



Nuraini & another (Suing as Administrators of the Estate of the Late Sadrudin Shamsudin Nurani) v Glitter Venture Limited & 23 others; Bisetto & another (Third party) (Environment & Land Case E10 of 2020) [2024] KEELC 1240 (KLR) (6 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1240 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E10 OF 2020
FM NJOROGE, J
MARCH 6, 2024

BETWEEN

FEIZAL SADRUDIN NURAINI 1ST PLAINTIFF

FARAH SADRUDIN NURANI 2ND PLAINTIFF

SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE SADRUDIN SHAMSUDIN NURANI

AND

GLITTER VENTURE LIMITED & 23 OTHERS DEFENDANT

AND

PAOLO BISSETTO THIRD PARTY

GAETA GIUSEPPE THIRD PARTY

RULING

Application and Preliminary Objection

1. Before this court for determination is the 5th, 15th and 16th Defendants' Notice of Motion dated 9th October 2023 and a Notice of Preliminary Objection dated 23rd October 2023 filed by the 6th, 7th, 8th, 10th, 11th, 12th, 14th, 17th, 18th, 19th, and 21st Defendants.
2. In their Notice of Motion brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 2 Rule 15 (b), (c) and (d) of the *Civil Procedure Rules*, the said Defendants want the following orders: -
 - a. The Honourable Court be pleased to strike out the Plaintiff's suit.
 - b. The costs of this application be provided for.



3. In support of the application is the affidavit sworn by Susanna Bracco on 23rd August 2023, wherein she deposed that the subject of this suit Chembe/Kibabamshe/367, was previously held in common by one Sadrudin Shamsudin Esmail Nurani and Ramesh Lali Aggarwal (both now deceased); that the High Court in Malindi Civil Case No. 90 of 2006, decided in favour of one Shadrack Katana Ndundi on a claim for adverse possession against the said Sadrudin and Ramesh. Subsequently, the said Shadrack sold the land to the 1st Defendant who in turn developed the same into a hotel and residential estate. The 1st Defendant then transferred some of the apartment units to the 5th, 15th and 16th Defendants for a consideration. Susanna added that the decision of the Malindi High Court aforementioned, has neither been reviewed nor set aside on appeal; therefore, since their claim to the subject land falls under the said Shadrack, the Plaintiff's suit is now *res judicata*.
4. The Preliminary Objection echoes the contents of the aforementioned supporting affidavit. The grounds being that this suit is *res judicata* for being directly and substantially similar in issue and between the same parties herein and in Malindi Civil Case No. 90 of 2006 and that the plaintiffs have no consent to institute the suit on behalf of the estate of Ramesh Lali Aggarwal who previously owned the suit land in common with the said Sadrudin Shamsudin Esmail Nurani.
5. The Plaintiffs opposed the application and preliminary objection. They filed a Replying Affidavit sworn by Feizal Sadrudin Nurani on 30th October 2023.
6. Following this court's directions, both the application and preliminary objection were canvassed by way of written submissions.

6th, 7th, 8th, 10th, 11th, 12th, 14th, 17th, 18th, 19th, and 21st Defendants' Submissions

