



**King'ori v King'ori (Environment and Land Appeal 41 of 2021)
[2022] KEELC 15306 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 41 OF 2021**

JO OLOLA, J

DECEMBER 9, 2022

BETWEEN

NEPHAT KIGUTA KING'ORI APPELLANT

AND

JANE GATHONI KING'ORI RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Ruling of the Honourable D M Ireri, Senior Resident Magistrate, as delivered on October 8, 2021 in Othaya SRMCC No 16 of 2019.
2. By her Complaint dated January 12, 2018 as amended on March 16, 2018, Jane Gathoni King'ori (the Respondent herein) had sought Judgment against Nephth Kiguta King'ori (the Appellant herein) for:
 - (a) A perpetual injunction restraining the Defendant, his agents and/or servants from occupying, remaining in or in any other way dealing with the suit parcels of land – LR No Othaya/Ihuririo/1391 and 1392;
 - (b) General damages for trespass and mesne profits for loss of income from the tea bushes in the suit parcels/land for the period from May 29, 2009 to the time of vacant possession as pleaded in Paragraph 5 of the Complaint; and
 - (c) Costs and interest.
3. Those prayers arose from the Respondent's contention that she is the absolute registered owner of the two parcels of land having been so registered on May 29, 2009. The Respondent told the Trial Court that the Appellant had since May 29, 2009, without her consent or authority, been squatting in the suit parcels of land measuring approximately 0.402 Ha. (1 acre) and had constructed a dwelling structure therein, harvested the Respondent's tea leaves and cultivated food crops thereon.



4. In response to the suit the Appellant acting in person filed a Notice of Preliminary objection dated August 20, 2021 stating as follows:
 1. This objection is based on Court Order No ELC 459 of 2014 dated October 2, 2015 by the Environment and Land Court of Kenya at Nyeri;
 2. The above order is valid to date unless there is an appeal filed within the required time from the date of dismissal. The issue herein were tried in Nyeri ELC 459 of 2014;
 3. This has reference to my letter of defence further statement dated July 1, 2021 and subsequent hearing on August 13, 2021; and
 4. This case remains as dismissed and I hereby seek your arbitration on my objection.
3. That objection was heard by the Learned Trial Magistrate who in the impugned Ruling dated October 8, 2021 dismissed the objection and ordered that the suit proceeds' to hearing. Aggrieved by the said determination, the Appellant lodged a Memorandum of Appeal dated October 28, 2021 urging this Court to set aside the Ruling on the basis of some 5 grounds framed as follows:
 1. Only the dismissing Court can restart, re-open or retain a dismissed case for want of prosecution;
 2. Othaya Court did not dismiss this case and cannot consequently re-open it or reinstate it;
 3. This re-opening be done within 30 days to a maximum of 120 days from the dismissal date;
 4. It is now 6 years from October 2, 2015 to-date October 25, 2021 as per ELC 459 dated October 12, 2015; and
 5. The quoted case in Paragraph 15, 17, 18 and 19 for Kia, Moka, Koech and Gakui were all heard by Appeal Court, contrary to this one presented to a Lower Court.
4. As it were, this Court being the first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the Ruling and to arrive at its own independent Judgment on whether or not to allow the Appeal.
5. From the material placed before me, when this matter came up for hearing of the main suit before the Trial Court on August 13, 2021, the Respondent testified and gave her evidence-in-chief. Upon conclusion, the Appellant in his cross-examination started making reference to a Civil Case No 59 of 2012 which was said to be related to the matter herein and was filed by the Respondent against the Appellant. In response, the Respondent denied filing such a case but alluded to a case filed by the Appellant against herself and her father.
6. The Appellant then told the Court that the Respondent had filed Nyeri HCCC No 59 of 2012 which was then transferred to the ELC Court and given a new number being ELC case No 459 of 2014. The Appellant told the Court that the said case had been dismissed by the High Court and that no Appeal had been preferred against the dismissal. In addition, the Appellant told the Court that there was a pending criminal case before Court 1 at Othaya between himself and the Respondent involving forgery of documents relating to the suit properties.
7. Having heard both Parties on the matter, the learned Trial Magistrate made a brief Ruling as follows:

“court:

I have considered the submissions made by both parties



herein. It is my view that the issue of whether this matter is Res judicata or not should be addressed first.

The matter is thus adjourned to enable the Defendant file the Preliminary Objection. After considering the age of this matter the Defendant is granted only 14 days to file that notice and serve the Plaintiff.”

