Waweru v Waweru (Environment and Land Appeal 44 of 2018)
[2024] KEELC 6890 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6890 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 44 OF 2018

JG KEMEI, J

OCTOBER 17, 2024

BETWEEN

JOSEPH WAWERU ..... APPELLANT

AND

TABBY WAMBUI WAWERU ..... RESPONDENT

RULING

1. The application before Court is dated the 13/5/2024 brought by the Appellant/Applicant under Order 45 of the *Civil Procedure Rules* and sections 1A, 1B, and 3A of the *Civil Procedure Rules* and all enabling provisions of the law seeking orders that;

    a. Spent

    b. The Court order stay of execution of the judgment pending the hearing and determination of the application.

    c. The Court to review the judgment issued by the Court.

2. The application is premised on the grounds annexed thereto and the Supporting Affidavit of the Applicant Joseph Waweru sworn 13/5/24. The Applicant averred that when the matter was filed in Court in 2005 the Respondent was in possession of a valid title and the judgement was rendered on that basis.

3. However, the Ministry of Lands later discovered inconsistencies in the map cancelled all the titles with respect to Ruiru/Ruiru Kiu Block6and called upon title holders to submit their certificates for verification. That the Respondents title number Ruiru/Ruiru Kiu Block6/273 was one of those that were cancelled. That the title having been cancelled means that the judgment of the Court remains unenforceable. That it is for this reasons that the new evidence warrants the review and setting aside of the judgment of the Court.

4. In addition he stated that the Ministry carried out a new resurvey of the area. He attached a number of correspondences marked as A-E. That upon resurvey the new numbers were reissued. That the new number for the suit land now is Ruiru/Kiu/6/976.

5. He stated that though the Court allowed his application dated 14/4/22 seeking to adduce the new evidence, his Advocate failed to comply with the orders of the Court and hence the evidence was not considered in the judgment. He opined that if the Court allows the adduction of the new evidence the Court is likely to reach a different outcome.

6. The application is opposed by the Respondent via a PO dated the 23/5/2024 on the following grounds;

    a. Provisions of order 9 rule 9 of the *CPR* which make it mandatory that for any change of Advocates after judgment has been entered to be effected, then the must be an order of the Court upon application with notice to all the parties or upon a consent filed between the outgoing Advocate and the incoming Advocate has been contravened.

    b. The issues raised in the application dated the 13/5/24 are resjudicata with the same having been dealt with by the Court vide the ruling delivered in Court on 19/12/22.

    c. That the application is an abuse of the Court process fatally defective misconceived bad in law premature and should be dismissed with costs.

7. Vide a Replying Affidavit sworn on 22/5/24, the Respondent while opposing the application deponed that the matter has been in Court for two decades, since 2005 and all this while the Applicant is in trespass of her suit land. That the application is another scheme by the Applicant to keep this matter in Court and delay its determination thus deny her the fruits of her judgement. She termed the action of the Applicant as gambling with the Court as despite lodging an appeal on 23/4/24, he has come back to this Court for orders of review of judgment. That this is tantamount to an abuse of the Court process and urged the Court not to condone the acts of the Applicant.

8. Further she added that her title has not been cancelled and challenged to the Applicant to table any evidence to the contrary.

9. On adduction of new evidence the Respondent pointed out to the Court that though the Applicant had obtained orders to adduce new evidence, they failed to do so and the Court struck out the supplementary record filed out time. That no appeal has been proffered against the decision of the Court which stands. The Court was urged to hold that litigation must come to an end.

10. In a rejoinder vide a Further Affidavit sworn on 28/5/24, the Applicant refuted that the application is a delaying tactic but an attempt to enable the Court reach a just determination of the dispute before it. He conceded that his Advocate failed to file the supplementary record of appeal on time despite having been granted leave to do so and urged the Court to review its judgment to meet the ends of justice.

11. Both parties filed written submissions which I have read and considered.

12. The issues for determination are as follows;

    a. Whether the application is fatal for non-compliance with the provisions of Order 9 rule 9?

    b. Whether the application is *resjudicata* in view of the orders of the Court vide the ruling dated the 19/12/2022

c. Whether the Court should grant stay of execution pending the hearing and determination of the application

d. Whether the Court should review its judgment delivered on the 12/4/2024

13. With respect with the 1st issue, it is borne by the record that the Applicant was represented by the firm of J K Ngaruiya throughout the appeal and following the conclusion of the hearing of appeal, it would appear that the Applicant brought on board the current firm of Advocates – Waweru Nyambura & Co Advocates who filed a notice of appeal as well as the current application. It is the Respondents objection that the Applicant has failed to comply with the provisions of Order 9 rule 9 of the *Civil Procedure Rule*s which state as follows;

> " 9. Change to be effected by order of court or consent of parties [Order 9, rule 9.]
>
> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> a. upon an application with notice to all the parties; or
>
> b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

14. In the case of *Kazungu Ngari Yaa v Mistry v Naran Mulji & Co* [2014] eKLR, the Court in considering the provisions of Order 9 rule 9 stated as follows;

> " My understanding of the provision is that the requirements under (a) and (b) are disjunctive. The requirements envisage two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously.
>
> In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave.
>
> In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court."

