



Ouya v Executive Director Kenya Lake Conference & 4 others (Environment & Land Case E003 of 2021) [2022] KEELC 3574 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE E003 OF 2021
GMA ONGONDO, J
MAY 18, 2022**

BETWEEN

OLIMA OUYA PLAINTIFF

AND

**THE EXECUTIVE DIRECTOR KENYA LAKE CONFERENCE 1ST
DEFENDANT**

THE MANYATTA SDA CHURCH 2ND DEFENDANT

THE COUNTY GOVERNMENT OF HOMA-BAY 3RD DEFENDANT

THE NATIONAL LAND COMMISSION 4TH DEFENDANT

THE C.E.C HEALTH HOMA-BAY COUNTY 5TH DEFENDANT

RULING

1. On November 19, 2020, The Executive Director Kenya Lake Conference and The Manyatta SDA Church, the 1st and 2nd defendants respectively, through the firm of Abisai and Company Advocates raised a preliminary objection herein on points of law thus;
 - a) The case is *res-judicata*. A similar case was filed in Homa-Bay law courts *vide* Homa-Bay Chief Magistrate's Court Civil No 117 of 2014. Judgment was read on June 25, 2018. The matter was over the same subject matter.
 - b) The 1st and 2nd defendant have no requisite capacity to be sued herein as they are merely subsidiaries of Seventh Day Adventist Church East Africa Limited.
2. The plaintiff, Olima Ouya through Moriasi Osoro and Company Advocates generated this suit by way of a plaint (multi track) dated October 14, 2021 and filed on October 15, 2021 seeking the orders infra;



- a) An order of permanent injunction restraining the defendants, their servants and/or agents or any other person working or claiming under them from interfering with the running/operations of the Manyatta community dispensary.
 - b) An order of declaration that, the Manyatta community is the lawful owner of the said health facility and to the exclusion of the defendants and/or any other claiming under them.
 - c) General damages.
 - d) Costs and interest of this suit at court rate.
 - e) Such other or further relief that this honourable court may deem fit.
3. On November 22, 2021, learned counsel for the plaintiff sought leave of this court to file and serve an amended plaint to reflect the size, value and other issues of the suit premises. There was no objection thereto by the 1st and 2nd defendants' counsel. So, leave was granted instantly and the plaintiff's counsel was given 14 days from that date to file and serve amended plaint, if any, but none has been filed herein to-date.
 4. On the same date, the plaintiff's counsel orally applied to withdraw an application dated October 14, 2021 seeking leave to file this suit. The court allowed the application accordingly.
 5. Prior to the said withdrawal, the 1st defendant opposed the application by way of a replying affidavit sworn on November 21, 2021 by the Executive Director of the 1st defendant. A copy of judgment in Homa Bay Chief Magistrate's Court Civil Case No 117 of 2014 (the Homa Bay CM's court determined suit herein), was annexed to the said affidavit.
 6. By a statement of defence dated November 19, 2021 duly filed on even date, the 1st and 2nd defendants denied the plaintiff's claim. They are seeking that this case be struck out and dismissed with costs for the twin reasons stated in the preliminary objection.
 7. The preliminary objection was heard by written submissions pursuant to this court's orders given on January 26, 2022.
 8. By the submissions dated April 20, 2022 and filed in court on April 21, 2022, learned counsel for the 1st and 2nd defendants gave brief facts of the matter inclusive of the Homa Bay CM's court determined suit; that there is no appeal preferred therefrom; that this suit be struck out for being *res judicata*. Counsel identified triple issues for determination namely whether the suit is *res judicata*; whether the 1st and 2nd defendants have capacity to be sued in their own names and costs of the preliminary objection.
 9. In the analysis of the triple issues, counsel submitted in support of the preliminary objection. To fortify the submissions, counsel relied upon, *inter alia*, section 7 of the [Civil Procedure Act](#) chapter 21 Laws of Kenya, section 3 of the [Societies Act](#), the case of [Trustees Kenya Redemed Gospel Church and another-vs-Samuel M'Obuya Moraa and 5 others](#) (2011) eKLR and the decision in [Satya Bhama Gandhi-vs-Director of Public Prosecutions and 3 others](#) (2018) eKLR.
 10. In his submissions dated May 6, 2022 and filed in court on May 10, 2022, the plaintiff admitted that the Homa Bay CM's court determined suit existed having been originated by the 1st and 2nd defendants and it that was determined in favour of them. That the current suit was filed by the plaintiff on behalf of the community hence, a matter of public interest.
 11. Learned counsel for the plaintiff submitted, *inter alia*, that the instant suit is not *res judicata* as the parties to the current suit are totally different from the parties in the Homa Bay CM's court determined