8. Subsequently on August 20, 2021 the Appellant filed the Preliminary Objection framed as shown at Paragraph 4 herein above. When the matter came up for hearing on September 10, 2021 the Appellant requested for and was granted time to file submissions in support of the Preliminary Objection. Accordingly on September 20, 2021, the Appellant filed his submissions dated September 17, 2021.
9. Those submissions were filed after the Respondent’s Counsel on record had on August 30, 2021 filed their own submissions and were generally in response thereto. It was the Appellant’s contention that the matter had been dismissed by the Environment and Land Court at Nyeri on October 2, 2015 and that it was only the said Court or a higher one that could reinstate the matter and not the Lower Court.
10. In addition, the Appellant contended that some 6 years had lapsed since the matter was dismissed and that it was improper for the Respondent to start a new case to try and replace the Judgment dismissing the case.
11. Having considered those issues and in his Ruling dated October 8, 2021 aforesaid, the Learned Trial Magistrate delivered himself as follows at Paragraphs 21 and 22 thereof:
 21. This Court associates itself with the decisions referred to in Paragraphs 18, 19 and 20 herein above that where a former suit between the same parties litigating on the same issues has been dismissed for want of prosecution, then either party can bring a fresh suit and the fresh suit will not amount to being Res judicata. It is my considered view, and as rightly held by the Superior Courts in the decisions referred to in Paragraphs 18, 19 and 20, that a dismissal of a suit for want of prosecution is a technical knock-out arrived at without hearing parties on merit and therefore a fresh suit filed after such dismissal does not give rise to such fresh suit being Res judicata.
 22. Applying the said decision in the present case, it is clear that the former suit i.e Nyeri High Court ELC (sic) No 459 of 2014 was dismissed for want of prosecution which was a technical knock-out. In other words the said former suit was not heard and finally determined on merit and therefore the present suit cannot be said to be Res judicata. In summary, the dismissal in that former suit was not arrived at after hearing both parties herein on merit and therefore the Plaintiff was perfectly entitled to file and/or bring the present suit. The Defendant herein has thus failed to prove all the elements laid down by Section 7 of the *Civil Procedure Act* and the decision in *Independent Electoral and Boundaries Commission v Maina Kiai and 5 Others* (above), I therefore find and hold that the present suit is not Res judicata. The Preliminary Objection must therefore fail and is hereby dismissed.”
12. As it were, the order issued on October 2, 2015 dismissing the suit was attached as “Appendix C” to the Appellant’s documents. A perusal thereof reveals that the said ELC Case No 459 of 2014 instituted by the Respondent against the Appellant had been listed before the Honourable Justice L Waithaka on September 23, 2015 on a notice to show cause issued under Order 17 Rule 2(1) of the *Civil Procedure Rules* and that the Learned Judge had proceeded thereby to dismiss the suit for want of prosecution.



13. As was stated by the Court of Appeal in *Independent Electoral Boundaries Commission v Maina Kiai and 5 Others (2017) eKLR*:

“... for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

- (a) The suit or issue was directly and substantially in issue in the former suit;
- (b) That former suit was between the same parties or parties under whom they or any of them claim;
- (c) Those parties were litigating under the same title;
- (d) The issue was heard and finally determined in the former suit;
- (e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit or the suit in which the issue is raised.”

14. From a perusal of the pleadings filed by the Respondent in the said ELC Case No 459 of 2014, it was apparent that the Respondent had on March 15, 2012 instituted a suit seeking an order of injunction to restrain the Appellant from dealing with the same parcels of land in dispute herein. However, while the subject matter was the same, and as correctly stated by the Learned Trial Magistrate, the former suit had not been heard and finally determined.

15. As the Court of Appeal observed in *Michael Bett Siror v Jackson Koech (2019) eKLR*:

“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 had not been addressed and finally determined by the Court but the Judgment is the result of what may be described as a technical knock-out.”

16. While the Appellant contends that the matter could not be re-opened six (6) years later in the Lower Court, there was nothing to demonstrate that the value of the subject matter exceeded the jurisdiction of the Trial Court and/or that the same had been instituted outside the requisite period of limitation as provided under the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.

17. It follows that I did not find any basis to disturb the findings of the Learned Trial Magistrate. This Appeal was filed in complete misapprehension of the law and the same being misconceived must fail. Accordingly, I hereby dismiss the same with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF DECEMBER, 2022.

In the presence of:

Mr Nephath Kiguta King'ori – the Appellant in person

Mr C M King'ori for the Respondent

Court assistant - Kendi

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J O Olola



JUDGE

