Telengech v Lonrho Agri Business (E.A LTD) & 5 others (Environment & Land Case 308 of 2017) [2022] KEELC 4 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 4 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 308 OF 2017

SM KIBUNJA, J

MAY 4, 2022

BETWEEN

CRISTOPHER KIPROTICH TELENGECH ..... PLAINTIFF

AND

LONRHO AGRI BUSINESS (E.A LTD) ..... 1ST DEFENDANT

HIGHLANDS SURVEYORS ..... 2ND DEFENDANT

BENJAMIN BETT ..... 3RD DEFENDANT

DAVID TARUS ..... 4TH DEFENDANT

ABRAHAM CHERUIYOT ..... 5TH DEFENDANT

STEPHEN RONO KIPKORIR ..... 6TH DEFENDANT

RULING

[NOTICE OF MOTION DATED 8TH NOVEMBER, 2021]

1. The Plaintiff filed the notice of motion dated the 8th November, 2021 seeking for the following orders inter alia:

    a. Spent.

    b. That leave be granted to the firm of M/S Chebii & Co-advocates to come on record for the Defendant /Applicant(sic).

    c. Spent.

    d. That the Honourable Court be pleased to set aside the order issued on 3rd August 2018 and reinstate this suit

e. That costs of the application be provided for.

The application is based on the seven (7) grounds on its face marked (a) to (g), inter alia that he filed this suit against the defendants claiming interest on Soy/Soy Block 10 (Navillus)/1423; that the suit proceeded in his absence on the 3rd August 2018 and dismissal orders were issued; that he disputes service of the hearing notice; and that there was"gross misapprehension of facts by the honourable court largely due to misguiding evidence by the plaintiff". The application is supported by the affidavit of Christopher Kiprotich Telengech, the Plaintiff, on the 8th November 2021, in which he among others deposed that he is the registered proprietor of Soy/Soy Block 10 (Navillus)/1423, and has been in occupation since he purchased it; that the hearing of the suit proceeded in his absence, and the defendants are using the dismissal order issued by the court to subdivide the said land; and that neither himself nor his advocate then on record had been served with the hearing notice.

2. The application is opposed by the 1st Defendant through the filed replying affidavit sworn by Anne Halwenge Odwa advocate on the 3rd December 2021, wherein she deposed to the following inter alia; that on the 24th May 2018, the counsel for the Plaintiff was in court when by consent of those present, this matter was fixed for hearing on 25th July, 2018; that on the 25th July, 2018, the matter was confirmed for hearing at 10.00 am; that when the matter was called for hearing the counsel for the Plaintiff applied for an adjournment which the defendants opposed; that after considering the submissions, the court declined to grant the adjournment and dismissed the suit for non-attendance by the plaintiff; that subsequently, the Plaintiff filed an application dated the 26th July, 2018 seeking the very orders now being sought in this present application, and vide a ruling issued on 12th April, 2019 the court dismissed that application dated 26th July, 2018; and thus, the instant application is res judicata.

3. That following the directions that the application be canvassed through written submissions, the learned counsel for the plaintiff and 1st defendant filed the submissions dated the 2nd March, 2022 and 17th January, 2022 respectively.

4. The Plaintiff submitted that his claim ought to be reinstated because he was not given a chance to be heard. To support the aforementioned argument, the Plaintiff placed reliance on the provisions of Article 159 (2)(d) of the *Constitution of Kenya* that states that:

> " justice should be administered without undue regard to procedural technicalities."

The Plaintiff further submitted that the court should exercise its discretion to set aside the orders herein to ensure that justice is done. The learned counsel referred to the case of *Pithon Waweru Maina vs Thuka Mugitia* (1983) eKLR where the court held as follows:

> " The discretion of the Court being perfectly free and the words sufficient cause not being comparable or synonymous with 'special grounds' whether the grounds for granting relief will be accepted, depends on the facts of the particular case, it being neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised"

5. The 1st Defendant submitted that the Plaintiff's application ought to be dismissed because it offends the provisions of Section 7 of the *Civil Procedure Act* on res judicata as the plaintiff had vide the application dated 26th July, 2018 sought for similar orders to the ones sought in this instant application. That previous application was dismissed vide a ruling of the court issued on 12th April, 2019. The

learned counsel relied on the decision of the Court of Appeal in *Ngugi v Kinyaniui and 3 others* [1989] eKLR where it was held as follows:

> " Here, with due respect, the Judge erred in not hearing the motion before him because the doctrine of res judicata had been raised in the affidavit. This is a point of law as enacted in section 7 of the Civil Procedure Act (Cap 21). There is no way of going round what the Legislature has forbidden. The arbitration award recommended sub-division. This recommendation was to nullify the judgment of the High Court as pronounced by Kneller J to which there was no appeal. Parties cannot confer jurisdiction unto themselves to refer the matter to arbitration in the light of the matter which has already been adjudicated. There was an application to set aside the award, but the Judge entered judgment in terms of the award."

6. The following are the issues for the court's determinations;

   a. Whether the application dated the 8th November 2021 is res judicata.

   b. Whether the plaintiff has made a reasonable case for the dismissal of the suit order to be set aside and suit reinstated.

   c. Who pays the costs of the application.

