



**Ndungu v Waigi & another (Environment & Land Case  
659 of 2013) [2024] KEELC 343 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 343 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 659 OF 2013**

**J OMANGE, J  
JANUARY 25, 2024**

**BETWEEN**

**HUMPHREY NJUGUNA NDUNGU ..... PLAINTIFF**

**AND**

**JAMES MWAGO WAIGI ..... 1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed this suit on 3<sup>rd</sup> June, 2013. He further filed an amended plaint on 7<sup>th</sup> August, 2014. The matter came up for mention before the Judge on 20<sup>th</sup> July, 2016 during which the court ordered that the Plaintiff was to peruse the file so as to confirm whether summons had been taken out and served. Following this order, the matter was then mentioned before the Deputy Registrar on 12<sup>th</sup> September, 2018 on which date the Plaintiff sought for time to put their house in order.
2. The next time the matter was mentioned before a Judge on 19<sup>th</sup> September, 2019 it was for notice to show cause why the suit should not be dismissed for want of prosecution. The Court heard both parties and found that no sufficient grounds had been given for failure to set the matter for hearing. The suit was dismissed for want of prosecution. This prompted the filing of an application to set aside this order and for reinstatement of the suit.
3. After hearing both parties, the court allowed the application on 29<sup>th</sup> July, 2021 and reinstated the suit. The plaintiff was directed to set the suit for hearing within 90 days failing to which the suit was to stand dismissed. Following this decision, the defendant filed an application seeking to set aside the order made by Justice Komingoi on 29<sup>th</sup> July 2021 and the suit to be marked as dismissed as ordered on 19<sup>th</sup> September, 2021.
4. The court dismissed this application but found that in accordance to the directions given by the court earlier the suit stood dismissed by 29<sup>th</sup> October, 2021. These are the undisputed facts in this case.



5. The Plaintiff has now filed the Notice of Motion application dated the 18<sup>th</sup> October 2022 the Applicant in which he seeks the following orders:
  - a. That the honourable court be pleased to review order 2 of the orders given on 29<sup>th</sup> July 2021 by Hon Lady Justice L. Komingoi and extend time for setting down this suit for hearing.
  - b. Costs of the application.
6. The Plaintiffs case is that the Plaintiff did not comply with the Courts order made on 29<sup>th</sup> July, 2021 due to the existence of the application dated 29<sup>th</sup> August, 2021. The Plaintiff contends that given that there was a pending application he could not set down the matter for hearing as directed by the court. He seeks extension of time within which to set the matter for hearing.
7. The 1<sup>st</sup> Respondent opposed the application by filing a notice of preliminary objection dated 24<sup>th</sup> April 2023 on grounds that the application was res judicata to the ruling delivered on 29<sup>th</sup> July 2021 and that this honourable court is now functus officio. The 1<sup>st</sup> respondent also filed a replying affidavit in which he reiterated the contents of the preliminary objection and further deponed that despite the ruling on 30<sup>th</sup> September 2021 dismissing the matter, there was a mention on 15<sup>th</sup> November 2021 to select a hearing date during which the Applicant failed to show up in court.
8. Both parties filed submissions. The applicant insists that this is a totally different application as he is seeking time extension unlike in the 1<sup>st</sup> application where he sought for orders for review for reinstatement of the suit.
9. The 1<sup>st</sup> Respondent on the other hand insists that the matter is res judicata as the issues raised in the instant application had already been raised in the previous application and conclusively determined. He cited the case of *Independent Electrol and Boundaries Commission Vs Maina Kiai* (2017) eKLR wherein the supreme court outlined the factors to be established for *res Judicata* to apply.
10. I have considered the submissions by both counsel, the cited authorities and the pleadings. The issues that lend themselves for determination by the court are; Whether the application is *res Judicata*? Whether the court should review its order given on 29<sup>th</sup> July, 2021. Whether the court should extend the time for setting down the matter for hearing.
11. The preliminary objection is brought on grounds that the application is *res Judicata*. Section 7 of the [Civil Procedure Act](#) Cap 21 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”.
12. [Black’s law Dictionary](#) 10<sup>th</sup> Edition defines *res Judicata* as follows;
 

