



**Kenya Forest Service & another v Ongai (Environment and Land Appeal
17 of 2022) [2024] KEELC 3760 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 17 OF 2022**

M SILA, J

MAY 8, 2024

BETWEEN

KENYA FOREST SERVICE 1ST APPELLANT

THE HONOURABLE ATTORNEY GENERAL 2ND APPELLANT

AND

LEAH MAGOMA ONGAI RESPONDENT

*(Being an appeal against the ruling of Hon. Ocharo, Senior Principal Magistrate,
delivered on 26 July 2022 in the suit Kisii CMCCELC No. E138 of 2021)*

JUDGMENT

(Appeal against finding that the suit before the Magistrates' Court was not *res judicata*; respondent filing suit against the appellants and asserting title to the disputed land; respondent having sued the Hon. Attorney General but not the Kenya Forest Service in a previous suit where she had also asserted that she holds title to the suit land; Court in that previous suit holding that the respondent does not have a good title to the suit land and dismissing her case in a judgment delivered in 2014; respondent now filing suit against Kenya Forest Service still contending that she holds title to the suit land; *res judicata* raised but plea dismissed on the basis that Kenya Forest Service was not party in the previous suit; on appeal court finding that the core issue is whether or not the respondent holds title to the suit land which was already decided; court holding that the said judgment was in rem; party cannot merely by now suing a different party seeking the same reliefs escape the plea of *res judicata*; appeal allowed; suit struck out as being *res judicata*)

1. The appellants have preferred an appeal against the ruling of the trial Magistrates' Court which declined to allow the appellant's preliminary objection that the suit was *res judicata*.



2. To put matters into perspective, the respondent through a plaint filed on 17 December 2021 sued the Kenya Forest Service as 1st defendant and the Honourable Attorney General as 2nd defendant. In the plaint, the respondent contended to be the lawful registered owner of the land parcel Kisii Municipality/Block III/294. She pleaded that she was allotted the suit land vide an allotment letter dated 19 September 1986 and was eventually issued with a lease on 5 June 2001 and a Certificate of Lease on 25 October 2001. She pleaded that despite her ownership the 1st defendant has on intermittent periods used the suit land as a temporal Central Tree Nursery and obstructed her from using the land. In the suit, she asked for the following orders :-
 - a. A declaration that the plaintiff is the legal, registered and legitimate owner of the land parcel Kisii Municipality/Block III/294.
 - b. Eviction of the 1st defendant from the suit land.
 - c. A permanent injunction to restrain the 1st defendant from continuing to occupy the suit land.
 - d. General and exemplary damages for trespass.
 - e. Costs of the suit.
3. Together with the plaint, the respondent filed an application for injunction seeking to restrain the 1st appellant from the suit land pending hearing of the suit. Interim orders were granted on 17 December 2021. The appellants shot back with an application dated 29 December 2021 inter alia seeking the suspension of the interim orders on the basis that the 1st appellant was all along in occupation of the suit land since 1978. More importantly, the appellants sought orders for the suit to be dismissed for being *res judicata* the suit Kisii ELC No. 40 of 2012 Leah Magoma Ongai v Attorney General, wherein judgment was delivered on 19 December 2014. On 3 January 2022, the plaintiff amended the plaint to remove the Attorney General as party to the suit so as to leave only the Kenya Forest Service as defendant. Parties were directed to file written submissions towards the application, which they did, and ruling was delivered on 26 July 2022 whereby the court inter alia held that the suit was not *res judicata* and directed the appellants to file defence within 14 days. Aggrieved, the appellants have preferred this appeal and they contend that the trial court erred in not finding that the suit was *res judicata*.
4. I directed the appeal to be argued through written submissions and I have seen the submissions of Mr. Wabwire, learned State Counsel appearing for the appellants, and those of Mr. Nyangacha for the respondent.
5. The issue really is whether or not the suit herein is *res judicata*. The principle of *res judicata* is embodied in our judicial system through Section 7 of the [Civil Procedure Act](#), Cap 21, Laws of Kenya, which provides as follows:-
 7. Res judicata

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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.



Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

6. The essence of the principle of *res judicata* is to bring a finality to litigation so that a party does not continuously come back to court to have an issue that has already been determined tried afresh with the hope that this time there will be a different finding in his favour.
7. In our case, the appellants cited the suit Kisii ELC No. 40 of 2012 and a copy of the judgment was annexed. It is discernible from the judgment that on 6 February 2012, the respondent filed suit against the Honourable Attorney General seeking the following orders :
 - i. A declaration that the plaintiff is the legitimate and/or lawful owner of LR No. Kisii Municipality/Block III/294.
 - ii. An order for the eviction of the defendant more particularly Forest Department from LR No. Kisii Municipality/Block III/294.
 - iii. A permanent injunction restraining the defendant more particularly the Forest Department from entering, trespassing on, building on, interfering with and/ or in any other manner whatsoever dealing with LR No. Kisii Municipality/Block III/294.
 - iv. General damages for trespass.
 - v. Costs of the suit.
 - vi. Such further and/or other relief the court may deem fit and expedient to grant.
8. The Attorney General in the suit was sued in a representative capacity on behalf of the District Forest Office, Central Kisii District. The defence of the Attorney General was that the property was owned by the Government of Kenya and that the Department of Forestry was in lawful occupation thereof. The matter proceeded for hearing before Okong'o J, who delivered judgment on 19 December 2014. In his judgment the good judge framed four issues, being :
 - i. Whether the plaintiff is registered as the proprietor of the suit property?
 - ii. Whether the allocation and/or alienation of the suit property to the plaintiff was lawful?
 - iii. Whether the department of forestry on whose behalf the defendant herein has been sued has any rights and/or interest over the suit property?



- iv. Whether the plaintiff is entitled to the reliefs sought against the defendant?
9. On the first issue the court found that indeed the respondent was the registered proprietor of the suit land as she held title to the land. On the second issue, the court did not find the allocation of the land to the respondent to have been lawful. The court held as follows in paragraphs 18 and 19 of the judgment :
18. In the case before me, there is evidence that the department of forestry was in occupation of the suit property as at the date when it was purportedly allotted to the plaintiff. If the suit property was Trust Land, before it was set apart by County Council of Gusii for allotment to the plaintiff assuming that the setting a part of the same was done by the said council, the department of forestry that was in occupation thereof ought to have been consulted and the views of its officers taken into account before the allotment was done pursuant to the provisions of section 13 (2) of the Trust Land Act aforesaid.
19. In view of what I have set out hereinabove, I am not satisfied on the evidence before me that the allocation of the suit property to the plaintiff by the Commissioner of Lands and the subsequent issuance of a lease to the plaintiff by County Council of Gusii were lawful. I am unable to connect the letter of allotment that was issued to the plaintiff by the Commissioner of Lands with the lease that was issued to the plaintiff by the County Council of Gusii. The lease to the plaintiff is also not backed by the necessary resolutions required under the Trust Land Act, Cap 288 Laws of Kenya. The three cases that have been cited by the plaintiff's advocates are all distinguishable and as such are not supportive of the plaintiff's case. It is my finding therefore that the allocation of the suit property to the plaintiff and the subsequent issuance to her of a lease and certificate of lease over the same were irregular and unlawful. (underlining mine).
10. On the third issue, the court stated as follows at paragraph 23 of its judgment :
23. From what I have set out hereinabove, I am of the opinion that the department of forestry has a right of occupation over the suit property. This right could be determined by the Government of Kenya if the land was owned by the Government of Kenya or by the Kisii Town Council/ County Council of Gusii if the land was trust land in the event that the land was required for another purpose. I have no evidence before me that the license that was given to the department of forestry to occupy the suit property was determined either by the Government of Kenya or the County Council of Gusii before the suit property was allocated to the plaintiff. I am not in agreement with the submission by the plaintiff's advocates that whatever right the department of forestry had on the suit property was rendered void upon the allocation of the suit property to the plaintiff. Even if it is assumed that the title that was acquired by the plaintiff over the suit property is valid, the same was issued under the Registered Land Act, Cap.300, Laws of Kenya. When the said title was issued to the plaintiff, the department of forestry from the evidence before me was in possession of the suit property. As I have stated above, there is no evidence that before the alienation of the suit property to the plaintiff was carried out, inquiries were made as regards the occupants of the said parcel of land and the use for which the land had been put. I am of the opinion that the department of forestry had an overriding interest over the suit property pursuant to the provisions of section 30 (g) of the Registered Land Act, Cap.300, Laws of Kenya (now repealed) to which the plaintiff's title was subject.
11. On the fourth issue the court concluded as follows :
24. In view of the findings that I have made above, I am of the opinion that the plaintiff is not entitled to the reliefs sought in this suit. I am not satisfied that the procedure leading to the



plaintiff's acquisition of title over the suit property was lawful and that the department of forestry is a trespasser on the suit property. I am unable therefore to make a declaration that the plaintiff is the legitimate and/or lawful owner of the suit property.

