



REPUBLIC OF KENYA



KENYA LAW
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Rono & another v Kabianga Tea Factory Limited (Enviromental and Land Originating Summons E008 of 2023) [2025] KEELC 3339 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3339 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023
LA OMOLLO, J
APRIL 24, 2025

BETWEEN

RICHARD KIPSIGEI RONO 1ST PLAINTIFF

DANIEL KIPRUTO ROP 2ND PLAINTIFF

AND

KABIANGA TEA FACTORY LIMITED DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 22nd May, 2024. The application is expressed to be brought under Sections 1A, 3A & 7 of the Civil Procedure Act and Order 2 Rule 15 of the Civil Procedure Rules.
2. The application seeks the following orders;
 - a. That the Plaintiffs/Respondents suit be struck out as;
 - a. It is res judicata.
 - b. It is scandalous, frivolous and vexatious.
 - c. It is otherwise an abuse of the Court process.
 - b. That the costs of this suit be provided for.
3. The application is based on the grounds on its face and the supporting affidavit of one Jaswinder Singh Virdee sworn on 22nd May, 2024.



Factual Background.

4. The Plaintiffs/Respondents commenced the present proceedings vide the Originating Summons dated 22nd November, 2023 where they seek the determination of the following questions;
 - a. Whether the Plaintiffs are entitled to file the instant fresh suit after ELC Suit No. 3 of 2016 involving the same subject matter was dismissed not on merit but on a technicality, to wit, want of prosecution.
 - b. Whether the Plaintiffs herein have been in quiet and uninterrupted possession of the whole of Kericho/Koitaburot/372 from 1973 to date.
 - c. Whether the said land has now devolved to the Plaintiffs herein by virtue of the doctrine of adverse possession.
 - d. Whether the Plaintiffs are entitled to declaration of ownership of land parcel Kericho/Koitaburot/372 by adverse possession.
 - e. Whether the names of the Plaintiffs should be entered in the register of lands as proprietors of Kericho/Koitaburot/372.
 - f. Whether the Defendant did exercise due diligence when they visited and bought the suit land in the year 2012 whilst the Plaintiffs were in peaceful, quiet and uninterrupted occupation.
 - g. Whether costs of this suit should be provided for.
5. In response, the Defendant/Applicant filed a Replying Affidavit on 19th December, 2023 sworn by one Jaswinder Singh Virdee.
6. The application under consideration first came up for directions on 4th July, 2024 when the Court granted the Plaintiffs/Respondents time to file their response.
7. The Court also issued directions that the application be heard by way of written submissions.
8. The matter was mentioned severally to confirm filing of submissions. On 5th November, 2024 the application was reserved for ruling.

The Defendant/Applicant's Contention.

9. The affidavit in support of the application is sworn by Jaswinder Singh Virdee. He describes himself as the Defendant/Applicant's managing director.
10. He contends that the Plaintiffs/Respondents together with one Joseph Rop filed Kericho ELC Case No. 3 of 2016 against the Defendant/Applicant seeking for the Court to issue orders of adverse possession over land parcel No. Kericho/Koitaburot/372.
11. He also contends that from the pleadings filed in this matter and those filed in Kericho ELC Case No. 3 of 2016 it is apparent that both suits have been filed on behalf of Kiprono Too (deceased) and Kimeli Busienei (deceased).
12. He further contends that upon being served with the pleadings filed in Kericho ELC Case No. 3 of 2016, the Defendant/Applicant filed two affidavits in response. One affidavit was sworn by Selina Cherop Mursoi while he swore the other affidavit.
13. It is his contention that on 6th December, 2021 Kericho ELC Case No. 3 of 2016 was dismissed for want of prosecution.



