Khaoya (Personal representative of Elika Nanjala Mutuka) & another v Wekesa & 13 others (Civil Case 100 of 2010) [2022] KEELC 3844 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3844 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL CASE 100 OF 2010

BN OLAO, J

JULY 28, 2022

BETWEEN

JAMES WEKESA KHAOYA (PERSONAL REPRESENTATIVE OF ELIKA NANJALA MUTUKA) ..... 1ST PLAINTIFF

TERESINA NAMAEMBA ..... 2ND PLAINTIFF

AND

PAUL JUMA WEKESA ..... 1ST DEFENDANT

JAMIN WASIKE KITUYI ..... 2ND DEFENDANT

JOSEPH SIMIYU KITUYI ..... 3RD DEFENDANT

JAMES ROBERT ETYIANG ..... 4TH DEFENDANT

HENRY NASIO ..... 5TH DEFENDANT

JOHN MASIKA WEKESA ..... 6TH DEFENDANT

MANJARO KUNDU TITILA ..... 7TH DEFENDANT

MZEE KUNDU KIMALILO ..... 8TH DEFENDANT

CHEMIATI WAFULA ..... 9TH DEFENDANT

EMMANUEL WAMALWA ..... 10TH DEFENDANT

BENSON WAMALWA JUMA ..... 11TH DEFENDANT

SOLOMON WAMALWA JUMA ..... 12TH DEFENDANT

WAMALWA WANYONYI ..... 13TH DEFENDANT

VINCUS JOSHUA ..... 14TH DEFENDANT

RULING

[1] I am beginning to wonder whether John Wekesa Khaoya and Teresina Namaemba (the plaintiffs herein) are really keen in prosecuting this suit or they derive immense pleasure by simply trooping to this Court *Ad Nauseam* either to admire the smart Judicial Officers and other Staff or just to sympathize and laugh at the container which we imported from Kakamega Court to use as a registry. Either way, I must caution them that this file is now taking up valuable space in our registry. Perhaps we should now consider charging them storage fees!!

[2] Sample this: The plaintiffs first moved to this Court on October 11, 2010 vide their home made plaint seeking various orders against Paul Juma Wanyama and Jamin Wasike Kitui (the 1st and 2nd defendants respectively) with regard to the land parcel No East Bukusu/south Nalondo/1945 which has since been sub – divided to create land parcels No East Bukusu/south Nalondo/2725 – 2728. That plaint was later amended on June 20, 2011

[3] Meanwhile, by an application dated November 10, 2010, the plaintiffs had sought and obtained an order of temporary injunction to restrain the defendants by themselves, their servants and/or agents from tilling, dealing, transferring or working on the land parcels No East Bukusu/south Nalondo/2725 and 2727 pending the hearing and determination of the suit. That application was allowed by Omollo J on October 2, 2013 who went on to direct that: -

> " The case be heard on February 10, 2014. The defendants be served."

However, the suit did not proceed to trial because the plaintiffs had not filed and served several documents. Applications continued being filed in the matter. When the matter came up before Mukunya J on July 20, 2015, he advised the parties:-

> " ..... to deal with and/or withdraw all filed applications filed herein to pave the way for a hearing date which thereafter shall be fixed in the registry thereafter."

[4] The Judge's advice was not headed. On February 21, 2018, the Deputy Registrar cautioned the plaintiffs that unless the orders issued by the Judge on July 20, 2015 are complied with within 30 days, the file would be placed before the judge for dismissal. However, notwithstanding several mentions before the Deputy Registrar, the suit survived the guillotine of dismissal.

[5] The matter then came up before me on June 20, 2018, July 23, 2018 and September 26, 2018 when the Court was informed that the plaintiffs wanted to amend their plaint and also that there was a possibility of a settlement between the 2nd plaintiff and the 1st to 4th defendants. However, nothing came out of those proposals. Instead, Counsel kept coming in and getting out of the case which continued to be adjourned no doubt in the spirit of Article 50(1) of the *Constitution*.

[6] By a Notice of Motion dated October 5, 2018, the plaintiffs sought the main prayer that this Court summons the defendants to show cause why they should not be fined Kshs 200,000/= or jailed for six (6) months for being in contempt of Court orders of injunction issued on October 7, 2013 (the order by Omollo J was actually dated October 2, 2013). That application was dismissed by me vide a ruling dated May 30, 2019. In that ruling, I also made the following order: -

> " I also direct that the plaintiffs take the earliest dates in the registry for the hearing of this suit."