7. In the submissions filed on 30th January 2024, Counsel for the said defendants listed four issues for determination. First was whether the Plaintiffs have consent to file this suit on behalf of the administrators of the estate of Ramesh Lali Aggarwal. It was counsel's submission that since the land was owned by two tenants in common, and by virtue of Section 91 (1), (2) (5) and (6) of the [Land Registration Act, 2012](#), one co-tenant could not deal with the suit land without the consent of the other. To Counsel, since the Plaintiffs did not have the consent from the administrators of the estate of Ramesh Lali, they lacked *locus standi* to institute the suit.
8. The second issue was what was the effect of the withdrawal order made on 29th March 2021. Quoting Order 25 rule 1 and 2 of the [Civil Procedure Rules](#), counsel argued that there is no procedure in law on withdrawal and discontinuance of a suit that has already been determined. He argued that the only proper procedure is under Section 16 of the [ELC Act](#) which provides that appeals from this court shall lie to the Court of Appeal. Counsel submitted that the judgment in Malindi HCCC 90 of 2006 was executed on 7th August 2007, therefore this court became functus officio and had no jurisdiction to withdraw Malindi HCCC 90 of 2006. To buttress this point, counsel relied on the case of [Raila Odinga & 2 others v IEBC & 3 others](#) [2013] eKLR, [Menginya Salim Murgani v KRA](#) [2014] eKLR and [Peterson Ndung'u & 5 others v KPLC Ltd](#) [2018] eKLR.
9. On the issue of *res judicata*, counsel submitted that the doctrine is explained in Section 7 of the [Civil Procedure Act](#) and in the cases of [Lotta v Tanaki](#) [2003] EA 556 and [Sceneries Limited v National Land Commission](#) [2017] eKLR. To him, the issues and parties in this suit are directly and substantially similar to those in Malindi HCCC 90 of 2006 where judgment has long been executed.
10. The final issue was whether this court has jurisdiction to hear and determine this suit. Counsel submitted that this suit is time barred as it offends the provisions of Section 7 of the [Limitation of Actions Act](#) for being filed 22 years after the certificate of confirmation of grant in the estate of Sadrudin



Shamsudin was issued. Counsel added that this court did not have jurisdiction to set aside a decision of a court of concurrent jurisdiction and that could only be done by the Court of Appeal. Counsel relied on the case of Mashreq Bank PSC v Kuguru Food Complex Limited [2018] eKLR and CCD v ENB, PKN, VD & BU [2018] eKLR. Counsel urged the court to allow the Preliminary Objection and the notice of motion application.

Plaintiffs' Submissions

11. The Plaintiffs' counsel filed Submissions on 30th January 2024 wherein two issues for determination were identified- whether or not the suit is *res judicata* and whether the threshold for dismissal or striking out of a suit has been met.
12. Regarding the first issue, counsel relied on the case of Henry Wanyama Khaemba v Standard Chartered Bank (K) Limited & another [2014] eKLR. He submitted that the objection as raised constitutes a mixture of facts and law therefore could not pass the test. He argued that one of the hallmarks of the principle of *res judicata* is the existence of a final determination of a previous suit; that since there was no final determination in Malindi HCCC No. 90 of 2006, the present suit could not be said to be *res judicata*. He explained that the judgment in the said suit was set aside and the suit withdrawn thus effectively, all presumed rights became extinguished. To buttress this point, counsel relied on the case of Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR and John Frence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] eKLR.
13. In relation to the second issue, counsel submitted that this suit raises fundamental points of law and facts on the integrity of the process culminating to alienation of LR No. Chembe/Kibabamshe/367 in favour of the 1st Defendant. He added that the issue of consent of the administrator of the estate of Ramesh Lali Aggrawal has long been cured and lack thereof is no longer a ground to occasion dismissal of the entire suit. Counsel relied on the cases of DT Dobie & Company (K) Ltd v Joseph Mbaria Muchina & another [1980] eKLR; Blueshield Insurance Company Limited v Joseph Mboya Oguttu [2009] eKLR.

The issues for determination in the motion and the preliminary objection are as follows:

- a. Whether the present suit is *res judicata* Malindi HCCC 90 of 2006.
- b. Whether plaintiffs have *locus standi* to sustain this suit on behalf of the estate of Ramesh Lali.
- c. Whether this suit should be struck out.

Analysis and Determination

14. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“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”