- suit. That the preliminary objection must fail even on the issue of capacity as the former suit was filed by the 1st and 2nd defendants.
12. To buttress the submissions, counsel relied on articles 22 (2) and (3), 46 (1) (c), 48, 50 (1) of the Constitution of Kenya, 2010. Counsel urged that the current suit be allowed to proceed unhindered in the interest of justice.
 13. The 3rd, 4th and 5th defendant were duly served as disclosed in the affidavit of service sworn on October 22, 2021 by Muga Dennis Odhiambo, a licenced court process server. Be that as it may, the 3rd, 4th and 5th defendants failed to file any statement of defence or response and submissions in this suit.
 14. I have duly considered the preliminary objection, the pleadings of the plaintiff and the 1st and 2nd defendants alongside their respective submissions. In that regard, are the grounds of the preliminary objection tenable?
 15. The preliminary objection has been raised in line with the decision in the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1909) EA 696 where the Court of Appeal held-

“ A preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and if argued as a preliminary objection, will dispose of the suit.....”
 16. It is trite law that a preliminary objection is a threshold question and best taken at inception of a case. That the same calls for a definitive, determination and prompt pronouncement; see the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko and 2-others* (2013) eKLR.
 17. On the first ground of the preliminary objection, the dispute in Homa Bay CM’s court determined suit pertained to ownership and management of health facility of the 2nd defendant. It is noteworthy that the 1st and 2nd plaintiffs therein are the 1st and 2nd defendants herein respectively. Judgment was delivered on June 25, 2018 in favour of the plaintiffs in the Homa-Bay CM’s court determined suit.
 18. Paragraph 15 of the plaint is an averment in consonant with the mandatory legal provision, order 4 rule (1) (f) of the Civil Procedure Rules, 2010. Besides, paragraph 14 (i) and (ii) of the 1st and 2nd defendants’ statement of defence is an accusation of the averment thus, provoking the preliminary objection.
 19. The anchorage of *res judicata* doctrine is section 7 of the Civil Procedure Act chapter 21 Laws of Kenya. A party seeking to rely on the doctrine must satisfy the five essential elements of the same that are stipulated thereunder in conjunctive as opposed to disjunctive terms.
 20. In the Black’s Law Dictionary 10th Edition at page 1504, the term ‘*Res Judicata*’ means an issue that has been definitively settled by judicial decision. Also termed former adjudication, claim preclusion, direct estoppel or estoppel by judgment/record/per rem or judicatant. That the three essential elements of the term are;
 - a) An earlier decision on the issue
 - b) A final judgment on the issue
 - c) The involvement of the same parties or parties in privity with the original parties.
 21. In the foregone, it is pretty clear that this suit involves the 1st and the 2nd defendants and the plaintiff in privity with the defendants in the Homa Bay CM’s court determined suit over the same issue. Quite



clearly, the essentials of *res judicata* doctrine have been satisfied by the 1st and 2nd defendants in the preliminary objection.

22. On the second ground of the preliminary objection, I take into account the definition of the term “capacity” in the *Black’s Law Dictionary* at page 249 (supra). Similarly, in the *Concise Oxford English Dictionary* 12th Edition at page 208, “capacity” means;

“a person’s legal competence.”

23. I bear in mind the parties’ respective pleadings and the character of this suit. In view of section 3 of the *Societies Act* (supra), ground number two of the preliminary objection succeeds.
24. It must be noted in paragraphs 3, 7, 9, 10, 11, 13 and 14 as well as prayers (a) and (b) of the plaint that the present dispute concerns possession, management and or administration of the Manyatta Community Dispensary allegedly owned and occupied by the 1st and 2nd defendants. The same has been pointed out in paragraph 17 herein –above.
25. To that extent , the present suit does not fully fall within the purview of article 162 (2) (b) of the *Constitution* of Kenya, 2010, section 13 of the *Environment and Land Court Act*, 2015 (2011) and or any of the relevant provisions of the law. So, this court is devoid of jurisdiction over this suit; see also, inter alia, *Republic v Karisa Chengo and 2 others* (2017) eKLR and this court’s recent decision in the case of *Juma Robinson Jalango (The Project Manager, Kimira Oluch Small Farm Improvement Project (KOSFIP) v Ministry of East Africa Community (EAC) and Regional development and 4 others*, Homa Bay ELC JR No EOO3 of 2022 (2022) eKLR.
26. I take into account articles 22 (2), 46 (1), 48 and 50 (1) (supra) as captured in the plaintiff’s submissions. However, this suit is *res judicata*, among other things, as discussed hereinabove. Indeed, the cardinal principle is that litigation has to come to an end; see *Halsbury’s Laws of England* (4th Edition) Volume 22 page 273.
27. Accordingly, I find the preliminary objection dated November 19, 2020 and filed herein on even date, meritorious. I proceed to dismiss this suit mounted by way of a plaint dated October 14, 2021 as shown in paragraph 2 herein-above.
28. By dint of the proviso to section 27 (1) of the *Civil Procedure Act* (supra), costs of the preliminary objection and the entire suit to the 1st and 2nd defendants.
29. It is so ordered.

DELIVERED, DATED and SIGNED at Homa Bay this 18th May 2022

G.M.A ONG’ONDO

JUDGE

PRESENT

a. Mr H. Bunde holding brief for Mr Moriasi Osoro, learned counsel for the plaintiff

b. Mr. O.M.Otieno holding brief for Mr R. Abisai, lerned counsel for the 1st and 2nd defendants

c. Okello, court assistant

G.M.A ONG’ONDO

JUDGE

