



**Joshi & 2 others v Kirui (Environment & Land Case 6 of 2014)
[2022] KEELC 15282 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 6 OF 2014
MC OUNDO, J
DECEMBER 8, 2022**

BETWEEN

CHRISTINE ANDREE JOSHI 1ST PLAINTIFF

STEPHEN ELKINGTON 2ND PLAINTIFF

BARRY JAMES JOSHI 3RD PLAINTIFF

AND

SALLY CHEPWOGEN KIRUI RESPONDENT

RULING

1. What is coming before me for determination is the Notice of Motion dated the 6th May 2022 which did not indicate under what provision it had been brought. Order 51 Rule 10 Civil Procedure Rules provides that:

“(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule. (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

2. The rule is not couched in mandatory terms and so in the spirit of Article 159 (2) of *the Constitution* and Section 1 A and B of the *Civil Procedure Act*, I find that the failure to cite the correct provisions of law is not fatal and would not per se warrant a dismissal of the application which seeks a myriad of orders to wit;

i. Spent

ii. Spent



- iii. The honorable court be pleased to compel the DCIO-Bomet to investigate and file a report on the fraudulent transfer of land parcel No. Kericho/Chemagel/1401 to the Bank of Credit and Commerce International (overseas) Limited (now Oriental Bank) within 30 days.
 - iv. The honorable court be pleased to grant leave to the Applicant to amend her defense and counterclaim.
 - v. The honorable court be pleased to enjoin the Oriental Commercial Bank Limited, the Hon Attorney General and the Land Registrar, Bomet to the suit.
 - vi. The honorable court be pleased to order the Land Registrar Bomet to avail the respective parcel file for parcel No. Kericho/Chemagel/1401 to aid the hearing and determination of the present suit.
 - vii. That upon granting prayer 4 above, the honourable court be pleased to deem the amended defense and counterclaim duly filed upon payment of the requisite fee.
 - viii. Cost of the application to be provided for.
3. The Application is supported by the grounds set on its face as well as on the supporting affidavit of Sally Chepwogen Kirui the Applicant herein sworn on the 6th May 2022.
 4. The application was opposed by the 1st Respondent's Replying Affidavit dated the 23rd May 2022 wherein the court directed that the Application be disposed of by way of written submissions in its orders of 9th May 2022.
 5. The Applicant's submission on her application is based on her disposition that there had been fraudulent transfer of land parcel No. Kericho/Chemagel/1401 to the Bank of Credit and Commerce International (overseas) Limited (now Oriental Bank) as the legal charge transferring the property to the said bank had not been signed by the deceased proprietor and there had been no Control Board minutes and consent to charge. That the spousal consent had been obtained prior to charging the said land. That further there had been no Notice including the Redemption Notice served upon the deceased proprietor.
 6. That despite there having been a request to the office of the Director of Public Prosecutions and the Director of Criminal Investigation to assist in conducting investigations into the fraudulent dealings with respect to the said suit land, there had been no assistance forthcoming either from these offices or the office of the Land Registrar Bomet in the provision of the parcel file relating to the suit land.
 7. It was their submission that they had sought to join the Hon Attorney General and the Land Registrar to the suit as well as to amend the defence and counterclaim so as to bring out specific issues in dispute for quick determination and disposal of the suit.
 8. The Respondents opposed the application stating that the matter had been pending in court for eight years due to the constant filing of applications after applications by the Defendant/Applicant, which curtailed the hearing of the matter despite notice from court to desist from this conduct. That the Respondent had been travelling all the way from Mombasa ready to proceed with the hearing of the matter only for the same to be adjourned at the instance of the Applicant who is in possession of the suit land therefore not in a hurry to have the matter proceed for hearing and final determination.
 9. That the issue on fraud was heard and determined by a court of competent jurisdiction in Civil Suit No. 1550 of 2002 and therefore the Defendant/Applicant was seeking to re-litigate on an issue that had already been concluded. That the matter was therefore res judicata.



10. That the current suit was one that only sought for delivery of vacant possession. That the counterclaim by the Defendant/Applicant having been struck out, the proposed amendment was therefore meant to reopen issues that had already been determined.
11. That the prayer to amend the defense so as to join the extra proposed Defendant/Applicant was frivolous, scandalous and otherwise an abuse of the court process and should be dismissed for reasons that the joinder of Defendant/Applicant was res judicata Civil Suit No. 1550 of 2002, because the proposed parties sought to be joined were in relation to the issues of fraud in the transfer of the suit property, issues which were disposed of in the earlier suit, and not in relation to the Applicant's surrender of vacant possession of the suit property.
12. That the Applicant had not complied with the Government Proceedings Act and could not therefore institute proceedings against the Government without the requisite notice of her intention to sue and that notwithstanding, the proposed intention to sue the Land Registrar and the honorable Attorney General was time barred. That amendments are not given in vacuous, but to serve a purpose and no explanation has been given as to why the Defendant/Applicant would want to join the Land Registrar and the Honorable Attorney General, parties who were not in the former suit, and in a suit that seeks for vacant possession.
13. That an application of 14th December 1999 gave rise to a consent order of 9th March 2000 which the Applicant's deceased husband failed to comply with thus giving rise to the public auction and therefore the issues that the Applicant now seeks to introduce were heard and determined in a decision of 22nd March 2002.
14. That the application, which sought to compel the DCIO Bomet to carry out investigations into fraudulent dealing with the property must also fail for reasons that the office of the Inspector General of the National Police was an independent office under Article 157 and 245 of *the Constitution* and the court would not ordinarily interfere with the running of its business.
15. In totality the Plaintiff/Respondent submitted that the Applicant's application was riddled with falsehoods, the same sought to reopen an otherwise determined case in Civil Suit No. 1550 of 2000 which would then be res judicata. That the application therefore lacked merit and the same ought to be dismissed.

