Njagi v Ngoriadomo (Environment & Land Case 97 of 2011)
[2024] KEELC 3614 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3614 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 97 OF 2011

FO NYAGAKA, J

MAY 2, 2024

BETWEEN

JANE KARIMI NJAGI ..... PLAINTIFF

AND

RICHARD NGORIADOMO ..... DEFENDANT

RULING

1. Before me is a Notice of Motion dated 26/07/2023 and filed the same date. It was brought by the Defendant. It was anchored on the provisions of Sections 3A and 63(e) of the *Civil Procedure Act*, Order 10 Rule 11 of the *Civil Procedure Rules* and all enabling provisions of the law (sic). It sought the following reliefs:

    1. ...spent

    2. ...spent

    3. That this Honorable Court be pleased set aside the proceedings and ex parte judgment delivered on 30th October, 2018 and all consequential orders therein.

    4. That this Honourable court do grant any other or further orders as it deems necessary in the circumstances and in the interest of justice.

    That the costs be in the cause.

2. The Application was supported by a number of grounds on the face of it and by the Affidavit of, one Richard Kapunton Ngoriadomo Lokolinyang, the Defendant. It was sworn on 26/07/2023.

3. That sometime in 2011, the plaintiff instituted the suit against him. He instructed an advocate to enter appearance and defence. The Advocate filing the requisite documents. On several occasions he visited the Advocates' offices, and the Advocate informed him that the matter had not been fixed for

hearing. In 2013, his wife became ill and passed away and as a result he fell into depression. Each time his Advocate informed him that their matter had never taken off, he believed, the said Advocate. Then the matter proceeded ex parte and the plaintiff testified without being cross examined. His failure to attend the hearing was not deliberate but a result of being misled by the Advocate. He was now dissatisfied with the judgment and wished to set it aside. He was apprehensive that if the court did not intervene he would be condemned unheard. He had lived on the suit property since 1990 and had no other home. He would therefore suffer irreparable loss and damage if the orders sought were not granted. He had a defence that had merits and raised triable issues. No prejudice would be occasioned upon the plaintiff if the orders sought were granted. He had complied with the court orders by moving away the cattle from the land except the maize still growing on it at the time of the application.

4. The Applicant supported his Application through an Affidavit he swore on 27/07/2023. It repeated the contents of the grounds of the application hence I need not repeat it here. But in addition he annexed as PK-1 a copy of a letter dated 12/06/2023 issued by the Kapenguria Country Referral Hospital to the effect that he had been Hospitalized between 22/10/2018 and 27/10/2028 due to diabetes and hypertension, annexture PK-2 a copy of the death certificate of the wife, and PK-3 a copy of the judgment delivered on 30/10/2018.

5. The application was opposed through a Replying Affidavit sworn by the plaintiff on 15/08/2023. She deposed the application was an abuse of the court process. The applicant had admitted that the suit land belonged to her and therefore the application was only a waste of the court's precious time. The hearing of the suit proceeded with the applicant's knowledge. By the time the instant application was brought, a bill of costs was filed and taxed by the parties' consent.

6. After the delivery of the judgment impugned the applicant brought an application for review of the same. The Respondent annexed as JN-1 a copy of the ruling of this court on the application. She deponed further that the applicant was not truthful and honest and had misled the Advocate on record. There were no good grounds for reopening the case, which had been instituted 12 years before. It was not true that the Applicant's then advocate did not attend court hearing because the case proceeded in his presence, after the Surveyor filed his report. The Advocate alleged to have misled the party had not sworn an affidavit to confirm the allegations raised against him.

7. Further, if the allegations in the application were true, then they should not be visited on the respondent/plaintiff. The applicant was aware of the judgment all along. He had moved the court only because he was being evicted but he remained adamant, on the land, and forcefully threatened to harm the plaintiff. His Affidavit contradicted the application. If his advocate misled him, then there were avenues available to him, such as a suit for damages against the said advocate. The applicant had been on the land for five years despite the judgment for him to move. Had he been dissatisfied with the judgment he should have filed an appeal against it. The application was brought in bad faith. The applicant had requested the respondent at one time to purchase the land instead of moving out. His behavior was wanting since the application had been overtaken by events and since the applicant had moved his animals from the land.

