Kianjoya Enterprises Limited & another v Kimani & 2 others (Environment & Land Case 25 of 2023) [2023] KEELC 21293 (KLR) (3 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21293 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 25 OF 2023

A OMBWAYO, J

NOVEMBER 3, 2023

BETWEEN

KIANJOYA ENTERPRISES LIMITED ..... 1ST PLAINTIFF

NINE SISTERS LIMITED ..... 2ND PLAINTIFF

AND

SAMUEL MACHARIA KIMANI ..... 1ST DEFENDANT

JUDY NJERI THUO ..... 2ND DEFENDANT

JOHN NGANGA GITHII ..... 3RD DEFENDANT

RULING

1. In the current suit, Kianjoya Enterprises Ltd and nine sisters Ltd have come to this court against Samuel Macharia Kimani, Judy Njeri Thuo, John Ngare Githii and Joseph Mwangi Wathika and the Chief Land Registrar praying for judgment for a declaration that the plaintiff is the legitimate and lawful owner of the suit premises known as Miti Mingi/ Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412 and 1413 (Kianjoya "D")

2. Moreover, they pray for the cancellation of the illegal Titles registered as Miti Mingi/ Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412 and 1413 (Kianjoya "D") held by the defendants and a consequent order directing the 5th defendant to rectify the register in respect of the suit premises by restoring the plaintiff as the registered proprietor of the suit premises.

3. They further pray for a permanent injunction restraining the defendants by themselves, their agents, employees from trespassing into, encroaching onto or interfering with the plaintiff's quiet possession of the suit premises any way dealing with the suit preemies or the title thereto. They pray for General damages for trespass and Costs of this suit.

4. Previously in the year 2019, 1st plaintiff instituted another of suit in Nakuru No. 59 of 2019 seeking a declaration that the plaintiff is the legitimate and lawful owner of the suit premises known as Miti Mingi/ Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412 and 1413 (Kianjoya "D") and Cancellation of the illegal Titles registered as Miti Mingi/ Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412 and 1413 (Kianjoya "D") held by the defendants and a consequent order directing the 5th defendant to rectify the register in respect of the suit premises by restoring the plaintiff as the registered proprietor of the suit premises.

5. He further prayed for permanent injunction restrain the defendants by themselves, their agents, employees from trespassing into, encroaching onto or interfering with the plaintiff's quiet possession of the suit premises any way dealing with the suit preemies or the title thereto. General damages for trespass Cost of this suit.

6. In the current suit, the 1st and 2nd defendants have filed an application dated 21st August 2023 praying for orders that this Honorable Court be pleased to order that the current suit being Nakuru ELC ND. 025 of 202.3 *Kianjoya Enterprises Ltd another v Samuel Macharia Kimani 4 others* is *res judicata* with ELC No, 59 of 2019 *Kianjoya Enterprises Limited v Samuel Macharia Kimani 4 others* and therefore the current be struck out.

7. The application is based on grounds that the respondent filed suit ELC No 025 of 2023 *Kianjoya Enterprises Ltd another v Samuel Macharia Kimani 4 others* on the April 6, 2023 with suit in ELC No. 59 of 2019 *Kianjoya Enterprises Limited v Samuel Macharia Kimani 4 Others* suit equally filed on the 19th June 2019 by the Respondent.

8. The two suits are between the same parties, same cause of action and over the same subject matter i.e Kainjoya Enterprises Ltd as Plaintiff and Samuel Macharia Kimani, Judy Njeri,John Nganga, Joseph Mwangi, Chief Land Registrar in chronological order with the parcels of land in issue a complete mirror in both suits Miti Mingi/Mbaruk Block 8/1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412 1413 Kainjoya

9. The present suit has merely undergone a cosmetic change to include one more Plaintiff Nine Sisters Ltd which party was always mentioned in the Plaintiff/Respondent list bundle of documents in ELC No, 59 of 2019 *Kianjoya Enterprises Limited v Samuel Macharia Kimani & 4 others* as owner of land parcel.

10. The previous suit Nakuru ELC No 59 of2019 *Kianjoya Enterprises Limited v Samuel Macharia Kimani others* was dismissed twice by this Honorable Court on the March 15, 2022 and equally on the 24th November 2022.

11. The present suit ELC No. 025 of2023 *Kianjoya Enterprises Ltd & another v Samuel Macharia Kimani & 4 others* is res judicata with the Respondents only available avenue at law being an appeal of the order issued by Hon. Lady Justice Lynette Amollo before the Court of Appeal and not the instant suit as filed. The suit as presently filed is an abuse of court process, waste of precious judicial time which ought to be struck out. It is in the interest of justice, Equity and good conscience that the orders sought be granted any delay to grant them will lead to injustice to the Applicants.

12. The plaintiffs respondents filed a replying affidavit admitting her instituted the suit No. Nakuru ELC No.59 of 2019 against the defendant herein. The suit was dismissed on March 15, 2023 for want of prosecution. The suit was not determined on merit. He states that land is an emotive fact and therefore he intends to seek injunction against the defendant herein. Accordingly, the plaintiff/respondent to

suit raises pertinent issues to be determined on merit. He states that holding the suit res-judicata would be contrary to his right to be heard enshrined in article 50(1) of the *Constitution of Kenya* , 2010

13. The gravamen of the applicant submissions are that the two suits mirror each other and that the court has pronounced itself on the merits of the issues. The applicant submits that the matter directly in dispute in the current suit is directly and substantially in issue in the previous suit. That the parties are the same litigating under the same title and that the court is the same court of competent jurisdiction.

14. The applicant further argues that the current suit is an abuse of court process and therefore should be struck out. The applicant contends the suit was dismissed for want of prosecution and that the application to reinstate the suit was also dismissed with costs and therefore the plaintiff recourse was to appeal and not to file another suit. The applicant relies on the provisions of order 2 rule 15 of the *Civil Procedure Rules 2010*.

15. The gist of the respondents submissions is that the suit is not res-judicata as the previous suit was not heard on merit but was dismissed for want of prosecution and therefore holding that the suit is res-judicata would be contrary to the right to fair hearing by dint of articles 50 (1) and Article 159 (2) of the *Constitution of Kenya*, 2010 and section 19 of the *Environment and Land Court Act* on procedural technicalities.

16. The responds further argue that the 2nd plaintiff was not a party to the previous suit. The plaintiffs contends that section 7 of the *Civil Procedure Act* cap 21 Laws of Kenya envisage the principle of res-judicata to apply where the issues in the previous suit ought to have been heard and finally decided. The respondent contends that the suit is not *res-judicata* and that they ought to be given an opportunity to prosecute this claim on the conclusion on merit.

17. According to the respondent, the previous suit was never determined on merit. That the plaintiff lost the previous suit through mistakes of their advocate which should not be visited upon them. The plaintiff are willing to prosecute the suit if given a chance.

18. I have considered the application and do find the following issues ripe for determination

    1. Whether the suit is res-judicata

    2. Whether the suit is an abuse of the court process

1. Whether the Suit is Res-judicata

19. Section 7 of the *Civil Procedure Act* cap 21 laws of Kenya provides as follows: -

> 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"

20. 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..."

21. In order therefore to decide as to whether a suit is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire former suit and the current suit to ascertain;

    i. What issues were really determined in the previous suit;

    ii. Whether they are the same in the subsequent suit and were covered by the decision.

    iii. Whether the parties are the same or are litigating under the same Title and that the previous suit was determined by a court of competent jurisdiction.

22. Kuloba J., in the case of Njangu v Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

> 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

23. Kuloba J., in the case of *Njangu v Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), held that:

> 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....."

24. In the Court of Appeal case of *Siri Ram Kaura v MJE Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that: -

> The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

25. In the current suit other than the 2nd plaintiff, the parties are the same as the parties in the former suit. The 2nd plaintiff has been described as a limited liability company but the cause action as brought out by the plaintiffs is the same and therefore it can be rightly stated that in the former suit the second plaintiff in the current suit was litigating through the 1st plaintiff.

26. The court is the same court of competent jurisdiction, the Environment and Land Court Nakuru. However this court finds that the former suit was not heard on merit but dismissed for want of prosecution. *Black's Law Dictionary* 10th Edition defines the terms "heard and determined" as follows: -

> of a case, having been presented to a Court that rendered Judgment.".

27. The term "hearing" is defined in the same dictionary as follows: -

> A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."

28. A lot of judicial ink has been spent on the doctrine of res-judicata where the suits were dismissed on technicality such as for want of prosecution but not heard on merit. In the case of *Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited* [2005] KLR 97 the Court stated:

> Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in the *Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits".

29. In Moses Mbatia vJoseph Wamburu Kihara [2021] eKLR, My sister judge Lord J. G Kemei held as follows:-

> A suit that was dismissed or struck out for nonattendance or want of prosecution in my view is not synonymous with a suit that has been heard and determined. In the circumstances of this case I am guided by art 50 (1) of the *Constitution* which provide for fair hearing as well as art 159 (2)(d) of the *Constitution* which direct this Court to tend to the substance of the case and its attendant justice. In the instant suit the previous suit was dismissed for want of prosecution".

30. Ultimately on the issue, I do find that suit is not res-judicata because the previous suit was not heard and determined on merit.

2. Whether the Suit is Abuse of Court Process

31. The term abuse of court process is generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. Abuse of process can also mean abuse of legal procedure or improper use of the legal process.

32. In *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 [2009] KLR 229, the Court of Appeal held that:

> The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -
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> i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
>
> ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
>
> iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.
>
> iv. Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness.

33. In *Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 others* Nairobi (Milimani) HCCC No. 363 of 2009, Kimaru, J stated with respect to the court's power to prevent abuse of its process as follows:

> This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is

the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

34. This court is not persuaded that the plaintiffs are acting in bad faith or that their claim is frivolous or vexatious and therefore the application is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA E MAIL AT NAKURU THIS 3RD DAY OF NOVEMBER 2023.

A.O. OMBWAYO

JUDGE