14. It is also his contention that before the said suit was dismissed, the Plaintiffs/Respondents were on 30th January, 2020 served with a Notice to Show cause why the suit should not be dismissed for want of prosecution.
15. It is further his contention that he is informed by his advocates on record that on 10th March, 2020 the Plaintiffs/Respondents pleaded with the Court to allow them to substitute the 1st Defendant in the said suit who was deceased.
16. He contends that on 18th November, 2021 the Court issued another Notice of Dismissal to the Plaintiffs/Respondents. On 6th December, 2021 their Counsel attended Court and he was unable to show sufficient cause why the suit should not be dismissed and the suit was therefore dismissed for want of prosecution.
17. He also contends that in the said matter, the Plaintiffs/Respondents filed an application on 15th August, 2022 where they sought orders of review and for the setting aside of the order of dismissal. He adds that the said application was dismissed on 9th March, 2023.
18. He further contends that the Plaintiffs/Respondents have never appealed against the order of the Court that dismissed their application for review.
19. It is his contention that in July, 2023 the Defendant/Applicant instructed its advocates on record to issue a Notice to vacate land under Section 152A of the Land Act, 2012.
20. It is also his contention that he is informed by the said advocates that the Plaintiffs/Respondents were served with the Notice to Vacate on 8th August, 2023.
21. It is further his contention that the Plaintiffs/Respondents waited until the said notice lapsed before filing the present suit. He adds that the Plaintiffs/Respondents are acting mala fides.
22. He contends that at the inception of the previous suit, the Plaintiffs/Respondents were not in possession of the suit parcel. He adds that the Plaintiffs/Respondents took advantage of the Covid-19 lockdown to take possession of the land.
23. He also contends that Kericho ELC Case No. 3 of 2016 raises the same issues as the present matter, it was between the same parties and over the same subject matter. He adds that the said suit was already determined by this Court.
24. He ends his deposition by stating that the present suit is res judicata, frivolous, vexatious and it is otherwise an abuse of the Court process and urges the Court to strike it out with costs.

The Plaintiffs/Respondents Response.

25. In response to the Defendant/Applicant's application, the Plaintiffs/Respondents filed a Replying Affidavit sworn by Richard Kipsigei Rono the 1st Plaintiff/Respondent on 26th September, 2024.
26. He deposes that the Defendant/Applicant's application is tailored towards subverting substantive justice as there are over three hundred members of the families of Kiprono Too (Deceased) and Kimeli Busieneri (Deceased) living on the suit parcel.
27. He also deposes that the previous suit was not determined on merit and that they were advised by their advocates on record that they were at liberty to file a fresh suit since the previous one was dismissed for want of prosecution.



28. He further deposes that he is imploring the Court to ignore technicalities and instead dispense substantive justice and allow the parties to ventilate on the merits of their respective cases.
29. He reiterates that there are three hundred people on the suit parcel who have lived there for over fifty years who are at risk of being landless.
30. It is his deposition that the Defendant/Applicant is estopped from feigning innocence as its representatives went to the suit land before they purchased it and found the Plaintiffs/Respondents in possession with homesteads all over the land.
31. It is also his deposition that the Court should hear the Plaintiffs/Respondents case on its merits in the interest of justice, peace and tranquility.
32. It is further his deposition that the Plaintiffs/Respondents believe in the rule of law hence their decision to come to Court instead of opting for anarchy.
33. He ends his deposition by stating that once the case is allowed to proceed, nothing will stop the parties from seeking an amiable solution in the spirit of Alternative Dispute Resolution.

Issues for Determination.

34. Both the Defendant/Applicant and the Plaintiffs/Respondents filed their submissions on 4th November, 2024.
35. The Defendant/Applicant submits on the following issues;
 - a. Whether the instant suit should be struck out for being res judicata.
 - b. Whether the instant suit is scandalous, frivolous, vexatious and is otherwise an abuse of the Court process.
 - c. Whether the Respondents are entitled to file the instant suit after its previous suit was dismissed for want of prosecution.
36. With regard to the first issue, the Defendant/Applicant relies on Section 7 of the Civil Procedure Act, the judicial decision of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR and submits that the 1st Plaintiff/Respondent instituted Kericho ELC Case No. 3 of 2016.
37. The Defendant/Applicant also submits that in the said suit, the 1st Plaintiff/Respondent presented a claim for adverse possession over LR No. Kericho/Koitaburot/372.
38. The Defendant/Applicant further submits that the issues that were directly and substantially raised in the previous suit have been raised in the present proceedings.
39. It is the Defendant/Applicant's submissions that the parties in the former and current suit are similar and that the 1st Plaintiff/Respondent has included the 2nd Plaintiff/Respondent as an attempt to evade the doctrine of res judicata. The Defendant/Applicant relies on the judicial decision of *E.T vs Attorney General & another* [2012] eKLR as was cited in *Alfred Sagero Omweri v Kennedy Omweri Sagero* [2021] eKLR in support of his submissions.
40. The Defendant/Applicant submits that the dismissal of a suit for want of prosecution amounts to a judgement and such a matter is deemed to have been determined on its merits. The Defendant/Applicant relies on the judicial decision of *Re Estate of Yusuf Kipkorir Chepkeitany [Deceased]* [2021] eKLR in support of its submissions.