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
13. In respect of the current application in considering whether the matter is *res Judicata* the court is called upon to consider;



- i. The issues in the previous Application;
  - ii. whether the issues are the same as in the current application and if so whether the decision addressed all the issues.
  - iii. whether the parties are the same or are litigating under the same title and if the court that rendered the decision was of competent jurisdiction.
14. In *Uburu Highway Development Ltd – vs – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court ruled that the application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same application having been finally determined “thrice by the High Court and twice by the Court of Appeal”, it could not be resuscitated by another Application.
15. The Court of Appeal further stated:
- “That is to say, there must be an end to applications of similar nature, that is to further, under principles of *res Judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for.
16. On the question of *res Judicata*, the application herein is between the same parties, the issue is on extension of time which the court had earlier addressed. The only difference is that in this application the applicant does not seek reinstatement of the suit and has also prayed for review of the earlier order not setting aside of the order 19<sup>th</sup> September, 2019.
17. Having considered the two applications, the questions the court asks itself is “ what is the Plaintiff asking the court to do in both instances? In the first application dated 20<sup>th</sup> July, 2020 the Plaintiff was seeking to set aside an order the court had made against him. In the second application the Plaintiff is seeking to review a courts decision which it has not complied with. The issue in both applications is whether to extend time for fixing the matter for hearing. This issue had been determined by the court which gave a self-executing order when it declared that if the matter was not listed for hearing within 90 days, the suit would stand dismissed. Given that the present application is framed as a review of the earlier order I will consider it on merits.
18. The applicant had filed an application seeking to review the order issued on 29<sup>th</sup> July 2021 to extend time to set a hearing date on grounds that the failure to comply to set the hearing date within 90 days was not intentional due to the pendency of a different application from the 1<sup>st</sup> Defendant’s counsel.
19. The power to review the decision of a Court is provided for under Section 80 of the *Civil Procedure Act* thus:
- Any person who considers himself aggrieved—
- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit



Further, [Order 45, Rule 1](#) provides:

‘...and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay’

20. Therefore, the power to review the decision of a Court is limited and can only be exercised in the following circumstances;
  - i. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
  - ii. There is a mistake or error apparent on the face of the record; or
  - iii. There are other sufficient reasons; and
  - iv. The application must have been made without undue delay.
21. There is no new evidence that has been brought before the court neither is there any mistake or error apparent on the face of the record. The court is therefore left to consider whether the application adduces sufficient reasons for the court to exercise its discretion. The courts have held that sufficient reasons which could very well be referred to as sufficient cause is a matter of fact. Hence the onus is on the Plaintiff to adduce such facts that would satisfy the court that there are sufficient reasons to exercise discretion in his favour.
22. The Plaintiff states that when the matter came up for mention on 21<sup>st</sup> October, 2021 there was a pending application hence he could not list it for hearing. I have considered this averment but I find that I am satisfied that the Plaintiff is being less than candid on what transpired. The matter was referred to Justice Wabwoto to give a hearing date on 15<sup>th</sup> November, 2021. The Plaintiff does not explain why he or his counsel did not attend court. I also note that the impugned Defendants application is dated 29<sup>th</sup> August, 2021. As such by the time the matter came up before the Deputy Registrar on 21<sup>st</sup> October, 2021 the application had already been filed. The Plaintiff could have sought extension of time at this juncture. He failed to do this and fails to give any plausible reason why he did not.
23. I am alive to the Plaintiffs right to be heard. However, this right must be exercised in a manner that does not hold the Defendant who equally has rights at ransom while the Plaintiff leisurely prosecutes his case. I find that no facts have presented that would warrant exercise of the courts discretion in favour of the Plaintiff. In any event the suit already stands dismissed by virtue of the self-executing order given by the court on 20<sup>th</sup> July, 2021. As such extension of time without reinstating the suit would be of no benefit to the Plaintiff.
24. In the final result I find that the application has no merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**JUDY OMANGE**

**JUDGE**



In the presence of: -

Mr. Ng'ang'a for 1<sup>st</sup> Defendant

Mrs Nzuvani for 2<sup>nd</sup> Defendant

No appearance for the Plaintiff

Steve - Court Assistant

