



Canon Automobile Limited v Kwale International Sugar Company Ltd & another; Attorney General (Plaintiff to the Counterclaim); Canon Automobiles Limited & 5 others (Defendant to the Counterclaim) (Environment & Land Case 126 of 2021) [2022] KEELC 14534 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 126 OF 2021**

AE DENA, J

NOVEMBER 3, 2022

BETWEEN

CANON AUTOMOBILE LIMITED PLAINTIFF

AND

KWALE INTERNATIONAL SUGAR COMPANY LTD 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

AND

ATTORNEY GENERAL PLAINTIFF TO THE COUNTERCLAIM

AND

CANON AUTOMOBILES LIMITED . DEFENDANT TO THE COUNTERCLAIM

SULEIMAN ABDALLA MACHAFU .. DEFENDANT TO THE COUNTERCLAIM

HAMISI OMAR NDAR DEFENDANT TO THE COUNTERCLAIM

ABDALLA MOHAMMED SARAI DEFENDANT TO THE COUNTERCLAIM

HASSAN ALI MKUNGU DEFENDANT TO THE COUNTERCLAIM

HAMISI ALI MKUNGU DEFENDANT TO THE COUNTERCLAIM

RULING

1. The suit property in dispute is Kwale/Shirazi Bodo/754 which the plaintiff claims to be the registered proprietor. It is the plaintiff's case that it purchased the suit property by an agreement dated April 15, 2011 from Suleiman Abdalla Machafu, Hamisi Omar Ndar, Abdalla Mohammed Sarai, Hassan Ali



Mkungu and Hamisi Ali Mkungu. That by virtue of section 27 and 28 of the Registered Land Act (now repealed) the plaintiff claims its title is indefeasible. It is pleaded that the cause of action herein arose on 6/11/2011 when the defendant's employees allegedly visited the suit property demanding that the plaintiffs produce its documents of ownership herein. That on 7/11/2011 they unlawfully entered the suit property and demolished a perimeter fence the plaintiff had put up.

2. The 1st defendant denies the existence of the parcel Kwale/Shirazi Bodo/754 and alleges that it is part of parcel number LR 27742 measuring 6082.6 Ha which the Government of Kenya through the Permanent Secretary to the Treasury is the grantee and proprietor. The 1st defendant states that it is the *bona fide* proprietor after the said government granted it a leasehold interest over the suit property pursuant to a 99-year lease which commenced on 1/06/2007 for which they have been duly paying the annual rent to the Government of Kenya.
3. The Attorney General is sued as the chief legal representative of the Government and sued as a representative of the Ministry of Finance and the Ministry of Lands. It is alleged the Ministry of Finance was never the owner of the parcel number LR 27742 and could not confer that which he never owned (*nemodati*). Alternatively, that the certificate of lease is improper for failing to comply with statutory requirements for issuing such huge piece of land including public participation. The allegations are denied through a defence and counterclaim. It is stated that LR 27742 was initially owned by Associated Sugar Co (Ramisi Sugar) who charged it to Bank of India in 1980, defaulted in its loan obligations whereupon the Ministry of Lands & Agriculture paid the loan in lieu of the exercise of statutory power of sale by the chargor upon which the title for parcel number LR 27742 was made in the name of the permanent secretary to the Treasury of Kenya as CR No 42459 on 22/8/2007 and subleased to Kwale International Sugar Company Ltd at an annual rent of Kshs 3,006,000. It is pleaded that the suit property overlaps and forms part of the leased land. The 2nd defendant prays that the title held by the plaintiff be recalled, revoked, cancelled and nullified for the benefit of the permanent secretary to the Treasury of Kenya for being created illegally, negligently in bad faith. A permanent injunction restraining the defendants and its agents in the counterclaim from *inter alia* trespassing, leasing, charging and taking any action that may prejudice the 1st defendants' rights to parcel number LR 27742. The allegations in the counterclaim are denied by the plaintiff.
4. The plaintiff has since given its evidence in the suit and what is pending is the defence hearing.

The Application

5. The 1st defendant has filed an application dated 3/03/2022 the subject of this ruling. The application seeks the striking out of paragraph 14 and 15 of the plaintiffs amended plaint touching on exact boundaries of LR 27742 as being *res judicata* Constitutional Petition No 8 of 2019 *Said Omar Mwituu & Others Vs Kwale International Sugar Co Ltd & 8 others*. The court is also asked to isolate and disregard all issues determined and settled *vide* the said petition. It is stated that the subject land parcel in the said petition is the same as the LR 27742 herein and the respondents in the petition were the alleged vendors in herein. Further that Justice Sila Munyao's judgement settled key questions raised by the plaintiff herein namely whether the land is trust land, whether the land is ancestral land and whether the land was improperly and illegally acquired and sublet to the 1st respondent therein who is the 1st defendant in the present suit. This court is referred to paragraphs 38-40, 43,48,50 and 51 of the judgement in the petition. It is urged that the said judgement divests this court of the jurisdiction to re-open and determine the issues already settled in the said judgement. The application is supported through the affidavit of David Kulecho the 1st defendants legal officer, filed on 4/3/2022 and which largely expounds the content of the paragraphs of the judgment cited herein.