41. The Defendant/Applicant also submits that the previous suit was dismissed for want of prosecution which dismissal was never challenged.
42. The Defendant/Applicant relies on the judicial decision of *Njue Njagi v Ephantus Njiru Ngai & another* [2016] eKLR and urges the Court to strike out the suit for being res judicata.
43. With regard to the second issue, the Defendant/Applicant relies on the judicial decision of *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR and submits that since it has established that the suit is res judicata the present matter can only be termed as vexatious.
44. The Defendant/Applicant relies on the ruling delivered on 9th March, 2023 in Kericho ELC Case No. 3 of 2016 and submits that the 1st Plaintiff/Respondent sought for and was granted interim orders but failed to prosecute the said suit.
45. The Defendant/Applicant submits that the Plaintiffs/Respondents in the present matter also sought interim reliefs that were granted as in the previous suit and that their actions demonstrate an abuse of the Court process.
46. With regard to the third issue, the Defendant/Applicant relies on the judicial decision of *Mumira v Attorney General (Constitutional Petition E007 of 2020)* [2022] KEHC 271 (KLR) (8 April 2022) (Ruling) and submits that it was not open to the Plaintiffs/Respondents to file a fresh suit based on the same facts while seeking similar reliefs.
47. The Defendant/Applicant concludes its submissions by urging the Court to allow its application and strike out the suit.
48. The Plaintiffs/Respondents in their submissions submit on the following issues;
 - a. Whether the former suit was heard and determined on merits and subsequently;
 - b. Whether the instant suit is res judicata.
49. With regard to the first issue, the Plaintiffs/Respondents submit that the previous suit was dismissed for want of prosecution and it was therefore not heard and determined on merit.
50. The Plaintiffs/Respondents rely on the judicial decision of *Ng'ati Farmers' Co-operative Society v Attorney General & 7 Others, Wachira & 126 others (Interested Party)* (Environment and Land Judicial Review Case E004 of 2021) [2022] KEELC 4776 (KLR) (20 September 2022) (Ruling) in support of their submissions.
51. On whether the suit is res judicata, the Plaintiffs/Respondents rely on Section 7 of the Civil Procedure Act, the judicial decision of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR and submit that the Court in determining whether a suit is res judicata considers whether the issues raised in the said suit were determined in the previous suit and whether those issues are the same in the subsequent matter. The Court also considers whether the parties are the same and whether the previous suit was determined by a Court of Competent jurisdiction.
52. The Plaintiffs/Respondents rely on the judicial decisions of *Kenya Commercial Bank Limited v Orapa & another* (Commercial Case E336 of 2023) [2024] KEHC 4130 (KLR) (Commercial and Tax) (30 April 2024) (Ruling), *Moses Mbatia v Joseph Wamburu Kihara* [2012] and urge the Court to hear and determine the matter on its merits.



Analysis and Determination.

53. I have considered the application, the response thereto and the submissions.

54. The following issues arise for determination;

- a. Whether the Plaintiffs/Respondents suit is res judicata.
- b. Who should bear the costs of the application.

A. Whether the Plaintiffs/Respondents suit is res judicata.

55. It is the Defendant/Applicant's contention that the 1st Plaintiff/Respondent instituted ELC Case No. 3 of 2016 against it seeking orders of adverse possession over land parcel No. Kericho/Koitaburot/372.

56. The Defendant/Applicant also contends that the said suit was dismissed for want of prosecution on 6th December, 2021 and the Plaintiffs/Respondents did not file any appeal challenging the said dismissal.

57. The Defendant/Applicant further contends that the Plaintiffs/Respondents instead filed the present suit which is also seeking for orders of adverse possession over land parcel No. Kericho/Koitaburot/372.

58. It is the Defendant/Applicant's contention that the present suit raises the same issues as the issues raised in Kericho ELC Case No. 3 of 2016 which makes this suit res judicata.

59. In response, the Plaintiffs/Respondents admit that they filed Kericho ELC Case No. 3 of 2016 against the Defendant/Applicant where they sought adverse possession orders over land parcel No. Kericho/Koitaburot/372.

60. The Plaintiffs/Respondents also admit that the said suit was dismissed for want of prosecution.

61. The Plaintiffs/Respondents contend that since the previous matter was dismissed for want of prosecution, it was not heard and determined on merit.

