



**Mukhwana v Mulehi (Environment & Land Case 344 of 2012)  
[2025] KEELC 4053 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 4053 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 344 OF 2012  
CK YANO, J  
FEBRUARY 27, 2025  
FORMERLY HCC 82 OF 2007**

**BETWEEN**

**HERMMATON MUKHONGO MUKHWANA ..... PLAINTIFF**

**AND**

**ZACHARIA MONYO MULEHI ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 18<sup>th</sup> March, 2024 brought under Order 24 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1, 1A, 1B, 3 & 3A of the *Civil Procedure Act* and Articles 50(1) and 159(1) and (2) of *the Constitution* of Kenya, 2010, the Defendant/Applicant seeks for orders:-
  1. The Honourable court be pleased to revive the abated suit for it to be heard on merit.
  2. That the status quo prevailing at the institution of the suit be reinstated.
  3. That this Honourable court be pleased to substitute the defendant with Abeuty Likhakasi Mulehi who is the legal representative of the estate of Zacharia Monyo Mulehi.
  4. Costs of this application be in the cause.
2. The Application is premised on the grounds that Zacharia Monyo Mulehi, the Defendant died on 24<sup>th</sup> December, 2021 and Abeuty Likhakasi Mulehi has obtained letters of administration ad litem with regard to the estate of Zacharia Monyo Mulehi. That there was a defence and counterclaim dated 10<sup>th</sup> July, 2013 on record which was never ruled upon. The applicant stated that the counterclaim was never heard and is prejudicial to the defendant because it leaves the defendant without resolution to the dispute at hand. It is contended that none of the parties to this action will be prejudiced by the orders sought, that the application has been timeously presented and that the requirement of justice demand that suits or disputes be heard on merit as opposed to technicalities.



3. In the supporting affidavit the applicant has annexed a copy of the death certificate and copy of the limited grant issued on 6<sup>th</sup> July, 2023 in Eldoret CMC Cause No. 178 of 2023. The applicant averred that the defendant was his grandfather and was the beneficial owner of land known as Lugari/Likuyani Block 1 (Vihiga) 234 which was fraudulently sold to a non-member of Vihiga Farmers Co. Limited which is the subject matter in this case and that there is a pending restriction which was registered by the Land Registrar, Kakamega County where the land is registered. The applicant reiterated that the counterclaim was never ruled upon.
4. The Applicant deponed that her grandfather had been in actual possession of the suit land since the year 1977 and had developed it with permanent buildings and had also been living on the said land. It is the applicant's contention that the plaintiff did not acquire good title to the suit property and that it should thus revert back to the estate of the applicant's late grandfather. The applicant contended that he is still interested in prosecuting the counter-claim as evidenced by the timeous and prompt filing of this application.
5. The plaintiff opposed the application through a Replying Affidavit dated 15<sup>th</sup> July, 2024 in which he has deponed inter alia, that the affidavit in support of the application is full of falsehoods calculated at misleading the court. It is also contended by the plaintiff that the application is frivolous and is meant to bar him from enjoying utilization of the suit land since he was issued with certificate of title on 29<sup>th</sup> December, 2000. That no reason has been advanced to warrant revival of the abated suit and why the letters of administration could not be obtained within 12 months of the demise of the defendant after the court granted the applicant leave to apply. That the applicant is guilty of laches and indolence.
6. The plaintiff further deponed that the court was alive to the fact that there was a counter-claim and that the same had abated and that is why the suit was marked as abated and the file closed. The plaintiff contended that he had given evidence way back in the year 2018 and reopening the matter would prejudice him. That the application is made in bad faith, adding that litigation must come to an end. The plaintiff stated that the decision by the court on 30<sup>th</sup> November, 2023 is sound and ought to be maintained.
7. The application was canvassed by way of written submissions which were duly filed by the advocates on record and which I have read and considered and I need not reproduce them in this ruling.
8. I have considered the application, the response and the rival submissions. The issues for determination are whether the application has merit and whether the orders sought should be granted or not.
9. In the application herein, the applicant seeks to have the abated suit revived and reinstated for hearing on merit and for the applicant who is the legal representative of the estate of the deceased defendant to be substituted in place of the deceased.
10. I have perused the court record. The defendant herein died on 24.12.2021. As at 23.12.2022, the plaintiffs suit against the defendant and the deceased defendant's counter-claim had abated as there was no substitution made within one year. On 21.3.2023, the court marked the matter as abated. By a Notice of Motion dated 1.8.2023, the applicant herein sought to set aside and vacate the order of abatement and have the suit reinstated for hearing on merit. By a ruling dated 30.11.2023, the court (Obaga J.) found that the applicant's application dated 1.8.2023 was incompetent and lacked merit and dismissed it with no order as to costs. In the present application, the applicant is also seeking more or less similar orders as those in the application dated 1.8.2023 which was dismissed by the court.



11. The law pertaining to the doctrine of res-judicata is captured under the provision of section 7 of the Civil Procedure Act which states:-

“No court shall try any suit or issue in which the matter is 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 the court.”

12. The issues which were before this court in the Notice of Motion dated 1.8.2023 are the same as those now raised in the present application. There was a final determination on those issues by the court in its ruling dated 30.11.2023. there is also no doubt that the parties are the same in the proceedings. Indeed, the applicant in both applications is the same.

13. There is no doubt that the principle of res judicata applies to applications with the same force whether the application be final or interlocutory. The statutory provision under section 7 of the Civil Procedure Act is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit (or application) between the same parties if the issue was determined in the former suit or application after a hearing. In this application, the applicant is the same just as in the previous application. The applicant is now seeking the same orders as those he had sought in the former application, yet the court had already adjudicated on those issues. By dint of section 7 of the Civil Procedure Act, this application, in my view, is barred by the doctrine of res judicata.

14. By reason of the foregoing, I find that the application dated 18.3.2024 is an abuse of the court process as it raises issues which had been substantially litigated and adjudicated upon by a court of competent jurisdiction. The same is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HON. C. K. YANO**

**ELC, JUDGE**

**27<sup>TH</sup> FEBRUARY, 2025**

In the presence of;

Court Assistant -Laban

No appearance for the Plaintiff/Respondent.

No appearance for the Defendant/Applicant.