6. The application is opposed through the replying affidavit of the plaintiffs managing director by Jaweed Mohamed sworn on April 24, 2022. It is stated that the applicant has misapprehended the doctrine of *res judicata*, that the issue in the petition was whether the petitioner's equitable claims would defeat the 1st defendants title while in the present suit two parties are claiming ownership of over the same property thus different issues. That in the judgement the court proceeded on the basis that the title was not being challenged, had no advantage of looking at the evidence now being presented. The decision there right as it may be cannot be import into a case with totally distinct facts. That summary rejection of the plaintiff's case is a root that can only be taken in clearest of cases and where the claim is uncontestably bad. It is deposed that the only way to a fair hearing is for the plaintiff to prosecute its whole case on merit and not portions of it.
7. Ms Waswa state counsel informed this court that the 2nd defendant was not participating in the application. The application was canvassed by way of written submissions which both parties filed and exchanged.

Analysis and Determination

8. I have considered the grounds for the application, its supporting affidavit and the replying affidavit of the plaintiff, the written submissions filed on behalf of the parties and case law cited. The issues for determination is whether the plaintiff is entitled to the orders sought and who should bear the costs of this application.
9. Section 7 of the [Civil Procedure Act](#) chapter 21 of the laws of Kenya underpins the doctrine *res judicata*. The court is barred from trying any suit where the following elements exist
 1. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits.
 2. The former suit must have been between the same parties or parties under whom they claim
 3. The parties must have litigated under the same title
 4. The court which decided the former suit must have been competent
 5. The former suit must have been heard and finally decided by the court in the former suit.

There are numerous cases that touch on the above. See [Uhuru Highway Development Limited –versus Central Bank of Kenya & 2 others](#) [1996] eKLR, [Ngugi Versus Kinyanjui & 3 others](#) 1989 eKLR, [Kenya Commercial Bank Limited Versus Benjob Amalgamated Limited](#) [2017] eKLR.

10. In my consideration of the application I will therefore address the issue whether the application should be allowed based on the criteria given. Upon reading the judgement in Petition No 8 of 2019 [Said Omar Mwitw & others vs Kwale International Sugar Co Ltd & 8 others](#), this court noted that the subject matter of the petition is stated as land parcel LR No 5004/30/R which is also described as LR No 27742. The suit property in the present suit is described as Kwale/Shirazi Bodo/754 but the 1st defendants state at paragraph 13 of their defence that the same is part of LR No 27742. The description of the same in prayer [i] of the amended petition (Ministry of Lands has issued a deed plan as Deed Plan No 277846 Folio No 343/69, Plot Parcel No LR 27742 dated 13/08/07 Computations No 55074 Net area 6082.60 Ha) tallies with the defendants description of the suit property including the size of the suit property and the dates when the register for the suit property was opened (the year 2007).



11. Further in paragraph 21 of the judgement it is stated that,

"LR No 5004/30/R, is stated to have been private land originally allocated to Kenya Sugar Limited by the Government under a leasehold title of 999 years, it is the same land given as security to bank of india, it is the same land that was consolidated together with other parcels of land being LR No 5009, LR No 5048, LR No 5055/R, LR No 5056 to form LR No 27742 measuring 15,000 acres which the Government then leased to the 1st respondent in the year 2007 for a period of 99 years. The lease was executed on 20 August 2007 and a certificate of title issued to the 1st respondent under the Registration of Titles Act, cap 281 (repealed)."

I have noted from the foregoing excerpt, that the 1st respondent therein is the 1st defendant in this matter, that the acreage also translate to the Net area 6082.60 Ha pleaded by the defendants in the present suit to have been leased to the 1st defendant. This same history is reflected in the 1st defendants defence in the present suit in paragraphs 7,8,9 and 10 of the counterclaim. There is no doubt that the suit property which is subject of this present suit is the same suit property that was subject of the petition.

12. At paragraph 4 of the judgement the court summarises the petitioners claims as follows; -

"...the petitioners contend to be the beneficial owners of the suit land which they claim was trust land under the Kwale County Council. They aver that they are the original indigenous residents of the land as members of the Digo tribe and that they have been on the land since time immemorial. They claim that they have been asking to be allocated land but they have never been so allocated. They aver that the 1st respondent (Kwale International Sugar Company Limited, sometimes referred to herein as Kiscol) was granted 15,000 acres which it has used to cultivate sugar. They contend that there is no valid ownership documentation in favour of the 1st respondent and further that the 1st respondent..... They claim that a sublease in favour of the 1st respondent, dated 20 August 2007, was not properly executed and has not been registered, and thus there is no proof of ownership of the land by the 1st respondent. They further plead that it was wrong and illegal for the 3rd respondent (District Land Registrar-Kwale) to lease the land without taking into account the proprietary interests of the community and failing to appreciate that the land was not available for alienation. They contend that even if the land was to be acquired by the Government, they ought to have been involved in its setting apart, and be resettled and compensated, rather than being rendered homeless and destitute....."

In the present suit the 1st defendant at paragraph 13 of the defence and counterclaim reiterates that the suit property is part of LR No 27742 measuring 6082.6ha.... which belonged to the government and was leased to the 1st defendant.

13. Again from the foregoing it is clear that the main issue is the ownership of the same suit property LR No 27742 which is said to have been leased out to Kwale International Sugar Company improperly and which the community want an order compelling the registrar Kwale and the registrar of titles to issue them with a certificate of ownership or title documents and in the alternative an order for cancellation of the sub-lease dated August 20, 2007 issued to the said Kwale International Sugar Company.

14. Having found that the subject matter is the same, then the plaintiffs in the present suit are litigating under the same title and I need not go into whether the parties are the same and especially the vendors named in the counterclaim. In this regard I find guidance in *WZO Konit Tedla & another vs Osborne*



Asbiono Mutumira (2017) eKLR cited by counsel for the 1st defendant herein, where the court of appeal stated that its either the parties be the same or the parties be litigating under the same title.

15. The following excerpts of the judgement demonstrate that all the issues surrounding the ownership of the suit property were finally determined in the petition including the boundary issues, the defects cited by the plaintiff on the legality of the lease including the particulars of illegality pleaded at paragraph 14 (a) – (f) of the amended plaint.
35. I have no reason to doubt that the Government acquired either all or some of the parcels of land of Associated Sugar Company Limited. I have seen a Gazette Notice No 10327 of 15 December 2006 in an affidavit sworn by Zacharia Ndege for the 5th respondent, which publishes an intention by the Government to acquire the land parcels No 5048, 5056, 12335, 5031, 5009, and 12336 (which is same as LR No 5004/30/R). The purpose of acquisition is for the Ramisi Sugar Factory Project. There was an amalgamation of some of the parcels of land which led to the creation of LR No 27742 which was subsequently leased on 20 August 2007 to the 1st respondent for a period of 99 years at the annual rent of Kshs 3,0006,000/= per annum. The petitioners allege that the lease is not properly drawn, but I see no issue. I have seen a copy of the lease and I am unable to decipher what is wrong with it. It is clear to me that the 1st respondent holds a sublease to the land parcel LR No 27742 measuring 6082.6 Ha for a duration of 99 years from 1 June 2007. anybody disputing that has his facts all wrong.
36. The petitioners are certainly completely off the mark in trying to claim that this is land that was trust land and was illegally allocated to the 1st respondent. This was private land that had been handed down to various private companies over the years, resting with the acquisition and subsequent lease by the Government to the 1st respondent.
16. The plaintiffs in their submission have contended that the striking out is not deserved. That it would be a draconian measure to be resorted to in exceptional circumstances where the court has had occasion to hear and interrogate the evidence. That it would impede access to justice. From my analysis herein it appears to me that the suit property is the same property that was litigated upon in the petition as the one in the present suit. That its ownership has already been determined in the judgement pronounced in Petition No 8 of 2019 *Said Omar Mwitw & others vs Kwale International Sugar Co Ltd & 8 others*. If ownership of a suit property has been determined how then will another party who claims ownership of the same file another suit seeking for a determination of the same? Indeed, this would go against the very objectives of the doctrine of resjudicata as to finality of litigation and in addition multiplicity of decisions that could as well embarrass the court and cause confusion in the society. I do not see as a court how I will be able to determine this matter without contradicting the judgement delivered by a competent court of concurrent jurisdiction. I'm convinced beyond reasonable doubt this suit is res-judicata and litigation as to the ownership of the 1st defendants title must come to an end. In this regard I'm further guided by the rationale for *res judicata* as enunciated by the Court of Appeal in *John Florence Maritime Services Limited & Ano vs Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) e KLR and which was stated as follows: -

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court's limited resources and timely termination of cases. 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.”



17. Having made the above findings this court must render itself on the counterclaim which it is trite is deemed to be a suit of its own. I have considered the issues raised in the counterclaim. Having found that the suit property in the Petition No 8 of 2019 *Said Omar Mwitw & Others vs Kwale International Sugar Co Ltd & 8 others* and the present suit property is the same, an order hereby issues recalling the title document for Kwale/Shirazi Bodo/754 for cancellation.
18. The upshot of the foregoing is that the plaintiff's suit is struck out for being resjudicata. The defendants shall have the costs of the suit. I make no orders for costs on the counterclaim.

DELIVERED AND DATED AT KWALE THIS 3RD DAY OF NOVEMBER, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Kongere for the Plaintiff/ Respondent

Mrs Waswa for 2nd Defendant

Ms. Adunga for the 1st Defendant

Mr. Denis Mwakina- Court Assistant.