15. The *Black's law Dictionary* 10th Edition defines "*res judicata*" as: -
- “An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
16. In the present case, the Plaintiffs indicate in their Amended Plaint dated 22nd March 2023 that they are “suing as the administrators of the Estate of Sadrudin Shamsudin Nurani”. Their claim is that the said Sadrudin and one Ramesh Lail were registered as tenants in common of the land LR No. Chembe/Kibabamshe/367 (the suit property); that the 1st Defendant fraudulently procured registration of the suit property in its favour thereby interfering with the Plaintiffs’ proprietary rights. As a result, the 1st Defendant caused the registration of sub-leases to the 5th -23rd Defendants. The Plaintiffs want several orders to wit, a declaration that they are the true owners of the suit property and that the certificate held by the 1st Defendant was acquired illegally; a nullification of all the subsequent sub-leases; eviction orders; a permanent injunction restraining the Defendants from dealing with the suit property; payment of mesne profits and general damages.
17. It is also undisputed that there was previously filed a suit referenced Malindi ELC No. 90 of 2006. In that case, the Plaintiff was one Shadrack Katana Ndundi, who filed an Originating Summons, for an action of adverse possession against the title held by Sadrudin Shamsudin Nuran and Ramesh Lail. ex-parte judgment was entered in favour of the said Shadrack Katana. On 26th November 2007, the administrators of the Defendants in that case sought to set aside the ex-parte judgment in an application which was subsequently dismissed on 23rd February 2015 for want of prosecution. Interestingly, the suit was by consent withdrawn on 29th March 2021.
18. It is important that I address this issue of withdrawal before deciding on the issue of *res judicata*. Counsel for the Defendants argued that the court had no business allowing the notice of withdrawal in the former case, since it had become functus officio. I do not agree. There are several instances where courts have dealt with withdrawal of suit even after judgment was delivered. For instance, in *Karisa Chengo Nguma v Kache Ruwa Kalama & another* [2019] eKLR the court stated: -
- “The filing of the Notice of Withdrawal on 8th May 2018 was therefore done after the suit had been set down for hearing and indeed judgment had been entered in favour of the plaintiff. Under Order 25 Rule 2, the suit could only be discontinued or the claim, or any part thereof, withdrawn upon the filing of a written consent signed by all the parties or with the leave of the court.”
19. Similarly, the Court of Appeal in *PIL Kenya Ltd -v- Joseph Oppong* [2001] eKLR stated: -
- “The notice of withdrawal was homemade and I infer that it was indeed filed by the Plaintiff/ personally. I say so advisedly. By his conduct he had no interest in the suit, with the result that his advocates had to formally apply for leave to cease acting for him. The plaintiff in that suit did not need the leave of court to withdraw his suit nor was a court order necessary to give effect to the withdrawal. All that was necessary was for the plaintiff to file a notice of withdrawal before judgment. After judgment, however, the leave of the court was necessary.” (emphasis mine.)
20. The inference from the above decisions is that a suit may be withdrawn even after Judgment, however, the leave of the Court is necessary because rights of the parties have crystalized and prejudice may be visited on a party that may be affected by the withdrawal. This leave in my view was granted on 29th



March 2021 when the withdrawal was recorded by consent and in the presence of both counsel therein. The net result is that the suit Malindi ELC 90 of 2006 ceased to exist after 29th March 2021.

21. Be that as it may, a close perusal of the present and former suit reveals that the parties herein are in one way or another litigating in privity with the original parties in the former suit. However, I am not convinced that the issues raised are directly or substantially similar in the two suits. I say so because, the basis of the former suit was rights accrued under adverse possession; while the instant claim is based on alleged fraud on the part of the Defendants. The Plaintiffs' claim is that the said Shadrack Katana never filed the former suit for adverse possession and has never stayed on the suit property. This in my view is a fact which entirely changes, the aspect of the case. The outcome is that the doctrine of *res judicata* does not apply in this case.
22. I have considered the arguments on the Plaintiffs' *locus standi* to sustain the suit on behalf of the estate of Ramesh Lail. To the Defendants, the Plaintiffs ought to have first obtained from the administrators of the estate of Ramesh Lail, consent to file the present suit. The Plaintiffs claim that the said consent was obtained and annexed the same in their Replying Affidavit. I have seen the said consent dated 22nd January 2015, I therefore agree with the Plaintiffs that this issue is untenable at present.
23. Given the foregoing findings, I see no basis for striking out this suit. The upshot is that both notice of motion dated 9th October 2023 and Notice of Preliminary Objection dated 23rd October 2023 are hereby dismissed with costs to the plaintiffs.
24. The parties shall comply with Order 11 of the [Civil Procedure Rules](#) by filing their respective consolidated trial bundles duly indexed and paginated, the plaintiffs within the first 30 days and the defendants within the 30 days following and the suit shall be mentioned on 6/5/2024 for issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE

ELC, MALINDI

