



**Abdalla & another v Streeper (Environment & Land Case
E011 of 2023) [2024] KEELC 135 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E011 OF 2023
NA MATHEKA, J
JANUARY 25, 2024**

BETWEEN

JAMILA JAFFER ABDALLA 1ST PLAINTIFF

RUKIA JEFFER ABDALLA 2ND PLAINTIFF

AND

ZULEKHA ABDALLA STREEPER DEFENDANT

RULING

1. The application is dated 26th July 2023 and is brought under order 40 rules 1, 2, 3, 5 & 9 of the Civil Procedure Rules Sections of the Civil Procedure Act Cap.21 Laws of Kenya, Sections 14, 24, 25, 26& 79 of the Land Registration Act 2012, Articles 40, 50, 60, 64 of the Constitution of the Republic of Kenya, Sections 5 of the Fair Administration Action Act seeking the following orders;
 1. That this application be certified as urgent and be heard ex-parte in the first instance.
 2. That this Honourable court be pleased to issue an order in the nature of a temporary injunction restraining the defendant/respondent her servants, agents, workers, employees, immediate family members, nominees, proxies, and/or such other persons duly instructed by the defendant/respondent from evicting and disturbing the quiet, and peaceful enjoyment of property, transferring proprietary interest, alienating share, further execution and promulgation of the unregistered purported memorandum of understanding dated the 26th May 2021, gaining entry lawful authority, and/or in the such other manner dealing with the proprietary rights of all that parcel of land known as Mombasa/Block XVI/875 pending the hearing interpartes of this application.
 3. That this Honourable Court be pleased to issue an order in the nature of a temporary injunction restraining the defendant/respondent her servants, agents, workers, employees, immediate family members, nominees, proxies, and/or such other persons duly instructed



by the defendant/respondent from evicting, disturbing the quiet, and peaceful enjoyment of property, transferring proprietary interest, alienating share, further execution and promulgation of the unregistered purported memorandum of understanding dated the 26th May 2021, gaining entry without lawful authority, and/or in the such other manner dealing with the proprietary rights of all that parcel of land known as Mombasa/Block XVI/875 pending the hearing and determination of this suit.

4. That the Honourable court be pleased to issue a declaration Mombasa/Block XVI/875 is trust property bequeathed by dint of the lifetime wishes of Bai Said Abdalla (now deceased) pending the hearing and determination of this suit.
 5. That the Honourable court be pleased to issue an order of valuation by competent valuer of national repute agreed upon by both the 1st and 2nd plaintiffs/applicant and the defendant in respect of the v. aluation of all that premises known as Mombasa/Block XV1/875 pending hearing and determination of this suit.
 6. That the Honourable Court be pleased to be at liberty to issue and/or grant such other Order(s) or further relief (s)as it may deem necessary and give any consequential directions in the circumstances of this suit.
 7. That the costs of this application be provided for.
2. It is based on the grounds that this application is the only avenue available to the 1st and 2nd plaintiffs/applicants seek injunctory orders restraining the defendant/respondent her servants, agents, workers, employees, immediate family members, nominees, proxies, and/or such other persons duly instructed by the defendant/respondent from evicting, disturbing the quiet, and peaceful enjoyment of property, transferring proprietary interest, alienating share, further execution and promulgation of the unregistered purported memorandum of understanding dated the 26th day of May 2021, gaining entry without lawful authority, and/or in the such other manner dealing with the proprietary rights of all that parcel of land known as Mombasa/Block XVI/875. That Bai Said Abdalla (now deceased) of whom the 1st & 2nd plaintiffs/applicants and the defendant/respondent are the bona fide dependents, beneficiaries and survivors bequeathed by surrender all that parcel of land known as Mombasa/Block XVI/875 by virtue of love and affection of all her daughters in equal measure. That the defendant/respondent has taken it upon herself to disenfranchise the 1st and 2nd plaintiffs and the immediate family of another sister Silanda Jaffu Abdalla (now deceased) by constructing a storied building to be utilized solely by the said defendant/respondent. That absolutely no consent of the co-registered owners of all that parcel of land Mombasa/Block XVI/875 has derived from the 1st and 2nd plaintiffs/applicants their immediate families, further, no family gathering and/or meeting has been called to build a consensus as to the demolition of the old house and consequent building of a stored building.
3. The Defendant raised a Preliminary Objection against the whole of the suit dated 26th July, 2023 stating that;
1. That this matter is res judicata.
 2. The Plaintiffs suit is incompetent for want of authority and Verifying Affidavit of the 2nd Plaintiff.
 3. That this suit is incompetent and the court lacks jurisdiction to entertain it.
 4. The suit herein is misguided, frivolous, vexatious and amounts to abuse of the process of the court as it does not disclose any cause of action known in law.



