



Onyango v African Banking Corporation & another (Civil Case E015 of 2022) [2024] KEHC 461 (KLR) (12 January 2024) (Ruling)

Neutral citation: [2024] KEHC 461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE E015 OF 2022
SN MUTUKU, J
JANUARY 12, 2024**

BETWEEN

DAVID SILA ONYANGO PLAINTIFF

AND

AFRICAN BANKING CORPORATION 1ST DEFENDANT

METROKAM PROPERTIES LIMITED 2ND DEFENDANT

RULING

Background

1. The Plaintiff herein guaranteed financial facilities granted by the 1st Defendant to one Irene Atieno Ajwang. A charge was executed over the Plaintiff's parcel of land Ngong/Ngong/14875 (the suit premises) to secure the lending. The suit premises was valued by the 1st Defendant at Kshs 65,000,000 and a forced sale value of Kshs 48,750,000.
2. The loan became non-performing leading to the 1st Defendant selling of the suit premises by public auction in February 2022. The 2nd Defendant is the buyer of that property. The property changed ownership from the Plaintiff to the 2nd Defendant after a title deed to the suit premises was issued to the 2nd Defendant. The 2nd Defendant, through its advocates, served a three-months' notice to the Plaintiff to vacate the property. After three months lapsed, the Plaintiff was still in occupation. This necessitated filing of ELC Misc. Application No. E096 of 2022 at Nairobi.
3. The 2nd Defendant secured an eviction order from the ELC and served it on the Plaintiff. The eviction order was executed on September 20, 2022.
4. Before the execution of the eviction order, the Plaintiff filed on 10th August 2022, a notice of motion dated August 8, 2022 under *High Court Vacation Rules* together with a Plaint. The Notice of Motion sought temporary injunction against the Respondents against any dealings with the suit premises



pending the hearing and determination of the Notice of Motion and the main suit. It also seeks compelling orders against the 1st Defendant to issue updated accounts in respect to loan repayments by the Plaintiff and particulars of the alleged public auction of the suit premises. It is that Notice of Motion and the Plaint that has provoked this Preliminary Objection (PO).

The Preliminary Objection

5. The Notice of Preliminary Objection is dated 20th February 2023. It was filed by the 2nd Defendant. It is worded as follows:
 - i. That the Court lacks jurisdiction to hear and determine this suit as the issues raised in the present suit were canvassed and determined in the Environment and Land Court of Kenya at Nairobi Miscellaneous Application No. E096 of 2022 *Metrokam Properties Limited -vs- David Sila Onyango & Irene Atieno Ajwang*, hence the Plaintiff's suit is incompetent as it offends the mandatory provisions of section 7 of the *Civil Procedure Act* Chapter 21(Laws of Kenya).
 - ii. That the application and the suit by the Plaintiff is defective, misconceived, vexatious and an abuse of court process and ought to be struck out.
6. In support of the PO, the 2nd Defendant swore an Affidavit dated 13th January, 2023 deposing that he purchased the suit premises, comprising House No. 98 on LR Ngong/Ngong/14875, on 3rd February 2022 through a public auction conducted by Viewline Auctioneers. That he served the Plaintiff with a Notice to vacate on 4th February 2022. That the eviction notice was to take effect on 4th May 2022 however the Plaintiff did not move out. That being the registered owner upon completion of payment of the purchase price, he filed an ELC Miscellaneous Application No. E096 of 2022 *Metrokam Properties Limited -vs- David Sila Onyango & Irene Atieno Ajwang* and obtained an eviction order which was served upon the Plaintiff and executed.
7. He has deposed that the issues being raised in the Plaint and the Notice of Motion are res judicata, the same having been canvassed in the ELC Misc. Application and therefore the Notice of Motion and the Plaint should be dismissed as this court lacks jurisdiction to determine them.
8. The Plaintiff has opposed the PO through a Replying Affidavit dated 5th May 2023 in which he has deposed that the suit before this court is not similar to the one dealt with in ELC Misc App No E096 of 2022. That the suit before this court is challenging the 1st Defendant's unlawful issuance of statutory notices and subsequent sale of the suit property to the 2nd Defendant over alleged breaches of contractual obligations over loan agreements. That the ELC court only interrogated the validity of the eviction order and not the validity of the statutory notices.
9. He has deposed that courts cannot issue substantive orders on ownership of property and declare a party as the registered owner in a miscellaneous application; that the Misc. Application filed before the ELC was limited to seeking an eviction order and that due to the limited prayers in the application, the court did not interrogate the circumstances surrounding the breaches of contractual obligations on the part of the 1st Defendant and the validity of the statutory notices as well as the computation of arrears outstanding.
10. He further deposed that the ELC matter was filed before an incompetent court without jurisdiction to handle the matter and therefore the issues raised in the suit before this court have not been previously litigated for the res judicata doctrine to arise. He deposed that the PO does not meet the threshold as stated in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. He urged that the PO be dismissed with costs.



11. This court directed that the PO be canvassed first through written submissions. Parties have filed their respective submissions.

Plaintiff's Submissions

12. The Plaintiff filed their submissions dated May 19, 2023 and raised four issues for determination
 - a. Whether the Preliminary Objection raises pure point of law?
 - b. Whether the Honourable Court has Jurisdiction to hear and determine this suit?
 - c. Whether the Honourable Court should strike out the instant suit as it offends the doctrine of res-judicata?
 - d. Who should bear the cost of this application?
13. The Plaintiff submitted on what constitutes a PO and cited Mukisa Biscuits case to support his submissions. In that case the Court held that:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

14. He submitted that the 2nd Defendant's PO is not based on pure points of law but rather on facts which are contested; that by raising the PO, the 2nd Defendant is attempting to continue to maintain ambiguity in the ownership of the suit property while denying the Plaintiff the right to have his matter fully determined.
15. He submitted that this Court has jurisdiction. He relied on Article 162 of the of the Constitution of Kenya on the establishment of the Environment and Land Court and section 13 of the Environment and Land Act. He stated that this court has jurisdiction to deal with this matter as the dispute relates to land and environment. He cited *Matter of Interim Independent and Electoral Commission* [2011]eKLR where Supreme Court quoted the “The Lillian “S” case and stated as follows:

“Jurisdiction is everything. Without it, a Court has no power to make one more step.” The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

16. He submitted that section 7 of the Civil Procedure Act provides for the criteria under which a matter shall be dismissed on the grounds of res judicata and cited *Nancy Mwangi T/A Worthlin Marketers -vs- Airtel Networks (K) Ltd & others* [2014] eKLR and *Bernard Mugo Ndegwa -vs- James Nderitu Gitbae & 2 others* [2010]eKLR where it was held 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”

17. He submitted that in this instant case the issues are not identical in both suits as was set out in their replying affidavit and therefore this matter is not res judicata. Further that the parties in the ELC suit are not the same as in this suit.

2nd Defendant’s Submissions

18. The 2nd Defendant’s submissions are dated 25th September 2023. It is submitted that the substantive law on res judicata is Section 7 of the [Civil Procedure Act](#). The 2nd Defendant cited *E.T -vs- Attorney General & another* (2012)eKLR where it was held that:

“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others* [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and Another* Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, ‘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”

19. The 2nd defendant further relied on various authorities including [Uburu Highway Development Ltd -vs- Central Bank of Kenya Exchange Bank Ltd \(in voluntary liquidation\) and Kamlesh Mansukhlal Pattni](#), to emphasize the point that there must be an end to applications of similar nature. The 2nd Defendant emphasized on the doctrine of finality to the effect that decisions of the court, unless set aside or quashed must be accepted as incontrovertibly correct. That the Plaintiff’s pleadings leave no doubt that the actions commenced are in respect of the same or a substantially similar cause of action as per the ELC suit. That the Court must not allow the plaintiff to challenge a judgement by filing a new suit, to this they prayed that the Plaintiff’s entire suit ought to be dismissed.

