



REPUBLIC OF KENYA



KENYA LAW
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**Suter v Rosi & 5 others (Environment & Land Petition 315 of 2015)
[2022] KEELC 15187 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 315 OF 2015
NA MATHEKA, J
DECEMBER 6, 2022**

BETWEEN

MICHAEL ANDREW SUTER PETITIONER

AND

LEILA JAMES VAN ROSI (ALIAS LEILA IBRAHIM KHAN) RESPONDENT

AND

LEKEV HOLDINGS LIMITED 1ST DEFENDANT

MILFAN DEVELOPERS LIMITED 2ND DEFENDANT

ABDULHAKIM ABDALLA 3RD DEFENDANT

LAND REGISTRAR MOMBASA 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The application is dated 18th July 2022 and is brought under sections IA, 1B, 3A and 63 (e) of the *Civil Procedure Act*, order 2 rule 15 and order 51 of the *Civil Procedure Rules* article 159 of the *Constitution* of Kenya seeking the following orders;
 1. That this Petition be struck out.
 2. That costs of this application and of the petition be paid by the petitioner.
2. It is based on the grounds that the petition is scandalous, frivolous and or vexatious. That the petition is otherwise an abuse of the Process of the Court. That the subject matter of the petition, to wit, subdivision number 1610 Section I mainland north was the same in HCC No 286 of 2007, HCC No 151 of 2006 and HCC No 204 of 1998, which suits have been determined thereby making this Petition



res judicata. That the registered owner of the suit property, Abdulhakim Abdalla, the 4th Respondent herein successfully petitioned this Honourable court to strike out the Petition against him in a ruling delivered by CK Yano, J on 24th January 2019. That the owner of the suit property, the subject matter of this Petition, is not a party to the Petition. That the petitioner is taking this Honourable Court's precious judicial time in engaging the parties herein in a futile academic exercise.

3. The Petitioner opposed it the grounds that the same is misconceived, bad in law and an abuse of the process of the court. The application is an abuse of order 2 rule 15 since it is supported by applicant's evidence contrary to strict provisions of order 2 rule 15 to that extend the same must fail. That the deponent of the supporting affidavit has not shown any evidence that he is a director of the 3rd Defendant and neither is there any evidence of resolutions by the 3rd defendant's Company to allow him to represent it and swear this affidavit. The applicant cannot ask the court to strike out the suit in its eternity but can only ask for the dismissal of the suit against it and to that extend this application must fail. The petitioner made all disclosures including bringing to court all previous rulings in this matter where in all instances the parties made application to strike out the petitioner's suit. That in all the rulings, the suits were struck out and the issue raised against the defendants jointly and severally in this Petition have never gone for trial and heard on merit. The petitioner is enforcing a constitutional right and raising a grave issues of fraud and corruption involving not only the 1st to 4th Respondents but the 5th Respondent as well and the Petitioner should be given a chance to adduce his evidence in court. The court should take judicial Notice that corruption is endemic in this county and particularly in land matters and the reason why the petitioner should be given a chance to have his day in court. The Ruling of Justice Yano of 24th January 2019 was for striking out and specific to the 4th respondent while the ruling in HCC NO. 286 of 2007 was for striking out as well and still the Ruling in HCC NO. 24 of 2009 was also for striking out and this confirms that all these rulings there is no evidence of the issue being heard and determined on merit and to that extend the issue raised in this Petition have not been heard and determined and cannot be a basis for striking out the Petition against the applicant let alone the entire suit.
4. The 1st, 2nd, 5th and 6th applicants have not made application to strike out the suit and the 3rd respondent cannot purport to be acting for them such that in the event the court will be considering the 3rd respondent's application it should be done in isolation of the suits against the other parties. The respondents by themselves or their Agents or servants participated in the fraud which led to the defendants loss of land and the reason why they are being sued jointly and severally. That it is only fair that the Petitioner should be left to proceed with his Petition so that justice is properly served by having the matter being heard and decided on merit.
5. This court has considered the application and the submissions therein. The applicant/3rd respondent states that the petition is otherwise an abuse of the Process of the Court. That the subject matter of the Petition, to wit, subdivision number 1610 Section I mainland north was the same in HCC No 286 of 2007, HCC No 151 of 2006 and HCC No 204 of 1998, which suits have been determined thereby making this Petition res judicata. That the registered owner of the suit property, Abdulhakim Abdalla, the 4th Respondent herein successfully Petitioned this Honourable Court to strike out the Petition against him in a ruling delivered by CK Yano, J on 24th January 2019. Section 7 of the [Civil Procedure Act](#) on *res judicata* reads 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”.

6. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
7. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.
8. In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, (2017) eKLR, that:

...the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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 in which the issue is raised.”

9. The court went on to state on the role of the doctrine;

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

10. The court in *John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) eKLR pronounced itself as follows;
11. The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues



already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

12. In the case before me, the applicant states that the subject matter subdivision number 1610 section I mainland north was the same in HCC No 286 of 2007, HCC No 151 of 2006, HCC No 204 of 1998 and HCC No 24 of 2009 and these matters have been determined.
13. In this case I have perused the pleadings referred to and find that the subject matter of the Petition, to wit, subdivision number 1610 section I mainland north was the same in HCC No 286 of 2007, HCC No 151 of 2006, HCC No 204 of 1998 and HCC No 24 of 2009, which suits have been determined. The parties are also similar. I also find that the registered owner of the suit property, Abdulkhakim Abdalla, the 4th Respondent herein successfully petitioned this Honourable Court to strike out the Petition against him in a ruling delivered by CK Yano, J on 24th January 2019. The 4th respondent is no longer a party in this suit. The plaintiff/respondent if aggrieved by these rulings ought to have appealed and not file a fresh suit by way of a Petition. I find that this Petition is res judicata and an abuse of the court process. I therefore strike off the Petition against all the respondents with costs to the respondents.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF DECEMBER 2022.

N.A. MATHEKA

JUDGE