The Submissions

8. The Application was disposed of by way of written submissions. The Applicant's were dated 02/01/2024 and filed on 12/01/2024. The Respondent were dated 26/01/2024 and filed on 01/02/2024. This Court has duly considered both and will include their relevant parts when determining the issues before it.

Analysis And Disposition

9. I have considered the Application, the Supporting Affidavit and the Replying Affidavit, the relevant law and the respective written submissions by rival parties. I find two issues for determination before me. One is whether the Application is res judicata, and two, who to bear the costs of the Application.

10. About res judicata, the law is now settled. Basically, when a court considers the issue, it analyzes the facts on the issue along two comparable planes. One is that there must be an earlier determination on the merits or specific issue to be considered the second time. The determination must be between the same parties who are litigating over the same issue or one that is substantially similar as the subsequent one, under the same title or under which they claim. Section 7 of the *Civil Procedure Act* provides on the same, and prohibits the court subsequently handling such a matter from doing so. In essence it calls on such a court to down its tools by striking out the subsequent issue. It stipulates:-

> " 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."

11. Therefore, the elements of *res judicata* are simple:

    a. the issue being tried the second time was previously tried and determined

    b. the issue being tried was the same, directly or substantially in issue as in the former proceeding

    c. court that tried it had competent jurisdiction

    d. determination was on merits and not on a technicality hence conclusive on the issue

    e. parties in the former proceeding were the same or litigated therein under the same title

12. In *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR the Court of Appeal stated as follows:

> " To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

13. Guided by the above law and authorities I now determine the issue. The Respondent argued that the Application was similar to the one this Court determined vide a ruling dated 31/05/2023 whose copy she annexed as JK-1. The Applicant refuted the argument. He deponed in the further Affidavit, at paragraphs *7* and *13* that he filed an application dated 14/01/2022 on 21/2023 for review of the judgment on learning that the matter had proceeded in his absence, and after he was evicted by the police. Then he deponed at paragraph 17 that the law permitted him to either appeal or apply for review and he chose the latter.

14. From the two contending arguments, it is clear that there was an earlier application. It was between the parties herein over the same judgment now sought to be set aside. It was aimed at setting aside the same just as is sought now. The only 'difference' is that in the earlier one the Applicant sought to set aside the judgment by way of review under Order 45 of the *Civil Procedure Rules, 2010*: the application was denied for reasons given in the Ruling delivered on 31/05/2023 annexed as JK-1. This Court has used the term "difference" in the sense of the imagination of the Applicant but it sees none. In the earlier application, the Applicant had moved the Court arguing that the judgment be set aside because

he had since obtained an allotment letter over the same parcel of land. He did not raise the issue of illness and death of the wife, his subsequent illness and the fact of being misled by learned counsel. All the issues or facts he now raises were within his knowledge prior to the earlier application. That being so, it means that none of these existed as against the alleged ex parte proceedings hence they were neither here nor there and they shall remain to be so. By whatever appearance the Defendant clothes it, this simple issue is that he wishes to set aside the judgment of this Court. Having attempted that unsuccessfully vide his earlier application dated 14/01/2022 and filed on 21/01/2022 (not 21/01/2023 as he deponed) he cannot have the second bite at the cherry. He should have brought all these issues in the earlier application. The same is res judicata. These are issues of conjecture which are after thoughts being raised by a party who sought the same orders (of setting aside the judgment) since he is hanging on any reed around so that he does not sink. The defendant's defence and evidence regarding the suit herein sunk some time back when the Court delivered its judgment herein. It should remain so, at the bottom of the sea.

15. For this reason, the instant Application and the prayers must fail. I dismiss it with costs to the Respondent.

16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 2ND DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE