, 2025 where they raised three issues for determination as follows:
 - a. Whether the judgment of the High Court dated 30th July 2020 is valid and enforceable in relation to the suit property.
 - b. If the above is in the affirmative, whether the plaintiffs suit vide a plaint dated 1st March 2024 is res judicata on account of it being settled by the above referenced judgment; and
 - c. What are the appropriate reliefs in the circumstances.
 7. On the first issue, the defendants/applicants submitted that the decision of the court is valid and enforceable unless it is set aside or appealed against. While relying on the cases of Kennedy Mokuva Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, and Tribe Hotel Ltd v Josphat Cosmas Onyango [2018] eKLR, the defendants/applicants submitted that there is a subsisting order of specific performance which cannot be ignored, and presently, the suit property is held in trust for them, and an order of eviction cannot issue.
 8. On the second and third issues, the defendants/applicants submitted that there is a binding court order, and that this court should down its tools to avoid sitting on appeal of a court of equal jurisdiction. Reliance was placed on the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR. The defendants/applicants further submitted that the instant application is an abuse of the court process on account of res judicata.
 9. The plaintiff/respondent filed its written submissions dated 17th March, 2025 where it raised one issue for determination which is whether the applicants' application has merit. On this issue, the plaintiff/respondent submitted that the cause of action in the present suit is different from the previous suit. To buttress on this submission, the plaintiff/respondent relied on the cases of Dina Management Limited v County Government of Mombasa & 5 others [2021] KECA 503 (KLR), John Florence Maritime



Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2015] KECA 472 (KLR), Karatu & 21 others v Njuguna & another (Sued as the administrators of the Estate of David Nganga Njuguna); Njenga (Defendant) [2023] KEELC 842 (KLR), and Samuel Muthia Magua v American Life Insurance Co. Ltd [2009] eKLR.

10. The plaintiff/respondent further submitted that the defendants/applicants have alleged in their submissions that they were not served with the completion notice, an issue that was not raised in their application. That service of the notice of completion was proper as it was done via registered post. The plaintiff/respondent urged this court to find that the cause of action in the present suit is different from the cause of action in the former suit.
11. I have considered the application, reply thereof and the written submissions filed by the parties. I am of the view that the issue for determination is whether this suit is res judicata.
12. The principle of res judicata is provided under Section 7 of the *Civil Procedure Act*, which provides 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.

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.

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

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

Explanation - (6) Where persons litigate bona fide in respect of a public right or of a private 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.”

13. The Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR expressed itself as follows on the issue of res judicata:

“(317) The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....

[319] There are conditions to the application of the doctrine of res judicata:

- (i) the issue in the first suit must have been decided by a competent court;



- (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and
- (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title *Karia and Another v. The Attorney General and Others*, [2005] 1 EA 83, 89.”

14. From the above, it will be observed that for res judicata to apply, the issue in the latter suit must have been directly and substantially in issue in the former suit, between the same parties, or between parties under whom they are litigating. Applying the above principles to the circumstances of this case, it is not in dispute that there was a former suit between the same parties, which was heard and determined, and the judgment delivered on 30th July, 2020.
15. The plaintiff/respondent argued that the judgment delivered on 30th July, 2020 was conditional upon payment of the sums owing. However, since the defendants/applicants defaulted on that condition by failing to remit the sums owing, it had no choice but to fall back to the sale agreement. In doing so, the plaintiff/respondent issued a 21 days’ notice of completion. The defendants/applicants did not honour the said notice. The plaintiff/respondent contends that by virtue of the judgment being conditional, and owing to failure by the defendants/applicants to effect payments within the time stipulated, a new cause of action thus arises that is distinct from the former suit.
16. However persuasive that might look, numerous authorities have stressed the need to ensure efficient and timely disposal of cases, and to avoid entertaining multiple suits that clog the system. In this case, whether in the former or the present suit, the sale agreement remains at the centre of the dispute. This agreement was in contention in the former suit, its enforcement is now in contention in this suit. If say I disallow the application, the court will be exposed to ridicule, as parties will have another chance to relitigate the same issues.
17. In my view, there exists another avenue for enforcing the decree in the instance that the defendants/applicants have failed to comply.
18. Arising from the above, this court finds merit in the notice of motion dated 19th November, 2024. This court grants the following orders:
1. The plaint dated 1st March 2024 is hereby struck out for being res judicata.
 2. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL, 2025.

HON. MBOGO C.G.

JUDGE

30/04/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Muuo for the Plaintiff/Respondent – present



Mrs. Muthie for the Defendants/Applicants – absent