Determination.

16. I have considered the Application, the submissions as well the authorities therein cited. I have also considered the fact that this application was filed immediately after another application by way of Notice of Motion dated the 29th November 2019, by the Applicant seeking to stay an execution of a ruling dated the 15th November 2019, which application had been dismissed. I have also considered the fact that the application dated the 29th November, 2019 had been filed by the Applicant after her counterclaim had also been dismissed in a ruling dated the 15th November, 2019 for being Res Judicata HCC No 1550 of 2002.
17. The synoptic view of this matter was well captured in *Christine Andree Joshi & 2 others v Sally Chebwogen Kirui* [2019] eKLR wherein my brother, Justice Kaniaru expounded at length on the genesis of the same and which summary I shall also adopt respectively.
18. The Applicant's application now seeks for orders to compel the DCIO-Bomet to conduct fresh investigations into the matter concerning land parcel No. Kericho/Chemagel/1401, to amend her



defense and counterclaim so as to join the Oriental Commercial Bank Limited, the Hon Attorney General and the Land Registrar, Bomet to the suit.

19. It must be pointed out first and foremost, that the court in Christine Andree Joshi & 2 others (Supra) found that the Defendant/Applicant's counter-claim was untenable, was not defensible from a legal or factual perspective and therefore was dead on arrival. That it was a non-starter because it was Res judicata and the same was dismissed with costs. The Applicant has once again sought to amend the said counterclaim.
20. It is not lost that this matter was substantially in issue in former suits between the parties herein being HCC NO.3154 of 1989 and HCC No. 3 of 2009 (Formerly Civil Suit No. 1550 of 2002) which suits had been heard and finally determined by courts of competent jurisdiction. No appeal had been filed and the Respondent now seeks execution of the decree.
21. It is further not lost that the current matter is one whereby the Plaintiff/ Respondent is now seeking from the Defendant/Applicant vacant possession of the suit land known as No Kericho/ Chemagel/1401, or in the alternative the Defendant/Applicant be evicted from thereon. This is after the disputed land had been sold to the Plaintiff/Respondent in a public auction, but who (Plaintiff/ Respondent) has never got vacant possession as the Defendant/Applicant and her family continue being in possession and/or occupation.
22. The Defendant/Applicant in a clever way has tried to prevent this matter from proceeding by filing application after application seeking a myriad of orders despite the matter having been determined. The latest one being the current one in which she now wants to have the court re-open an already decided case by seeking to have the DCIO Bomet carry out investigations into an alleged fraudulent dealing with the property, investigations which ought to have been conducted in the former suits herein above captioned.
23. The Defendant/Applicant further seeks to join the Oriental Commercial Bank Limited, the Hon Attorney General and the Land Registrar, Bomet to the suit, parties who did not participate in the former suits. How would the joining of these parties be relevant in the present suit that seeks vacant possession of the Applicant from the suit premises?
24. Whereas there is nothing inherently objectionable in a person being joined to a pending suit, it is doubtful in the present instance whether the joining of the parties sought by the Defendant/Applicant will transform the suit into one in which the Defendant/Applicant can then become a principal claimant and seek substantive reliefs keeping in mind that the suit has already been determined.
25. Indeed a party cannot be added to a suit to introduce a new cause of action or to alter the nature of the suit, but must be a party or parties who are necessary to *the constitution* of the suit without whom no decree can be passed. It should be a party or parties against whom a right or some relief is sought or who, although no relief may be claimed against, but whose presence would be necessary to enable the Court effectively and completely adjudicate upon and settle all the questions involved in the suit.
26. In the present case, I am not convinced that joining the said parties to the suit would be of any added value keeping in mind that this suit is at its end tail and only awaits execution.
27. It is trite law that if any judicial tribunal, in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is res judicata. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of res judicata can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case, as has been raised time and again in the instant case.



28. Litigants should not be allowed to litigate a matter all over again once a final determination has been made and it is trite that the mere addition of parties in a subsequent suit or omission of a party or parties as is sought in this case, does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. By the Applicant filing several applications seeking a myriad of prayers, in an already determined matter, she is not only in abuse of the court process, but her action is intended to harass, irritate, and annoy the adversary and interface with the administration of justice.
29. A lawyer's duty to the court relates to his/her status as a professional to serve, not only their clients, but also the public interest and to uphold the rule of law and administration of justice, and to discharge their duty as Advocates of the High Court of Kenya. A lawyer should not only serve their client's best interests, but should do so in a manner that would not put the administration of justice and the community's confidence in the profession at risk. Courts are therefore able to modify their procedures to avoid such prejudice and take any steps that are necessary to prevent an abuse of process. I find the Applicant and her advocate are in abuse of the court process and such flagrant abuse of Court processes must be brought to a halt. It is in light of the above that I find no merit in the application dated the 6th May 2022 and I proceed to dismiss it with costs.

DATED AND DELIVERED AT KERICHO VIA MICROSOFT TEAMS THIS 8TH DAY OF DECEMBER 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

