



Wasilwa & 2 others v Makokha (Environmental and Land Originating Summons E006 of 2023) [2025] KEELC 3753 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2023
EC CHERONO, J
MAY 8, 2025**

BETWEEN

**BENSON WASILWA 1ST PLAINTIFF
PATRICK LIANDA 2ND PLAINTIFF
ZAKAYO SINDANI 3RD PLAINTIFF**

AND

WILKISTER MASICHA MAKOKHA DEFENDANT

(IN THE MATTER OF THE SUBDIVISION ON THE LAND PARCEL COMPRISED IN THE TITLE KNOWN AS BUNGOMA/KABISI/2579 AND IN THE MATTER OF THE DELIVERY OF THE RESULTANT SUBDIVIDED LAND PARCELS OF THE LAND PARCEL KNOWN AS BUNGOMA/KABISI/2579)

RULING

1. The application before me is the Notice of Motion Application dated 22/05/2024 seeking the following orders: -
 - a. This suit be struck out for being Res judicata.
 - b. The costs of this application and the struck-out suit be paid by the Plaintiff/Respondent.
2. In his supporting affidavit, the Applicant deposed that the issues raised in this suit were directly and substantively in issue in Bungoma High Court Civil Suit No. 5 of 2011 wherein a final decision concerning the subject property i.e Bungoma/Kabisi/2XX9 was entered by Justice Mukunya on 03/12/2015. That the said judgement, the trial Judge directed that the Respondent herein who was the defendant in the former suit should move to the subject property as the land belonged to her and her children. That the present suit is therefore bad in law and that she stands to suffer losses if the orders sought are not granted.



3. In response to the said application, the 3rd Respondent-Zakayo Sindani filed a replying affidavit sworn on 25/08/2024 where he deposed that his late father Samuel Makokha Sindani and the Applicant herein were registered as joint proprietors of land parcel no. Bungoma/Kabisi/2XX9. That at the time of the said registration, the Applicant was residing in land parcel no. Bungoma/Kabuyefwe/34 that also belonged to Samuel Makokha Sindani. That vide a consent judgment dated 15/10/2015 in Bungoma High Court Civil Suit No. 5 of 2011, Samuel Makokha Sindani and the Applicant herein consented to the Applicant herein to move to the subject property within 30days and that the said land belonged to her i.e the Applicant and her children. On 03/12/2015, the said suit was concluded with the Applicant moving to the said land which is also the subject of the current suit.
4. It is the Respondent's contention that the said judgment created a trust in favour of the Applicant's children. That conflicts arose leading to various criminal charges and mediation sessions which resolved that Samuel Makokha Sindani ought to sub-divide the subject property amongst his children and the Applicant. That the Applicant attempted to fraudulently remove the name of Samuel Makokha Sindani from the register of the subject land leading to the placing of a restriction over the land. That with the assistance of the area chief, the late Samuel Makokha Sindani shared the subject land and contrary to the above, the Applicant varied the sub-division and armed with a court order issued in CM BGM ELC Misc Appl. No. 2 of 2023 sought to fix boundaries on the land. That this suit is meant to challenge the applicant's mode of sub-division therefore this suit is not res judicata.
5. When the said application came for directions, the parties agreed that the same be canvassed by way of written submissions.
6. The Applicant filed her submissions dated 22/05/2024 where she gave a brief history of the dispute as summarized above and submitted that the previous case was heard and determined on merits. Reliance was placed in the provisions of Section 7 of the *Civil Procedure Act* and the case of Zephaniah Gichure Ndungu v Rwaikamba Rwathia Trading Co. Ltd & Another ELC No. 78 of 2009 (OS) [2014] eKLR. It was her submission that she has proved that there have been previous cases arising from the same cause of action as in the present suit between the parties herein by availing copies of proceedings in the concluded cases in the High Court to warrant this court declare this matter as res judicata.
7. The Respondents on their part filed submissions dated 30/08/2024 where they stated that the instant suit raises issues that are only collateral and incidental to the direct and substantial matters in Bungoma High Court Civil Suit No. 5 of 2011. They further submitted that in view the aforesaid matters, they were not parties to the proceedings in Bungoma High Court Civil Suit No. 5 of 2011. They argued that the Defendant/Applicant in this suit is being sued as a trustee and the issue for determination is the entitlement of the beneficiaries under the trust. They argued that there is no fresh litigation of the issue as to whether the applicant should move into and stay on the suit property or whether she should refund the Kshs. 5,000/= given to her in the suit. It was therefore argued that the Applicant failed to raise the plea of res judicata. They asked the court to dismiss the application with costs.

Analysis Nd Determination.

8. I have considered the application, the rival addidavits and and submission as well as the applicable law.
9. The principles of Res judicata are set out in Section 7 of the *Civil Procedure Act* which states;-

“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.”

10. The principles in the above provision were recently restated by the Supreme Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR which summarized the same in civil cases as follows”

“(59) for res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”

11. Having set out the principles to follow in Res judicata, it is not in dispute that the parties herein agree that the subject matter in both the former suit and the present case is the same, to wit, land parcel no. Bungoma/Kabisi/2XX9 and that there is a final judgment entered by a Court of competent jurisdiction in the former suit being Bungoma High Court Civil Suit No. 5 of 2011 between Samuel Makokha Sindani vs. Wilkister Masicha Makokha. The divergent view by the parties is that the parties and the reliefs sought are not the same

12. From a review of the two cases, it is clear to me that the parties in the two cases are distinct. However, the courts are urged to remain vigilant to guard against litigants who metamorphosize and bring suits as new or add others to circumvent the doctrine of res judicata. See the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR. In relation to the foregoing, I have considered the pleadings by the Respondents herein and it is clear that the parties are suing in their own capacity as alleged trustees of the subject matter.

13. On the issue of the subject matter, the parties in the former suit agreed by consent to have the Applicant move to the suit property and the directions of the court was for her to occupy the subject land for herself and her children. As for the current suit, the Respondents argue that their claim is based on trust and the sharing of the subject property and not on the issue of ownership. I have had a chance to peruse the pleadings and I agree with the Respondents that the cause of action in the two suits is not the same.

14. Having considered the argument for and against the instant application, I find and hold that the suit herein is not Res judicata to Bungoma High Court Civil Suit No. 5 of 2011. It is my view that the instant suit should be allowed to proceed for hearing and to be determined on merits. Although the Respondents are the successful parties and ought to be awarded costs of this application, I find that since the relationship between the parties are close, I order that each party to bear their own costs of the application.

15. The upshot of my finding is that Notice of Motion application dated 22nd May, 2024 is devoid of merit and the same is hereby dismissed in its entirety with each party to bear their own costs.

16. Orders accordingly.

DATED, SIGNED and DELIVERED at BUNGOMA this 08th day of May, 2025.



HON.E.C CHERONO