7. I have considered the grounds on the notice of motion, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, the record, and come to the following conclusions;

   a. That from the court proceedings, I note that the plaintiff's counsel was among those in court on the 7th March 2018 when the suit was fixed for hearing for two days on the 25th and 26th July 2018, with a rider that there would be "no further adjournments". The court also directed that the matter be mentioned on the 24th May 2018. The record further shows that during the mention of the 24th May, 2018, the counsel for the Plaintiff, was among those present in court and the two dates fixed earlier for hearing were confirmed. The Plaintiff's claim that his the counsel and himself had not been served with the hearing notice has no merit as his counsel was present all through.

   b. That the record further confirms that on the 25th July, 2018 counsel for the Plaintiff, 1st, 5th and 6th Defendants were present in court when it was directed that the hearing "proceed at 10.00am." That when the matter was called at 10.00am, the counsel for the plaintiff is indicated to have walked in late after the counsel for the Defendants present had made their submissions inter alia pointing out that the suit was over eighteen years old, and had not commenced and should therefore be dismissed. The counsel for the plaintiff informed the Court that the matter had two hearing dates and that the Court should not to dismiss the claim as the Plaintiff was a serious litigant. The court considered the submissions by the counsel present for both sides and rendered itself as follows;

      > " The defendants counsel are in court with their witnesses. The plaintiff's counsel is in court without the plaintiff. No reason for absence has been given at all for the absence. The court has no option but to dismiss the suit for non-attendance, the suit is hereby dismissed for non-attendance. Costs to the defendants."

   c. The record also shows that the Plaintiff filed the notice of motion dated the 26th July, 2018 wherein he sought to set aside the order made on 25th July, 2018 with a view to reinstate the Plaintiff's claim. The application was heard on merit and dismissed vide the ruling of the Court

issued on 12th April, 2019. The instant application dated the 8th November, 2021 that seeks for leave of the Court to allow the firm of M/S Chebii and Company Advocates to come on record for the Plaintiff, and setting aside of the court order issued on 3rd August, 2018 was then filed. That for the avoidance of doubt, the order made on 25th July, 2018 is the same order that was issued on 3rd August, 2018.

d. It is trite that the doctrine of res judicata has jurisdictional implications, thus it must be addressed first whenever it is raised. The doctrine of res judicata is outlined in Section 7 of the Civil Procedure Act, chapter 21 of Laws of Kenya, which 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."

That in the case of *Nathan Mutua Kolile v Equity Bank (K) Limited & another* [2021] eKLR the Court cited the decision of the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR where it was held as follows:

> " ... for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> (a) The suit or issue was directly and substantially in issue in the former suit.
>
> (b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> (c) Those parties were litigating under the same title.
>
> (d) The issue was heard and finally determined in the former suit.
>
> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised...
>
> .... When considering whether an issue raised in an application is res judicata, it is crucial to restate that pursuant to Section 2 of the Civil Procedure Act, "suit" is defined to mean all civil proceedings commenced in any manner prescribed, thereby including applications."

The court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR made the following observation as relates to the doctrine of res judicata:

> " The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from

occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

And in *John Florence Maritime Services Limited & Another v Cabinet Secretary for transport and infrastructure & 3 others* [2015] eKLR the court made the following observation as relates to the doctrine of res judicata:

> " The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature."

e. That in the application dated the 26th July, 2018 the Plaintiff sought to set aside the order given on 25th July, 2018 dismissing his suit for non-attendance, together with an order reinstating the Plaintiff's claim. The Court delivered a ruling on 12th April, 2019 dismissing the aforementioned application. In the application dated the 8th November, 2021 the plaintiff seeks for among others stay of execution of the order issued on 3rd August, 2018 together with an order setting aside the order issued on 3rd August, 2018 and reinstating the Plaintiff's suit. That there is no doubt that both the aforementioned applications have the effect of reinstating the Plaintiff's claim, that had been dismissed for non-attendance. That having come to the finding that the dismissal order of the 25th July 2018 is the one that was extracted and issued on the 3rd August 2018, then the court has no difficulty in coming to the obvious conclusion that other than for the prayer for the new counsel to come on record for the plaintiff, the other prayers are effectively the same. That accordingly I find that the issue of setting aside the order given on the 25th July, 2018 and issued on the 3rd August 2018, in the instant application was heard and finally determined in the previous application dated the 26th July, 2018 that was decided on the 12th April, 2019.

f. That in view of the foregoing, I find that prayer (4) for setting aside the dismissal order and reinstating the plaintiff's suit in the notice of motion dated the 8th November, 2021 is res judicata.

g. That however, as a party has a right to be represented by a counsel of his own choice prayer (2) of the said application is allowed.

h. That as the plaintiff has largely failed in his application safe for the prayer for his new counsel to be allowed to come on record, he will pay the 1st defendant's costs in the application.

8. That flowing from the foregoing the courts find and orders as follows;

a. That prayer (2) of the notice of motion dated the 8th November 2021 is granted allowing M/S Chebii & Company Advocates to come on record for the plaintiff.

b. That the prayer (4) of the said application is *res judicata*, and is therefore struck out in view of similar prayers having been sought through the previous application dated the 26th July, 2018 and dismissed through the ruling dated the 12th April, 2019.

c. That as the 1st defendant has participated in the hearing of the application, the plaintiff will pay its costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 4TH DAY OF MAY, 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: Absent.....

DEFENDANTS:Absent.....

COUNSEL: Dr. Chebii for the Plaintiff

Ms. Odwar for 1st Defendant.....

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET