



**Momanyi v Kegeni & another (Environment and Land Judicial Review
Case 32 of 2011) [2022] KEELC 136 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 32 OF 2011
JM ONYANGO, J
JUNE 15, 2022**

BETWEEN

NICODEMUS MOMANYI APPLICANT

AND

ONCHIRI KEGENI 1ST RESPONDENT

LAWRENCE MOSE 2ND RESPONDENT

RULING

1. On 23rd November, 2021 this Court delivered a ruling dismissing the Applicant's application dated 3rd March, 2020 in which he sought an extension of time to apply for substitution of the deceased Respondent in order to revive the suit herein which had abated. Pursuant to the said ruling, the Applicant has filed yet another application seeking similar orders as follows:
 - i. That the Applicant be granted extension of time within which he can apply for substitution of the Respondent now deceased with his legal representative.
 - ii. That the suit which has since abated be revived and reinstated.
 - iii. That the respondent's legal representative, Lawrence Mose be substituted as the Respondent.
 - iv. Costs of this application be provided for against the estate of the Respondent.
2. The application is premised on the Applicant's Supporting Affidavit sworn on the 26th November, 2021. In the said affidavit he explains that he obtained judgment against the Defendant and his costs were taxed at Kshs. 93,000. However, the Defendant died before he could execute the decree. He further depones that he was not aware that the suit would abate if no action was taken within period of 12 months following the death of the Defendant. He later discovered that Respondent had taken out an Ad Litem Grant in pursuit of his late father's interest in ELC Case NO. 567 of 2011 and he should therefore be made responsible for his later father's estate in this matter.



3. The application is opposed by the Respondent through the Replying Affidavit of Lawrence Mose sworn on the 19th December, 2021. The Respondent depones that the Applicant's application is incurably defective, incompetent, frivolous and vexatious and a abuse of the process of the court. He further depones that the application is res judicata and that the provisions of Article 159 of *the Constitution* of Kenya and sections 1A and 1B of the *Civil Procedure Act* do not apply.
4. In response to the Replying Affidavit, the Applicant filed a Supplementary Affidavit sworn on the 21st February 2022 in which he deponed that the application dated 3.3.20 was a nullity as the Respondent had validly objected to representation of the Applicant by his previous counsel.
5. The application was disposed of by way of written submissions and both parties filed their submissions which I have considered.

Applicant's Submissions

6. In his submissions, learned counsel for the Applicant contended that no extension of time was required as the suit had been determined in favour of the defendant and the Applicant was only interested in pursuing the costs that had been awarded to the Defendant. He further contended that there was no need to apply for extension of time as all that was required was for the deceased Plaintiff to be substituted by the Respondent. He acknowledged that by failing to file his submissions in the previous application that was dismissed, the Applicant missed an opportunity to explain his position to the court. He therefore urges the court to consider the matter afresh.

Respondent's Submissions

7. On his part, learned counsel for the Respondent submitted that the application was res judicata as the Applicant had filed a similar application to the one that was dismissed by the court. Notably both applications are brought under order 24 Rule 3(1) and (2) of the *Civil Procedure Rules*. He submitted that the court had rendered its ruling on the previous application by declining to grant extension of time.

Analysis And Determination

8. Having considered the Notice of Motion, rival affidavits and submissions, the main issue for determination whether the said application is res judicata.
9. The doctrine of res judicata in Kenyan law is embodied in Section 7 of the *Civil Procedure Act* CAP 21. This section provides as follows:-

“7. *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.”

10. Applying the above provision to the instant application, it is not in dispute that the Applicant filed a similar application dated 3rd March 2020 through the firm of Ocharo Kebira & Company Advocates. Unfortunately, the Applicant did not file his submissions in respect of the said application. The court considered that said application and the Respondent's submissions and delivered its ruling on 23rd



November 2021 dismissing the application. The Applicant did not apply for review of the said ruling and has instead chosen to file a similar application contrary to the principle of res judicata.

11. In the circumstances, I have no choice but to dismiss this application with costs. I make no order as to costs.

Dated, signed and delivered at Kisii this 15th day of June, 2022.

J.M ONYANGO

JUDGE