62. They therefore contend that they were well within their rights to file the present matter.

63. The law relating to res judicata is found in Section 7 of the Civil Procedure Act. It 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.”

64. In the judicial decision of Christopher Kenyariri vs Salama Beach [2017] eKLR the Court set out the elements that need to be satisfied for a plea of res judicata to be upheld. The court stated 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.
- d) The issue was heard and finally determined.



e) The Court was competent to try the subsequent suit in which the suit is raised.”

65. In the present matter it is not disputed that the 1st Plaintiff/Respondent instituted Kericho ELC Case No. 3 of 2016 against the Defendant/Applicant herein.
66. It is also not disputed that in the said matter the 1st Plaintiff/Respondent sought orders of adverse possession over land parcel No. Kericho/Koitaburot/372.
67. It is further not disputed that the said suit was dismissed for want of prosecution and the Plaintiffs/ Respondents have filed the present suit seeking similar orders.
68. In essence, the following facts are common place: That there was a former suit between the same parties, That the issues in dispute in the present matter were directly and substantially in issue in the former suit. What is in dispute is whether the issues raised in Kericho ELC Case No. 3 of 2016 were heard and finally determined.
69. On one hand, the Defendant/Applicant contends that the previous suit was dismissed for want of prosecution and the said dismissal amounts to a judgement and it is therefore deemed to have been determined on merit.
70. On the other hand, the Plaintiffs/Respondent contend that since the suit was dismissed for want of prosecution it was therefore not heard and determined on merit.
71. The Court of Appeal in Michael Bett Siror v Jackson Koech [2019] eKLR held as follows;

“(28) The Appellant was contending that there were previous suits between the same parties’ arising from the same cause of action. The doctrine of res judicata bars the bringing of another suit where there has been a previous suit between the same parties that has been heard and finally determined by a competent Court. The rationale is that it would be pointless and a waste of judicial time, to re-litigate issues that have already been addressed and determined by the Court. It was not disputed that there were previous proceedings between the parties and/or parties claiming under them. The question that the learned judge ought to have addressed is whether these previous suits involved the same issues as the Respondent’s current suit and if so, whether, the issues in the previous suits were finally determined.

(29) Both the Appellant and the respondent in their affidavit sworn in support and in response to the appellant’s motion, were in agreement that two of the previous suits filed by the Respondent were dismissed for want of prosecution, while another was abandoned and withdrawn by the Respondent. This means that none of the suits was fully argued nor were the issues finally determined.

(30) 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.”
[Emphasis Mine]



72. As was held in the above cited judicial decision, while dismissal of a suit for want of prosecution is a judgment, it does not satisfy the requirements of Section 7 of the Civil Procedure Act. For a plea of res judicata to be upheld, issues must have been raised and determined i.e. the suit must be heard on its merits.
73. The suit Kericho ELC Case No. 3 of 2016 ,which is the previous suit, was dismissed for want of prosecution. The issues raised in the said suit were not fully determined by the Court and it cannot be said to be res judicata.
74. Further, the Defendant/Applicant in his submissions contends that since he established that the suit is res judicata, this matter is vexatious and an abuse of the Court process and ought to be struck out.
75. Order 2 rule 15 (1) (a), (b), (c) and (d) of the Civil Procedure Rules provides as follows:
- “At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that-
- a. it discloses no reasonable cause of action or defence in law; or
 - b. it is scandalous, frivolous or vexatious; or
 - c. it may prejudice, embarrass or delay the fair trial of the action; or
 - d. It is otherwise an abuse of the process of the Court.”
76. The Defendant/Applicant has anchored his contention that the suit is vexatious and an abuse of the Court process on the belief that the suit Kericho ELC Case No. 3 of 2016 is res judicata.
77. Having found that the suit Kericho ELC Case No. 3 of 2016 is not res judicata, it follows that this suit is not vexatious and an abuse of the Court process.

B. Who should bear the costs of the application?

78. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

79. The upshot of the foregoing is that the Defendant/Applicant’s application dated May 22, 2024 lacks merit and it is hereby dismissed with costs to the Plaintiffs/Respondents.
80. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 24TH OF APRIL, 2025.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kipkorir for Defendant/Applicant

Miss Cherono for Langat for Plaintiff/Respondents.

Court Assistant; Mr. Joseph Makori.