Analysis and Determination

20. I have read the pleadings in this matter. I have read and considered the PO, the Supporting Affidavit, and the Replying Affidavit in opposition. The issue is simply that the 2nd Defendant questions the jurisdiction of this court to determine this matter because the Plaint and the Notice of Motion raise issues which have been adjudicated upon by the court in ELC Misc. Application No. E096 of 2022. In other words, the matter is res judicata.
21. The starting point in considering whether a matter is *res judicata* or not is section 7 of the [Civil Procedure Act](#). It provides 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.

22. The elements outlined under the above section must be satisfied conjunctively for the doctrine of *res judicata* to apply, as was held by the Supreme Court in *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 others* [2017] eKLR, where that Court stated that:

- “(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.”

23. The essence of the doctrine of *res judicata* was explained by the Court of Appeal in *John Florence Maritime Services Limited & another v. Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR as follows:

“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.”

24. Further, the doctrine is discussed in *Henderson vs Henderson* (1843) 67 ER 313 as follows;

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.

25. The question this court must address is whether *res judicata* is applicable in this matter? The 2nd Defendant says it is applicable while the Plaintiff says it is not. The answer lies in the pleadings. The contents of the Plaint are clear to both parties. The reliefs sought in the Plaint are as follows:



- i. A declaration that the purported sale of LR No. Ngong/Ngong/14875 to the 2nd Defendant is a nullity.
 - ii. An order that the public auction staged for the sale of Ngong/Ngong/14875 on 3rd February 2022 be and is hereby set aside.
 - iii. A permanent injunction restraining the Defendants whether by themselves, servants, agents, and/or attorneys from in any way selling, letting, disposing, transferring, charging, pledging, evicting the Plaintiff from, or dealing or in any other way interfering with LR No. Ngong/Ngong/14875.
 - iv. An order that the 1st Defendant be directed to render and deliver to the Plaintiff true and correct accounts and entire statements of accounts for the Plaintiff's accounts operated with the 1st Defendant for the charge loan showing how the sum claimed by the 1st Defendant accrued.
 - v. An order directing the Chief Land Registrar to rectify the Register by cancelling the entries in the Register of the land regarding LR No. Ngong/Ngong/14875 and to cancel the transfer executed in favour of the 2nd Defendant and revert it to Plaintiff.
 - vi. Refund of the amount due to the Plaintiff together with interest consequent upon the accounts being taken.
 - vii. General damages.
 - viii. Costs and interest.
 - ix. Any other relief.
26. The subject matter of this Plaint revolves around LR No. Ngong/Ngong/14875. It is the substratum of this suit. It is clear from the pleadings that the major issue raised here is the sale by public auction of this property and the transfer of the same to the 2nd Defendant.
27. The Notice of Motion dated 8th August 2022, that gave rise to the PO sought the following orders:
- i. Spent.
 - ii. That the honourable court be pleased to issue a temporary injunction to restrain the 1st and 2nd Defendants, their servants, agents, employees, assignees, or any other person working under their express or implied instructions or authority from selling by public auction or private treaty, alienating, disposing of, entering, leasing, wasting, evicting the Plaintiff or in any other way dealing with and/or interfering with the Plaintiff's quiet possession of the land known as Ngong/Ngong/14875 pending the hearing of this application.
 - iii. That the honourable court be pleased to issue a temporary injunction to restrain the 1st and 2nd Defendants, their servants, agents, employees, assignees, or any other person working under their express or implied instructions or authority from selling by public auction or private treaty, alienating, disposing of, entering, leasing, wasting, evicting the Plaintiff or in any other way dealing with and/or interfering with the Plaintiff's quiet possession of the land known as Ngong/Ngong/14875 pending the hearing of this suit.
 - iv. That interlocutory mandatory injunction be issued compelling the 1st Defendant to issue updated statements of accounts particularly, inter alia, the chronology of the loan repayments made by the Plaintiff as well as the details thereof.



