Yuya Farmers Cooperative Society v Muliro & 19 others (Environment & Land Case E006 of 2024) [2024] KEELC 6760 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6760 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE E006 OF 2024

FO NYAGAKA, J

OCTOBER 3, 2024

BETWEEN

YUYA FARMERS COOPERATIVE SOCIETY ..... PLAINTIFF

AND

MUKASA MWAMBU MULIRO ..... 1ST DEFENDANT

EMMANUEL SICHANGI MALEMO & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS ..... 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 18/03/2024 the Defendants moved this Court under Sections 3, 3A and 7 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*. They sought the following orders:

    1. That the instant suit be struck out.

    2. That the plaintiff/applicant (*sic*) be condemned to pay costs.

2. The Application was based on two grounds. The first was that the instant suit was *res judicata* as it offended the provisions of Section 7 of the *Civil Procedure Act*. The second was that the issues raised by the Plaintiff were already determined in SPM Court at Kitale in in Land Case No 12 of 2000; also in Kitale High Court Misc. Civil Application No 30 of 2000; and Kitale ELC No 19 of 2013 Joseph Michael Muchoe Wanyama suing on behalf of members of Yuya Farmers Cooperative Society Limited v Mercia Moliro sued as the personal representative of Masinde Muliro (deceased) and in the Court of Appeal at Eldoret Civil Appeal No 17 of 2015, Joseph Muchoe Wanyama appealing on behalf of Yuya Farmers Cooperative Society Limited v Mercia Muliro sued as the personal representative of Masinde Muliro (deceased).

3. The application was supported by the affidavit sworn by Mukasa Mwambu Muliro on 18/03/2024. He deposed that he was competent to swear the affidavit on his own behalf and that of all the other Defendants; he was the son of the late Henry Masinde Muliro; the suit property was the property of his late father Honorable Henry Masinde Muliro and the Plaintiff had no *locus standi* to institute the instant application.

4. Further, the instant suit was *res judicata* in view of the fact that the Plaintiff had instituted a similar case against the late Henry Masinde Muliro which suit was dismissed and the Plaintiff preferred and Appeal which abated. He deposed further that the suit was *res judicata* by annexing copies of the previous determinations over the suit land. These were:

    a) Kitale SPM Land Case No 12 of 2000 which he marked as MM-1 (a)-(i) being copies of correspondences, Tribunal proceedings, court proceedings dated 23/02/2000, decree and ruling.

    b) Kitale HC Misc. Civil Application No 30 of 2000 which he annexed as MM2 being a copy of a Ruling.

    c) Kitale ELC No 19 of 2013 between Joseph Muchoe Wanyama suing on behalf of members of Yuya Farmers Cooperative Society Ltd v Mercia Muliro sued as the personal representative of Masinde Muliro (deceased) which he annexed as MMM3 (a) and (b) being copies of ruling and decree.

    d) Court of Appeal at Eldoret, Civil Appeal No 17 of 2015 between the same parties as in paragraph (c) above, which he annexed as MMM-4 being copies of the Memorandum of Appeal and Court order issued on 10/04/2017.

5. He deponed further that, he was now the legal representative of the estate of Henry Masinde Muliro for purposes of being able to sue on behalf of the Estate. He annexed as MMM-5 a copy of the Limited Grant for the estate of the late father and MMM-6 a copy of the Limited Grant in respect of the estate of the late Mercia Nomalungelo Muliro.

6. The deponent stated further that the Plaintiff's members were evicted from the suit land way back in the year 2000 as acknowledged in the letter dated 30/05/2019 written by the law firm of Kimugung and Company Advocates which he marked as MMM-7. Further, that one Joseph Muchoe for the Applicant had previously purported to be holding a title to the suit land yet he did not have any. The Applicant had all along been claiming the suit land based on the decree of the Chief Magistrates Court at Kitale Land Case No 12 of 2000, which was quashed and has now developed propaganda that it holds a decree in Kitale High Court Land Case No 12 of 2000 which did not exist.

7. Further, the said Joseph Muchoe had persistently been mobilizing members of the public to innovate assets of the late Masinde Muliro and as a result there existed Land Case No 9 of 2023, in which he had been sued among other persons. The instant suit was sub-judice but upon being sued, he desisted and had now emerged with the instant suit. He annexed as MMM-8 a copy of the Plaint in respect of Land Case No 9 of 2023. He deposed that the instant suit was an abuse of the entire process of the court and should be dismissed with costs.

