



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 132 OF 2020**

**ELIZABETH JOSEPH HAKIMU**

(Suing on behalf of Joseph Hakim Chifu).....**PLAINTIFF**

**VERSUS**

**MOHAMED HAMED ABDALLA.....DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 16<sup>th</sup> October, 2020 by the defendant which seeks to have the plaintiff's suit struck out and/or dismissed with costs on the grounds that the claim is *res judicata*. That the plaintiff and the defendant were embroiled in a similar suit being **HCCC NO.77 of 1993 (OS) Joseph Hakim Chifu –v- Mary Lindsay & 2 Others**. It is the defendant's contention that the matter was conclusively determined in 1998 in a ruling by Hayanga J dated 24<sup>th</sup> November, 1998 and a decree was issued thereof. That there must be an end to litigation. The defendant avers that the plaintiff has misled the court in her pleadings by enclosing an order that was set aside.

2. The application is supported by the affidavit Nassor Mohamed Abdalla sworn on 16<sup>th</sup> October 2020 in which he has annexed copies of pleadings, ruling, order and decree in HCCC No. 77 of 1993 (OS). It is averred that no appeal was raised or other proceedings instituted thereafter, and the plaintiff cannot purport to re-litigate the matter.

3. The defendant submitted that the former suit proceeded before the High Court in Mombasa which was a court of concurrent and competent jurisdiction as this court. That the former suit was determined on 24<sup>th</sup> November, 1998 when the same was struck out with costs and that no appeal or review was preferred. That the issues brought up in the present suit were canvassed in the previous suit which was dismissed. The defendant relied on the case of **Peter Chepkochoi Mitei –v- Esther Jelagat Ng'eny & 3 Others (2014)eKLR** where the suit was struck out by Munyao J for being an abuse of the court process. The defendant also relied on the case of **Karia and Another –v- Attorney General and Others (2005)1 EA 83; Edwin Thuo –v- Attorney General and Another Petition No. 212 of 2012 and Kenya Hotel Properties Limited –v Willisden Investments Limited & 4 Others (2013)eKLR**. It was submitted that because the former suit was determined, this court has no option but to down its tools in the matter by striking out the suit with costs. That the court is powerless to look into the merits and demerits of the decision of the former suit as the same would amount to sitting on appeal over the decision in the former suit.

4. In opposing the application, the plaintiff filed a replying affidavit dated 3<sup>rd</sup> November, 2020 asking the court to call for the file in Mombasa **High Court Misc. Civil Suit No. 77 of 1993**. This is because the defendant allegedly served the plaintiff with two copies of orders given on 24.11.1998 and 26.2.199 which raises eyebrows as to the authenticity of the pleadings in **Misc Civil Suit No 77 of 1993**. The plaintiff submitted that the previous matter was not heard and finally decided on merit. The plaintiff relied on the case of **Kenya Commercial Bank Ltd –v- Benjoh Amalgamated Ltd (2017) eKLR; State of Maharashtra and Another –v- National Construction Company, Bombay, Supreme Court Civil Appeal No.1497 of 1996 (cited in Mombasa HCCC NO.7 of 2018(; Mombasa HCCC No. 7 of 2018 Cosmas Mrombo Moka –v- Co-operative Bank of Kenya Ltd & Anor; Kiambu HCCC No. 5 of 2016 (OS) MWK –v- AMW, and Eldoret C.A. No.53 of 2016 Michael Siror –v- Jackson Koech**. The plaintiff submitted that the principle of *res judicata* does not apply to the matter herein since all the criteria needed for the same have not been met in totality. That it is in the interest of justice that the matter be allowed to proceed so that the court can go through the merits of the case.

5. I have considered the application and the rival submissions. The issue for determination is whether the suit herein is *res judicata*. The doctrine of *res judicata* is provided under Section 7 of the Civil Procedure Act 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.”**

6. Section 28 of the Environment and Land Court Act No. 19 of 2011 also bars further suits and provides as follows:

**“The court shall not adjudicate over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction prior to the commencement of this Act.”**

7. In this case, the plaintiff had brought the suit on behalf of the Estate of Joseph Hakimu Chifu (deceased). It is the plaintiff’s case that the deceased is and was at all material times the registered owner and his heirs are entitled to possession of the property known as **Land Title No.CR.7995 Plot No.313/MN/VI**. The plaintiff has also annexed documents showing that the deceased had filed **Mombasa Misc. Civil Suit No.77 of 1993 (OS)** claiming ownership of the suit land by adverse possession and a decree dated 29<sup>th</sup> March 1994 and issued on 9<sup>th</sup> June 1994 in his favour. The defendant has exhibited an order issued on 6<sup>th</sup> October, 1995 indicating that the order made on 29<sup>th</sup> March, 1994 was set aside and the respondent ordered to file a defence to the originating summons after which the case would be listed for hearing. There is also a decree given on 24<sup>th</sup> November, 1998 indicating that the suit came up for hearing on 24<sup>th</sup> November, 1998 in the absence of the advocate for the deceased, and the deceased having failed to comply with a court order made on 24<sup>th</sup> June 1997, it was ordered that the originating summons dated 12<sup>th</sup> January, 1994 be struck out with costs. While there is no dispute that the previous suit involved the same parties as the plaintiff’s current suit, the issue that arises is whether the previous suit was finally determined. From the documents filed, it is clear that the previous suit was struck out because the deceased allegedly failed to comply with a court order. This means that the previous suit was not fully argued and the issues herein were not finally determined. In my view, whereas the striking out of a suit can amount to a judgment, however, such a judgment in my opinion does not satisfy the requirements of Section 7 of the Civil Procedure Act as the issues raised in the suit were not addressed and finally determined by the court.

8. In the result, I find that the application herein lacks merit and the same is dismissed with costs.

**DATED, SIGNED and DELIVERED AT MOMBASA THIS 19TH DAY OF MAY, 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**