



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KERICHO**

**CIVIL SUIT NO. 54 OF 2014**

**THOMAS K. SAMBU.....PLAINTIFF**

**VERSUS**

**PAUL K. CHEPKWONY .....DEFENDANT**

**alias PAUL CHEPKWONY KOSKEI**

**RULING**

*(Suit filed by plaintiff seeking similar reliefs to a suit previously filed and dismissed for non attendance under Order 12 Rule 3; whether in the circumstances plaintiff may file a fresh suit; Order 12 Rule 6 bars the filing of a new suit; suit untenable and is dismissed with costs)*

This ruling is in respect of a preliminary point which I asked counsels to address me on. The issue that I raised is whether this suit is tenable, as there had been an earlier suit, **Kericho HCCC No. 23 of 2009**, which had been dismissed for non-attendance. Both parties filed submissions, but before I go to the gist of these, I think it is necessary that I lay down a little background to this suit.

Through the case registered as **Kericho HCCC No. 23 of 2009**, the plaintiff herein instituted a suit against the defendant seeking the following orders :-

- a. *A declaration that the plaintiff is the sole registered proprietor of L.R No. Kericho/Ainamoi/409.*
- b. *A permanent injunction be issued against the defendant, members of his family, his servants or agents from remaining or entering the suit land.*
- c. *An eviction order against the defendant.*
- d. *Kshs. 21, 500/= being mesne profits since 2003 to date and further mesne profits until the date of judgment.*
- e. *Costs of this suit.*
- f. *Such other or further relief this honourable court may deem just to grant.*

That matter was fixed for hearing on 29 June 2011. On that day, only the defendant attended and the plaintiff's suit was dismissed pursuant to the provisions of **Order 12 Rule 3** of the **Civil Procedure Rules, 2010**. Through a motion dated 11<sup>th</sup> July 2011, the plaintiff applied under **Order 12 Rule 7**, to reinstate the dismissed suit. That application was considered by my predecessor, Waithaka LJ, who dismissed it on 29<sup>th</sup> May 2014. A Notice of Appeal appears to have been filed, but I do not know whether the appeal was pursued.

On 13<sup>th</sup> October 2014, the plaintiff filed this suit against the same defendant in **Kericho HCCC No. 23 of 2009**. He indeed in his plaint, did mention that there had been this previous suit which was dismissed. In

the suit, the plaintiff asked for the following orders :-

- a. A declaration that the plaintiff is the registered proprietor of **LR No. Kericho/Ainamoi/409**.
- b. A permanent injunction be issued against the defendant, members of his family, his servants or agents from remaining or entering the suit land.
- c. Kshs. 21, 500/= being mesne profits since 2003 to date and further mesne profits until the date of judgment.
- d. Costs of this suit.

The defendant entered appearance and filed defence. He raised issue that there had been the previous suit **Kericho HCCC No. 23 of 2009**.

When the matter first came before me, I raised the question whether this suit is maintainable, given that it is similar to a suit that which had earlier been dismissed for non-attendance under **Order 12 Rule 3**.

In his submissions, Mr. Migiro for the plaintiff submitted that the matter is not res judicata as the matter was not heard. He submitted that a party whose suit has been dismissed for want of prosecution has the liberty to file a fresh suit. He relied on the cases of *Tee Electronics and Plastics Company Ltd vs Kenya Industrial Estates Ltd (2005) 2 KLR 97*, *Wanguhu vs Kania (1987) KLR 51* and *Simon Waiti Kimani & 3 Others vs Equity Building Society (2010)*.

Mr. Siele Sigira for the defendant submitted inter alia that the suit is res judicata. He also submitted that the plaintiff's authorities are distinguishable to the facts of this case. He submitted that the said authorities refer to a matter dismissed for want of prosecution and not a matter dismissed for non-attendance under **Order 12 Rule 3**. He further submitted that the plaintiff has not disclosed the fate of his appeal against the order disallowing the reinstatement of the dismissed suit. He was of the view that this case is an abuse of the court process. He relied on the case of *Shelf Co. Ltd & Another vs Attorney General & 2 Others (2015) eKLR*.

I have considered the matter. It is not in question that this suit is similar to the suit **Kericho HCCC No. 23 of 2009** which was dismissed on 29<sup>th</sup> June 2011 for non-attendance on the part of the plaintiff. The defendant had appeared at the hearing and did not admit any part of the plaintiff's claim and the matter was dismissed pursuant to the provisions of **Order 12 Rule 3**. **Order 12 Rule 3** is drawn as follows :-

***When only defendant attends [Order 12, rule 3.]***

1. *If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.*
2. *If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.*
3. *If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.*

The question that arises is whether the plaintiff is permitted to file a new case if the dismissal is under **Order 12 Rule 3**. The answer to this is found in **Order 12 Rule 6** which provides as follows :-

***Effect of dismissal [Order 12, rule 6.]***

1. *Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit.*
2. *When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.*

It will be seen that **Order 12 Rule 6(2)** is clear and unambiguous, that where a suit has been dismissed

under **Rule 3**, (meaning under **Order 12 Rule 3**), no fresh suit may be brought in respect of the same cause of action. There is no contention that the cause of action in this case is similar to the cause of action in **Kericho HCCC No. 23 of 2009**. It follows that the plaintiff is barred from filing a new suit over the same cause of action.

I have gone through the authorities tendered by Mr. Migiro for the plaintiff but they are clearly distinguishable. The authorities tendered address a dismissal for want of prosecution and not a dismissal for non-attendance under **Order 12 Rule 3**. They have no bearing in this matter. The situation herein is more or less similar to that which ensued in the case of **Salem Ahmed Hasson Zaidi vs Faud Hussein Humeidan (1960) EA 92**. Just as in this case, at the hearing of the suit, the plaintiff did not appear but the defendant did. The plaintiff's suit was subsequently dismissed for non-attendance. A new suit was filed. The East African Court of Appeal held that this latter suit was res judicata and held that a judgment pronounced against a party under the then **rule 178** of the Rules of the Court (similar to our **Order 12 Rule 3**) must be deemed to be a decision on the merits and have the same effect as a dismissal upon evidence, and accordingly, the matters in issue in the first action must be deemed to have been heard and determined; the dismissal of the earlier action therefore operated as res judicata.

The provisions of **Order 12 Rule 6 (2)** speak for themselves. The remedy that the plaintiff had was to apply to set aside the order of dismissal as provided by **Order 12 Rule 7** which is drawn as follows :-

***Setting aside judgment or dismissal [Order 12, rule 7.]***

*Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.*

It indeed appears that the plaintiff pursued this avenue but failed. His remedy was not to file a new suit but pursue an appeal, and hope that he will succeed. This new suit is untenable and must be dismissed. It is hereby dismissed with costs.

It is so ordered.

**Dated, Signed and delivered on this 24<sup>th</sup> day of July, 2015**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**PRESENT**

Mr. Migiro Advocate for Plaintiff

Mr. Siele Sigira Advocate for Defendant

Court Assistant; Mr. Kenei