8. The Respondent purported to have opposed the Application through a document it termed a Replying Affidavit sworn on 20/04/2024. But this Court carefully scrutinized its record, including the Case Tracking System (CTS) to confirm whether indeed the document served on the Applicants' office was filed. It found no record whatsoever. The Court went further to call for a copy of a receipt

evidencing payment for the said document. As at the time of preparing this Ruling there was none provided, despite several calls for the receipt.

9. It is therefore clear that the Respondent did not file a Response to the instant Application.

10. Upon receipt of the document purporting to be a Replying Affidavit by virtue of the fact that it was presented to the Applicant's offices on 15/05/2024, the Applicant filed, with leave of Court, a Supplementary Affidavit sworn on 25/05/2024. He deposed that the Respondent did not in paragraph 1 of the replaying Affidavit attach evidence of authority to swear the Affidavit in the suit and therefore had no locus standi to purport to act on behalf of the Plaintiff. Further, the Plaintiff had attempted severally to give the subject matter a new look but the annextures in the Supporting Affidavit showed that the suit had been dealt with previously.

11. He swore that the Plaintiff and its purported members were not resident on the suit land. The plaintiff had not demonstrated any documents of ownership of the suit land and as such could not be said to own the same. Further, the deponent was the administrator of the estates of the late Masinde Muliro and Mercia Muliro who had litigated over the suit land, and the mere fact that the suit had now been instituted against him and others did not exonerate it from being *res judicata*.

12. Again, that all the annextures to the Application dated 18/03/2024 refer to the same parcel number LR .11209 with the same claim for 201.7 acres. The litigation over the suit land previously involved the deponent as the representative of the estate of the late Masinde Muliro, and the deponents now late mother, Mercia Muliro in her capacity as the representative of the Estate of Masinde Muliro and the Plaintiff on the other side. The act of the Plaintiff suing the deponent in his own capacity and adding more Defendants did not make it a new suit with a different cause of action hence it was in the interest of justice that the suit be struck out.

Submissions

13. The Defendants filed their written submissions dated 23/03/2024. They argued that the suit was *res judicata* as provided under Section 7 of the *Civil Procedure Act*, which they quoted verbatim. They submitted further that the issues in this suit had been already determined in Kitale SPM Court Land Case No 12 of 2000, Kitale High Court, Miscellaneous Civil Application No 30 of 2000, Kitale, ELC No 9 of 2013 and Court of Appeal in Eldoret in Civil Appeal No 17 of 2015. They submitted that this suit was a waste of time and an abuse of the court process. They relied on the case of *Kenya Commercial Bank Limited v Muiri Coffee Estates Limited and another* (2016) eKLR where the Supreme Court of Kenya explained the nature and purpose of the doctrine of *res judicata*. Further, they relied on the case of *Omondi v National Bank of Kenya Limited and another* [2001] KLR.

14. They concluded their submissions by arguing that the subject being parcel of land LR No 11209 measuring approximately 201.7 acres was the same parcel of land being litigated over as was previously in the other matters where the 1st defendant had been involved in his capacity as the administrator of the estate of the late Masinde Muliro and with the late Marcia Muliro who was the personal legal representative of the Estate of Masinde Muliro both on one side and the Plaintiff on the other side and therefore the fact that the Plaintiff sued the Defendant and only added modified more Defendants did not make this cause of action a new one hence the suit should be struck out for being *res judicata*.

Issue, Analysis and Determination

15. I have considered the Application, the law and the submissions by the Defendants. The issue that commends to me for determination is whether the application is merited. The other one who to bear

costs is basically a matter of course because under Section 27 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, costs follow the event.

16. This Court begins the analysis of the first issue by comparing the facts on the process the Plaintiffs/ Respondents undertook upon service of the Application with the law. As stated above the Plaintiffs did not file any response to the Application. The law regarding the procedure of filing, service and response(s) to applications is explained under Order 51 of the *Civil Procedure Rules*. Rule 14 of the Order provides that;

> " (1) Any respondent who wishes to oppose any application may file t any one or a combination of the following documents -
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> (a) a notice preliminary objection: and/or; Court.
>
> (b) replying affidavit; and/or
>
> (c) a statement of grounds of opposition;
>
> (2) the said documents in sub-rule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing."

17. The law gives the effect of failure by a Respondent to file one or any of the documents listed above. Order 51 Rule 14(4) provides that:

> " If a respondent fails to file to comply with subrule (1) and (2), the application may be heard *ex parte*."

18. The meaning of the provision is that the consequence of failure to file a response is that the application may proceed *ex parte*. That means that the Court may exercise its discretion to permit the Respondent, by leave extending the time, to file any such document out time and the application proceeds inter partes or proceed *ex parte*.