- v. That interlocutory mandatory injunction be issued compelling the 1st Defendant to provide and supply particulars of the alleged public auction of the land known as Ngong/Ngong/14875.
 - vi. That this honourable court be pleased to grant such other order or directions as shall be considered by this honourable court just and mete.
 - vii. That costs of this application be provided for.
28. There is no doubt in mind that just as in the main suit, the subject matter in this application is the suit premises.
 29. To revert to the question I posed above, whether res judicata is applicable in this matter, it is for this court to determine whether all the elements, conjunctively, of res judicata as expounded in *Independent Electoral & Boundaries Commission v. Maina Kiai & 5 others* [2017] eKLR are satisfied.
 30. My careful reading and understanding of the issues raised here lead me to conclude that this matter or the issues raised in it were directly and substantially in issue in ELC Misc. Application No. E096 of 2022. It is true that in that Application, the Applicant was the 2nd Defendant in this matter. He sued the Plaintiff and Irene Atieno Ajwang. The subject matter was the suit premises which the 2nd Defendant had bought by public auction conducted by Viewline Auctioneers on the instructions of the 1st Defendant. Irene is the borrower, and the Plaintiff was the guarantor of the loan facility from the 1st Defendant. All these persons/entities are intertwined in this matter and in the ELC matter. It is therefore safe to say that these are the same parties or are parties under whom they or any of them claim and that these parties were litigating under the same title.
 31. The remaining two elements as to whether the issue was heard and finally determined in the former suit and whether the court that formerly heard and determined the issue was competent to try the subsequent suit presents some difficulties to this court which I will explain.
 32. As I have indicated above, the subject matter in this case is the suit premises and the sale by public auction. Failure by Irene Atieno Ajwang and by extension the Plaintiff to satisfy the loan facility led to the 1st Defendant exercising its statutory right of sale which is being contested by the Plaintiff. It led to the public auction conducted by Viewline Auctioneers upon instructions by the 1st Defendant. It led to the buying of the property in a public auction by the 2nd Defendant and change of ownership of the suit premises. It led to the service of the eviction notice on the Plaintiff. It led to the filing of ELC Misc. No. E096 of 2022 and issuance of the eviction order. It led to this matter.
 33. Land Reference No. Ngong/Ngong/14875 now belongs to the 2nd Defendant as far as the documents filed in this court in respect to this case show. That ownership is disputed. That dispute is not resolved. As regards sale of that property, the matter is finalized as long as the orders of the ELC remain in force. That, to my mind, is the central issue, that once resolved, the other issues touching on accounts can be handled.
 34. As to whether the court that handled the former matter, the ELC, is competent to try this subsequent suit, is not for me to pronounce. The ELC, by virtue of article 162 (2) of the [Constitution](#) is concerned, is a court of equal status to the High Court and I am not clothed with the requisite jurisdiction to determine if that court is competent or not or to criticize its actions.
 35. The challenge this court is facing is that even if I were to agree with the Plaintiff, I cannot overturn an order of the ELC due to the reasons I have given above to enable me to state that I can now proceed to determine this matter. This is because the suit premises have changed ownership through an order



issued by the ELC. There is need to clear that hurdle first before this court can proceed further with this matter.

36. For the reasons I have given above, I am constrained to find that I am not able to proceed handling this matter on the issues being raised so long as the orders of the ELC remain in force as it will mean my interfering with orders of a court of equal states, the jurisdiction to do so of which I lack. While I find that this matter meets some of the requirements for the court to find that it is res judicata not all the elements of res judicata have been satisfied given that all the elements are conjunctive. It is my considered view that the issue of ownership of the suit premises is central to the matter before the court. The other issues raised are secondary to that issue. Given that Ngong/Ngong/14875 has changed ownership, the secondary issues of giving accounts by the 1st Defendant cannot be handled by this court because of the existing ELC orders.
37. For the reasons contained in this Ruling, I hereby decline to allow the PO raised in respect of the Notice of Motion dated August 8, 2022. It is hereby dismissed. I am however of the view that parties to this matter need to find a better solution to the issues arising from this dispute. This court will keep this matter in abeyance to give the parties the opportunity to decide what the next cause of action will be.
38. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF JANUARY 2024.

S. N. MUTUKU

JUDGE