4. Hence the Plaintiffs entire Suit dated 26th July, 2023 filed herein ought to be struck out with Costs to the Defendant.
5. The Respondent submitted that the Applicants have failed to disclosed to the court that they had previously filed two (2) similar suits against him being; Succession Cause No. 304 of 2021 Jamila Jaffar Abdalla & Rukia Jaffar Abdalla vs Zulekha Abdalla Streeper and Kadhi's Misc. Application No.411 of 2021 Jamila Jaffar Abdalla & Rukia Jaffar Abdalla vs Zulekha Abdalla Streeper. That the Honourable Kadhi vide its rulings dated 7th December 2021 and 22nd June 2023 respectively, dismissed both suits for reasons that the court had no jurisdiction to declare a trust contrary to the entries at the land registry. Copies of the said suits and the rulings were annexed and marked as annexure "ZAS-7".
6. This court has considered the application and submissions therein and will first deal with the Preliminary Objection. Before I delve into the Preliminary Objection raised by the Defendant, it is important that I establish if they meet the test laid down in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the court held that;

A Preliminary Objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
7. In *Oraro vs Mbaja* 2005 eKLR, Ojwang J (as he then was) described it as follows;

I think the principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for it’s authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
8. It is clear therefore that a Preliminary Objection must only be based on pure points of law and if for any reason facts are involved, then they must not be contested. The Preliminary Objection raised by the Defendant raises the legal issue that the Plaintiffs’ suit is res judicata and that this Court lacks the jurisdiction to determine the suit. That is a pure points of law. The parties have made reference to previous cases involving the suit property. Those cases are not contested. The test laid down in the case of *Mukisa Biscuit Manufacturing Co Ltd* (supra) has been met. I shall now consider the merits or otherwise of the Defendant’s Preliminary Objection.
9. Section 7 of the *Civil Procedure Act* Provides

“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.”
10. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.



11. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, (2017) eKLR, that;

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

12. Expounding further on the essence of the doctrine the Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR pronounced itself 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.”

13. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* (supra), the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is;

- (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.”



14. On the issue as to whether this suit is res judicata, the court wishes to rely on the case of *George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another* (2014), eKLR, where the Court held that;

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

15. I have perused the court record and find that indeed the parties have litigated before the Kadhi in Succession Cause No. 304 of 2021 Jamila Jaffar Abdalla & Rukia Jaffar Abdalla vs Zulekha Abdalla Streeper and Misc.Application No.411 of 2021 Jamila Jaffar Abdalla & Rukia Jaffar Abdalla vs Zulekha Abdalla Streeper. Where in the Honourable Kadhi and rulings dated 7th December 2021 and 22nd June 2023 delivered. Copies of the said suits and the rulings were annexed and marked as annexure "ZAS-7". The option would have been for the applicant to appeal against this decision if dissatisfied and not file a fresh suit in the Environment and Land Court seeking similar orders. I find that this matter is res judicata Succession Cause No. 304 of 2021 Jamila Jaffar Abdalla & Rukia Jaffar Abdalla vs Zulekha Abdalla Streeper and Kadhi's Misc.Application No.411 of 2021 Jamila Jaffar Abdalla & Rukia Jaffar Abdalla vs Zulekha Abdalla Streeper. The Honourable Kadhi vide its rulings dated 7th December 2021 and 22nd June 2023 respectively, dismissed both suits for reasons that the court had no jurisdiction to declare a trust contrary to the entries at the land registry. Copies of the said suits and the rulings were annexed and marked as annexure "ZAS-7". Having found so the court will not proceed to determine the application dated 26th July 2023 but order that this suit be struck off with costs.

16. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