When the case next came up for hearing, the plaintiff was not present and had also not served the defendants in good time and Counsel for the 1st to 4th defendants sought an adjournment. The case was then listed for hearing on March 9, 2020 when the 1st plaintiff withdrew the claim against the 5th to 14th defendants and went on to apply for time to substitute the 1st defendant who had passed away on March 7, 2020. That appears not to have been done to – date.

[7] I now have before me for determination two (2) applications both filed by the 1st plaintiff. The first application is dated May 19, 2021 and the second application is dated February 9, 2022.

[8] The first application is a complete replica of the previous application dated October 5, 2018 and which I dismissed on May 30, 2019. It also seeks the orders that the 2nd to 5th defendants be committed to civil jail for six (6) months and be fined Kshs 200,000/= for being in contempt of the orders of this Court issued on October 7, 2013.

[9] The second application seeks a declaration that the suit against the 1st defendant Paul Juma Wanyama be marked as having abated following his demise on February 27, 2010.

[10] On February 17, 2022, I issued directions that the two applications be canvassed simultaneously by way of written submissions. Mr Kundu who is on record for the 1st to 4th defendants was allowed time to put in a response to both applications. However, he did not do so even after being granted an extension. Eventually, he informed the Court that he had lost contact with his clients and needed time to file an application to cease acting for the 1st to 4th defendants. That has also not been done to – date. The two applications therefore remain un – contested. That notwithstanding, I will consider the merits or otherwise of the two application.

[11] The Notice of Motion dated May 19, 2021 is really for striking out for reasons that it is *res – judicata*. As stated above, the orders sought in this application are the same orders that were sought in the application dated October 5, 2018 which I dismissed on May 30, 2019. The doctrine of res – judicata is set out in mandatory terms in Section 7 of the *Civil Procedure Act* 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." Emphasis mine.

Res – judicata applies both to suits and applications. In Uhuru Highway Development Ltd v Central Bank Of Kenya & Kamlesh Pattni Ca *Civil Appeal No 36 of 1996* [1996 eKLR], the Court of Appeal after citing the Privy Council in the case of Ram Kirpal v Rup Kuari (i.l.r) Vol Vi 1883 Allahabad went on to state thus: -

> " That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of *res – judicata* apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."

See also Mburu Kinyua v Gachini Tuti 1978 KLR where the majority of the Bench held that a second application to set aside a Judgment entered ex – parte would be res – judicata when the fact upon which it was based were known to the Applicant.

[12] The application to punish the defendants for contempt was previously canvassed by the plaintiffs and dismissed on May 30, 2019. The current application dated May 19, 2021 is therefore res – judicata. It is accordingly struck out.

[13] For the benefit of the plaintiffs, I can only re – visit my ruling delivered on May 30, 2019 wherein I cited the provisions of Order 40 Rule 6 of the *Civil Procedure Rules* which says: -

> "Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the Court orders otherwise. Emphasis mine.

rent application seeks orders that the 2nd to 5th defendants be cited for contempt of the orders of Omollo J issued on October 2, 2013. The 3rd, 4th and 5th defendants were not parties to the suit by the time those orders were being issued. They were only enjoined in these proceedings following an amended plaint filed herein on June 28, 2018. They cannot therefore be punished for orders issued long before they were made parties in this suit.

[15] The import of Order 40 Rule 6 of the *Civil Procedure* was considered by the Court of Appeal in *Barclays Bank Of Kenya v Henry Ndungu Kinuthia* 2018 eKLR where it stated that unless the order for temporary injunction is extended by the Court, it lapses after twelve (12) months. Further, in *Erick Kimingichi Wapang'ana & Another v Equity Bank Limited & Another* 2015 eKLR, the same Court said: -

> "Rule 6 Order 40 was made in clear cognizance of the preceding Rules in that order. It therefore follows that notwithstanding the wording of any order of interlocutory injunction, the same lapses if the suit in which it was made is not determined within twelve months "unless", as the Rule provides, "for any sufficient reason the Court orders otherwise ..... In this case there was no subsequent order extending the injunction. Having been issued on October 11, 2011, the injunction lapsed on October 12, 2012."
>
> It is clear therefore that notwithstanding the manner in which the interlocutory injunction is worded, it lapses if the suit in which it was issued is not determined within twelve (12) months unless the Court, "for any sufficient reasons," orders otherwise.

[16] It follows therefore that even if the Notice of Motion was not *res – judicata*, it would still collapse.