19. The implication of the court proceedings *ex parte* is straightforward: The Application shall proceed unopposed. By the application proceeding is such a manner, the legal implication is that matters which are deposed to by way of affidavit, in support of the application are uncontroverted. Thus, the Court is entitled to take all of them as unchallenged or true of the facts they state. This was the holing in *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR where Odero J, while addressing a claim the Respondent failed to Reply to held as follows:

> " As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition, which were filed, are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates v Unesco Co. Ltd* 2015 eKLR, *Prof Olaka Onyango & 10 others v Hon. Attorney General* Constitution Petition No 8 of 2014 And *Eliud Nyauma Omwoyo & 2 others v Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the

absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence."

20. Similarly, in *Phillip Tirop Kitur v Attorney General* [2018] eKLR, the learned judge, Mativo J (as he then was) held as follows:

> " 12. It is common ground that the only evidence on record is the evidence tendered by the petitioner. Failure to file a Replying Affidavit or adduce evidence on the part of the Respondent means that the evidence adduced by the Petitioner is uncontroverted and therefore unchallenged.[2] In *Interchemie EA Limited v Nakuru Veterinary Centre Limited* [3] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.
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> 13. A similar position was held in the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* [4] that it "is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

21. This Court wishes to emphasize one point: except in an application in brought under Order 2 Rule 15(1) (a) of the *Civil Procedure Rules*, 2010 where a party seeks to strike out a pleading for reason that it does not disclose a reasonable cause of action hence not needing to be supported by depositions through an Affidavit, an Application of any other nature is supported by depositions to facts. Such applications proceed by way of evidence in affidavit form. Therefore, in applications where a party moves the court by an application supported by an affidavit, he in essence presents evidence which, unless, controverted remains standing. And the consequences of failure to reply to an Affidavit are clear.

22. This Court borrows from the reasoning of the learned judge, Odunga J (as he then was) in *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* (2012) eKLR, where, in rendering a decision on the consequences of failure by a party to call evidence, he stated as follows:

> "What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another v Raju Govindji, HCCC No 548 of 1998 stated: -"Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

23. This leads me to the determination on whether the fact that an application is unopposed the court should grant it as a matter of course. This Court has often held that even where an application is not opposed, the court has the duty to examine the same and make a finding whether the uncontroverted facts merit the grant of the orders sought. So, applications may be frivolous, vexatious, absolute abuses of the process of the court or just mere non-starters. The duty of the court to sit and the interests of justice always require that the courts analyze every material placed before them and make findings

which are backed by both the law and the facts presented. Courts are neither robots nor mere conveyor belts which neither reason nor have minds. Court must be judicious in all cases and situations.

24. Given the above sound reasoning, this Court now proceeds to examine the uncontroverted facts given by the Applicants herein. The Applicants urge that the suit is *res judicata*. The law on *res judicata* is settled. It stems from the provisions of Section 7 of the *Civil Procedure Act* stipulates 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."

25. The concept of *res judicata*, as provided for in the legal rule cited above, simply means that a court of competent jurisdiction has made findings on merit on issues between same parties litigating under same title. The fact that a party excludes or includes one or more parties in a subsequent suit does not change the character and application of the doctrine. It means also that the courts have to be vigilant to find whether a party is being disingenuous by trying to clothe the same parties or subject differently so as to portray a picture that the parties or issues are not the same when they are.

26. 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."

27. In *Mwangi v Mokaya* (Environment and Land Appeal No 13 of 2023 [2023] KEELC 18642(KLR) (6th July, 2023) (Ruling) this Court held:

> " The elements of *res judicata* are therefore that the:
>
> a. issue being tried the second time was previously tried and determined
>
> b. 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."

28. Thus, irrespective of whether there are facts that controvert the Applicant's contention, the Applicant ought to show that the above elements are present in the instant suit. I have carefully examined the annextures to the Supporting Affidavit. In annextures MMM-1 which is the Ruling in Kitale CM Civil Suit No 12 of 2000, the Applicant was Joseph Muchuoe Wanyama (suing on behalf of members of Yuya Farmers Cooperative Society Limited), the Defendant was Mukasa Mwambu Muliro. Also, in Annexture MMM-3(a) and (b) the copy of the ruling in Kitale High Court Land Case No 19 of 2013, the parties were Joseph Muchoe Wanyama (Suing on behalf of members of Yuya Farmers Cooperative Society Limited as the Plaintiff v Mercia Muliro (suing as the personal representative of Masinde Muliro (deceased). In Annexture MMM-4(a) which is a copy of a Ruling in the Eldoret Court

