



**Kaingu & another v Ali (Environment & Land Case
180 of 2020) [2022] KEELC 3891 (KLR) (20 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3891 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 180 OF 2020**

M SILA, J

JULY 20, 2022

BETWEEN

KHADIJA CHARO KAINGU & ANOTHER PLAINTIFF

AND

ADAM ISSACK ALI DEFENDANT

RULING

(Application by defendant seeking to strike out plaintiffs' suit for being res judicata; plaintiffs filing this suit seeking cancellation of the title of the defendant over a Plot No. 1770; defendant having earlier sued the plaintiff over the same Plot No. 1770 but the defendants therein (plaintiffs here) did not defend the suit; judgment however entered for the plaintiff (defendant herein) for a Plot No. 1662 which is a different parcel of land; it cannot thus be argued that the question of ownership of the Plot No. 1770 was decided in the previous suit; this suit not therefore res judicata; application dismissed)

1. The application before me is that dated 3 December 2021 filed by the defendant. The application seeks that this suit be struck out for reason that it is res judicata. It is the contention of the applicant that the issues in this suit were decided in the case Mombasa ELC No. 172 of 2014, *Adam Isaack Ali vs Sachiel Ndoli Anyanga & Khadija Charo Kaingu* (the previous suit). The application is opposed.
2. In this suit, the plaintiffs/respondents have pleaded that in 1981 or thereabouts, they settled in Bombolulu at a place that came to be known as Ziwa La Ng'ombe Settlement Scheme. It is pleaded further that in the year 2002, the Government declared that it would register the persons in occupation through the Director of Land Adjudication. The respondents aver that despite being in occupation, they were omitted from registration, and instead, the land they occupied was given to the applicant. They allege that the applicant fraudulently got himself registered as proprietor and that he colluded with the Adjudication officers. They thus seek the cancellation of the applicant's title to the land parcel Mombasa/Ziwa La Ng'ombe/1777.



3. I have gone through the plaint in Mombasa ELC No. 172 of 2014. The plaintiff in that case was the defendant/applicant in the present suit, and the defendants in that case were the plaintiffs/respondents in the present suit. In that case, the applicant averred to be the registered owner of the land parcel Mombasa/Ziwa La Ngombe Scheme/1777. He pleaded that the respondents were in unlawful occupation. He sought a declaration that he is the lawful owner of the suit property and an order of eviction against the respondents. The suit was not defended and it proceeded for hearing ex parte before Omollo J. She proceeded to deliver judgment on 13 May 2015. What I see in the judgment is that the judge held that the applicant has demonstrated ownership of a Plot No. 1662. She further stated that the applicant did not explain the relationship between the land parcel No. 1777 and Plot No. 1662. She proceeded to state as follows :-

“I am satisfied therefore that the plaintiff has proved ownership of plot 1662 situated at Ziwa La Ng’ombe Squatter Settlement Scheme. He had also established that the defendants are indeed in occupation of this plot without his permission... I will grant him an opportunity to use and enjoy his plot No. 1662 by issuing the following orders :-

- a. An order directed to the defendants jointly and severally and their agents or persons claiming through them to vacate the suit premises within sixty days of delivering this judgment in default eviction to issue after sixty days,
 - b. An order of permanent injunction be and is hereby issued restraining the defendants by themselves, servants, workmen, heirs, personal representatives from entering accessing remaining on or howsoever interfering with the plaintiffs peaceful possession and enjoyment of the plot No. 1662 in Ziwa La Ng’ombe squatter settlement scheme.
 - c. Costs of the suit.”
4. I am not able to explain how the applicant’s pleadings for the Plot No. 1777 ended up in him obtaining judgment for the Plot No. 1662, but that is the way it is. Even the decree issued states that orders were made in respect of the Plot No. 1662 Ziwa La Ng’ombe Settlement Scheme.
5. In replying to this motion, the 2nd plaintiff has deposed that the applicant’s claim in the previous suit was over the Plot No. 1662. He has referred to the map of the area to demonstrate that the Plots No. 1777 and 1662 are in different locations and that the two plots are not the same.
6. For res judicata to apply, the test laid out in Section 7 of the *Civil Procedure Act*, must be met. The said provision is drawn as follows :-

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.

7. It will be seen from the above that the issue in question must have been heard and finally decided in the previous suit. It is difficult to see how it can be argued that the question of ownership of the Plot No. 1777 was decided in the previous suit.



8. I will have to agree with the respondents. I do not have any judgment in respect of the Plot No. 1777. That may have been the pleading in the previous suit, but a decision was made in respect of the Plot No. 1662. It cannot therefore be said that a decision has been made with finality over the proprietorship of the Plot No. 1777. The decision being relied upon by the applicant is over the Plot No. 1662 and it does not therefore help him.
9. Given the above, I have no option but to dismiss this application and it is hereby dismissed with costs.
10. Orders accordingly.

DATED AND DELIVERED THIS 20 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.