[17] The Notice of Motion dated May 19, 2021 is hereby struck out.

[18] The second application dated February 9, 2022 seeks the order that the suit against the 1st defendant Paul Juma Wanyama be declared as having abated. The Court would have expected that the Death Certificate of the 1st defendant be annexed to the application as proof that indeed he died on February 27, 2010 as deponed in the supporting affidavit of the 1st plaintiff. Instead, what has been annexed to the said affidavit is the funeral programme showing that indeed the 1st defendant passed away on February 27, 2020. Only the first page of the programme is annexed so it is not clear when he was buried. While the production of a Death Certificate is the best evidence to prove the fact that a party is deceased, it is by no means the only evidence to prove that fact. In my view, the Court can admit other congent evidence to prove that fact. In doing so, I take cognizance of the fact that in this country, many people are illiterate and may not even appreciate the need to obtain such a document. To insist on the production of a Death Certificate may result in an injustice being meted out to litigants who are otherwise well meaning and deserving of the orders sought. In the circumstances of this case, I am persuaded that the funeral programme is sufficient proof of the fact that the deceased passed away on

February 27, 2020. In any event, when the parties appeared before me on March 9, 2020, Mr Musumba then holding brief for Ms Gatimbu for the 1st to 4th defendants confirmed that he was aware about the demise of the 1st defendant. And finally, the averments contained in the supporting affidavit of the 1st plaintiff have not been rebutted as the application is not opposed. I therefore make the finding that the 1st defendant died on February 27, 2020.

[19] Order 24 Rule 4 of the *Civil Procedure Rules* provides as follows: -

> 4(1) "Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representation of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) .....
>
> (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant." Emphasis mine.

It is clear therefore that following the death of the 1st defendant on February 27, 2020, a fact that is not controverted, the suit against him has abated by law. There is no evidence of any intention of substituting him. The Notice of Motion dated February 9, 2021 is therefore meritorious. I allow it.

[20] Before I make the final disposal orders in this matter, I must once again impress upon the plaintiff on the importance of having this suit expedited. Were it not for their indolent in prosecuting their claim, they would not have ended up in the unfortunate muddle in which they now find themselves most notably, the fact that the suit against the 1st defendant has now abated. And having withdrawn the suit against the 5th to 14th defendants, they now only have the 2nd, 3rd and 4th defendants against whom to prosecute their claim.

[21] The plaintiffs also appear to be more preoccupied in prosecuting peripheral applications geared towards punishing the defendants for contempt. Even if they succeeded in having the defendants cited and punished for contempt of any orders of this Court, that will not determine the substratum of their suit which is a declaration that the defendants hold the land in dispute in trust for them. That is what they should prioritize rather than the ego trips whose main intention is only to see the defendants incarcerated in civil jail. And at this rate, they may soon run out of defendants to send to jail. Hopefully, this advice which is now being given for the umpteenth time will be taken with the seriousness which it deserves and I intend to make appropriate orders shortly to ensure that this suit is heard and determined without any further delay.

[22] Finally, I must deprecate the conduct of Mr Kundu Counsel for the 1st to 4th defendants in this matter. When he last appeared before the Deputy Registrar of this Court on April 26, 2022, he sought time to file an application to cease acting for the 1st to 4th defendants on the ground that he had lost their contact. He was granted upto May 18, 2022 to do so. However, he neither filed that application nor came back to Court to explain what difficulties he was experiencing in doing so and if he needed more time. Counsel owes a duty not only to his client but also to his opponent and the Court. As an Officer of this Court, Mr Kundu has an overriding duty to promote the interests of justice and observe the rules of professionalism. Having undertaken to file an application to cease acting for the 1st to 4th defendants, I find it dishonourable that Counsel not only failed to do so but also gave the Court a wide berth. Yet, under the overriding objectives of this Court, an Advocate has a responsibility to participate in the process of the Court by complying with Court orders and directions. In the circumstances of this case,

Mr Kundu has failed that test. For now, I shall do no more than to express my utmost displeasure and hope that conduct will not recur.

[23] Ultimately and having considered the two applications, this Court makes the following disposal orders: -

1. The Notice of Motion dated May 19, 2021 is hereby dismissed.
2. The Notice of Motion dated February 9, 2022 is hereby allowed.
3. The plaintiffs shall take the earliest hearing date in the registry and serve MR Kundu.
4. Each party to meet their own costs.

BOAZ N. OLAO.

J U D G E

28TH JULY 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 28TH DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO.

J U D G E

28TH JULY 2022.