of Appeal No 17 of 2015, which was an appeal from the Ruling annexed as MMM-4(a) the parties were the same as the ones in the Ruling. Also, Annexture MMM-4(b) which is a copy of the order of the Court of Appeal in relation to the same appeal, shows that the Registrar of the Court of Appeal marked the appeal as having abated in terms of Rule 99(2) of the Court of Appeal Rules. Annextures MMM-5(a) and 5(b) show that Mukasa Mwambu Muliro was granted letters Ad Litem to the estates of the late Henry Masinde Muliro and Mercia Numalungelo Muliro respectively on 10/02/2023.

29. That which is not in dispute is that the parcel of land in respect of all the matters evidenced by the annextures above is LR No 11209. This is borne out by paragraphs 3 and 8 of the Plaint and the reliefs sought at the tail as compared with the subject matter in the annextures referred to above. Among the Plaintiff's witnesses in the instant suit is Joseph Muchoe who happens to have been the party in the previous matters referred to in the annextures above. He has now folded his 'wings' and come out as just Yuya Farmers Cooperative Society. Further, he has sued the other Defendants besides the first one, but not shown their relationship with the suit land or even the first defendant.

30. Further, it is not deniable that Kitale ELC No 19 of 2013 was dismissed on 20/02/2014 after which the Plaintiff in that suit appealed to the Eldoret Court of Appeal as shown above. Thus, it is not in dispute that the issues between the parties were determined by the Kitale ELC in 19 of 2013 given that in that suit the deceased Mercia Numalungelo Muliro was sued as the Representative of the Estate of the late Masinde Muliro and when she died the appeal in Eldoret Court of Appeal No 17 of 2015 abated, and now Mukasa Mwambu Muliro who is the 1st Defendant herein has Letters of Administrative to the estates of the two deceased parents.

31. The effect of abatement of suits or even appeals is clear. This Court needs not repeat the same here. Suffice it to say that there being no appeal from the judgment of the Court delivered on 20/02/2014, by virtue of the abatement, the judgment stands and binds the parties thereto. The parties having been the late Henry Masinde Muliro and his now deceased wife, Mercia Numalungelo Muliro, and the 1st Defendant having taken out Letters of Administration of the Estate in issue, and the Estate being in the names of the deceased, it is clear to me that all the elements of *res judicata* are in this suit in relation to the Plaintiff and the 1st Defendant. Regarding the fact that Joseph Muchoe now did not list himself as the Plaintiff while he verified the contents of the Plaint by stating that he is the Chairman of the Plaintiff while he has been suing in on behalf of the Plaintiff previously does not change the Plaintiff. This is a classis case of parties trying to brand themselves with different names as chameleons so that they can keep knocking at the doors of courts over the same issues. It does not even make sense how the Yuya Farmers Cooperative Society Limited on whose behalf Joseph Muchoe has been suing over the same parcel of land now can purport to change to Yuya Farmers Cooperative Society. This is a wolf clothed in a sheep's skin and it must be and is hereby unmasked. It is none other than Joseph Muchuoe sneaking to Court having now known that the appeal he purported to file was lost. In any event adding the many other Defendants herein to the 1st defendant does not change the parties as to make the cause of action a new one. In any event, if the Plaintiff knew all along that the other Defendants had invaded the suit land it claims to be his, why did it not add them to the previous suit, namely, Kitale ELC No 19 of 2013? Matters are not tried by instalments. All parties to matters in controversy ought to be enjoined to suits, to avoid a multiplicity thereof. The Plaintiff did not do so. He cannot now claim that the defendants are new. In any event the Court already adjudged that it (Plaintiff) is not the owner of the suit land.

32. One important legal issue which the said Mr. Joseph Muchoe did not go around is the disclosure in writing of the authority by which he brought the instant suit on behalf of the Plaintiff, whether as a limited liability company as previously described in the suits he brought earlier (as shown above) or

as registered under the *Societies Act*. The said Joseph Muchoe is either out to conceal his identity and relationship with the parties he sued for and as in the previous matters or is groping in darkness.

33. The upshot is that the Application dated 18/03/2024 succeeds. This court finds that the instant suit is *res judicata*. It is hereby struck out with costs to the Defendants. The Defendants shall also have the costs of the application.

34. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY VIA TEAMS PLATFORM THIS 03RD DAY OF OCTOBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Nyamu Advocate-----for the Defendants/Applicants

Pukah Advocate------absent (served) for the Plaintiffs/Respondents