12. The court proceeded to dismiss the case and directed each party to bear his/her own costs.
13. In his submissions, counsel for the respondent submitted that the trial court was correct in not finding the suit to be *res judicata* because Kenya Forest Service were not party to the previous suit. He pointed at a dictum in the decision of Okong'o J where he stated as follows :

To conclude on this issue, I am of the view that even if the plaintiff's claim was proved, I would not have granted the reliefs sought against the department of forestry. As I have stated at the beginning of this judgment, the suit herein should have been brought against the Kenya Forest Service which is a body corporate with power to sue and to be sued. A suit could not lie against the Kenya Forest Service through the Attorney General. Being a state corporation, the Attorney General could appear on its behalf in the proceedings. Appearing for a party is however not the same thing as being a party to the proceedings.

14. He submitted that pursuant to the amendment of plaint filed on 3 January 2022, the Attorney General is no longer a party to the suit. He reiterated that *res judicata* cannot apply because Kenya Forest Service was not a party in the earlier case.
15. I am not persuaded. It is true that Kenya Forest Service was not a party to that case but the issues that the respondent raised in that case were fully determined. In the earlier case the plaintiff sued the Attorney General on behalf of the Forest Department. The Court nevertheless interrogated her title and found it to be an illegitimate one. That was a conclusive finding in rem. It is immaterial that the respondent has now sued different people. The fact remains that a court of competent jurisdiction already declared her title to be an unlawful one. Does she hope to change that because she has now sued a different party? I am afraid that the trial court has no jurisdiction to revisit the issue of her title in a fresh suit. To do so would be to invite the trial court, which is a subordinate court, to sit as an appellate court on a decision of a superior court, which cannot be allowed. Even this court, if the trial were lodged before it, cannot revisit the conclusive findings of the earlier court.
16. I do not think that one can escape the *res judicata* rule merely by changing the parties that he has sued when the central issue in the case is one that has already been decided in the previous case. For a judgment that is in rem, one cannot escape the plea of *res judicata* by changing the defendants since the previous decision applies in favour of or against the whole world including the plaintiff herself. The [*Blacks Law Dictionary*](#), 9th Edition, describes a judgment in rem as follows :

A judgment that determines the status or condition of property and that operates directly on the property itself. The phrase denotes a judgment that affects not only the interest in a thing but also all persons' interest in the thing.

The [*Halsbury's Law of England*](#), 4th Edition, Volume 26, at page 238 paragraph 503, on its part distinguishes between a judgment in rem and in personam as follows ;

A judgment in rem may be defined as the judgment of a court of competent jurisdiction determining the status or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation. A judgment in personam determines the rights of the parties among themselves to or in the subject matter in dispute, whether it be corporeal property of any kind whatever, or a liquidated or unliquidated demand, but does not affect the status



of either persons or things, or make any disposition of property, or declare or determine any interest in it except as between the parties litigant.

17. The judgment in the previous suit was a judgment in rem in so far as it pronounced itself on the title of the respondent. The respondent cannot now try to hide behind the veil that the suit now is against Kenya Forest Service. Even if Kenya Forest Service was not a defendant but any third party, the suit would still be unmaintainable in so far as the basis is that the respondent has title. The foregoing aside, isn our case *res judicata* would still apply because for all intents and purposes the Attorney General had been sued in the previous case as if he was representing the entire forestry department including Kenya Forest Service despite Kenya Forest Service not being sued. It is thus apparent that the parties herein are more or less parties litigating under the same title as in the previous suit. But what remains critical is that the question regarding the title of the respondent was determined in the previous suit and that cannot be revisited merely by cleverly drafted proceedings that now include a different party.
18. I am thus persuaded that the trial court fell into error in not allowing the application in so far as the question of *res judicata* was concerned. I am persuaded to overturn that decision. I substitute it with an order that the case of the respondent before the Magistrates' Court is *res judicata* and it is hereby dismissed. Any orders made in favour of the respondent in that case are hereby set aside and declared null and void. The appellant shall have the costs of the case before the trial court and also the costs of this appeal.
19. Judgment accordingly.

DATED AND DELIVERED THIS 8TH DAY OF MAY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Wabwire, State Counsel for the appellants

N/A on part of M/s Nyangacha & Associates Advocates for the respondent

Court Assistant – David Ochieng'