15. The Applicant offered no rebuttal on this issue and the same is deemed uncontroverted. I am persuaded by the decision of the Court in Kazungu Ngari above and hold that the objection has merit. This would have been sufficient to determine the application. However, the Court will proceed to determine each of the issues set out above.

16. On the second issue, the record is clear that vide an application dated the 14/4/22 the Applicant moved the Court seeking orders to adduce new evidence on appeal in form of maps and correspondences from the Ministry of Lands which made findings that the ground situation and the titles of Block 6 were inconsistent and recommended among other things the resurvey and reissuance of new titles. The

Court vide its ruling on the 19/12/2022 allowed the application and issued timelines within which the Applicant was to file and serve the supplementary record of appeal in default the orders shall lapse.

17. It is also borne of the record that the Applicant failed to comply with the orders of the Court. The self-executing orders of the Court took effect with the consequence that the supplementary record of appeal filed out of time was struck out – see para 5 of the judgment of the Court rendered on the 12/4/24.

18. The plea of res judicata is anchored under Section 7 of the *Civil Procedure Act* 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."

19. 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..."

20. The essence of this doctrine is that judicial determinations must be final, binding and conclusive. There must be finality to litigation. This position was affirmed by the Supreme Court decision in *John Florence Maritime Services Limited & Another v Cabinet Secretary, Transport and Infrastructure &*

3 Others [2021] eKLR and for the plea of res judicata to succeed, the following ingredients must be satisfied;

> " a. There was 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 had to be between the first and the second action identical parties, subject matter and cause of action."

21. The above position is reflected in South Africa as well. In the case of *FirstRand Bank Limited v Badenhorst No& Others* [2023] ZAGPJHC 779 it was observed that the doctrine of res judicata is an element of justice that seeks to protect litigants, and the Courts, from repetitive litigation. To determine whether a suit is res judicata Q Leech JA held as follows; -

> " In my view, the cause of action must be determined from an assessment of the whole of the case in which the final judgment was delivered. The basic ingredients or the factual basis – the necessary, material, central basic facts - that emerge from such an assessment must be compared against the facts distilled from the subsequent case in which the defence of res judicata is raised. The defence will find application if those facts are the same, and the other requirements are satisfied."

22. The Court finds that the issues and determined by the Court in its ruling are not dissimilar and therefore the application with respect to the adduction of new evidence is got up with the doctrine of resjudicata. The complaint by the Applicant that his counsel failed to comply with Court orders is one that finds remedy in another cause of action not before this Court. I say no more. Even if the Court was to be wrong on this finding, I have reflected on the nature of the correspondences annexed to the application and would like to agree with the Respondent that there is no single evidence that shows; firstly that the title of the Respondent has been cancelled; the Respondent has been issued with a new title; the position of the new title on the new RIM has been disclosed. My reading of the correspondences are recommendation of resurvey and readjustments of the titles on the ground. I refer to the letter dated the 7/7/2020 authored by Paul Ndungu on behalf of the Director of Surveys when he stated as follows;

> " Ref: AC/62/C/VOL. XXXIII/8 Date: 7th July 2020
>
> Chairman
>
> Kiu Block 6 Welfare Association
>
> Box 61401-00100
>
> Nairobi
>
> Inconsistencies Between Ground andRegistry Index Maps ofRuiru/KiuBlock6
>
> Your letter dated 13th May 2020 and earlier correspondences on inconsistencies between ground and Registry Index Maps (RIM) for Ruiru/Kiu Block 6 refers.
>
> This office investigated the allegation of the inconsistencies and established that the map for Ruiru/Kiu Block 6 does not fully reflect the ground situation. There are some land parcels whose position on the map is not as on the ground.

In view of the above findings, a meeting held a the offices f the Director of Surveys with leaders and representatives of area residents resolved that a resurvey be carried out with a view to make the necessary rectification.

You are therefore requested to inform the members of the Association of the plan and ask them to cooperate during the exercise.

Paul Ndungu

For: Director of Surveys."

23. It would appear that the Applicant has not explained the outcome of the above recommendations and whether indeed the resurvey and or reissuance of new titles was undertaken.

24. The Court finds that that the application is res judicata.

25. With respect to issue number 3, the Applicant framed the prayer as follows;

> "That the Court to order stay of execution of the judgement pending the hearing and determination of the application."

26. With the determination of the application, the prayer is spent and I find no necessity of discussing it. In any event the orders issued in the judgement were negative orders and absent any positive orders I find that there is nothing for the Court to stay.

27. Issue no 4 is on review of the judgment, having held that the orders sought by the Applicant are res judicata, the Court finds that review is untenable. More so when the Applicant has admitted having submitted himself to the jurisdiction of the Court of Appeal on appeal of the decision of the Court which he seeks to impugn on appeal.

28. In the end I find the application is unmerited.

29. It is dismissed with costs to the Respondent.

30. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 17TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Mumo HB Mr. Waweru for Appellant/Applicant

Mwangi HB Ms. Njoroge for Respondent

Court Assistants – Phyllis