



**Ong'ong'o v Ong'ong'o & 2 others (Judicial Review 1 of 2023)
[2024] KEELC 1441 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
JUDICIAL REVIEW 1 OF 2023
AY KOROSS, J
MARCH 14, 2024**

BETWEEN

MAURICE ADINDA ONG'ONG'O APPLICANT

AND

CLEMENT ABOGE ONG'ONG'O 1ST RESPONDENT

LAND REGISTRAR, BONDO 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. This ruling seeks to determine the chamber summons dated 14/07/2023 that was filed by the applicant in which he prays for several reliefs some of which are spent and the substantive prayers for determination are: -
 - a. The applicant be granted leave to file judicial review proceedings for the order of certiorari to quash the decision of Bondo District Land Tribunal cause no.18 of 1990 of April 2020.
 - b. The applicant be granted leave to file judicial review proceedings for the order of certiorari to quash the decision and order of Bondo SRM in Misc. Civil Case No. 2 of 2010 made on 25/06/2020.
 - c. The applicant be granted leave to file judicial review proceedings for the order of mandamus to compel the land registrar Bondo to remove and/or vacate the caution lodged by the 1st respondent on or about 30/12/2014.
 - d. Costs of the motion be borne by the 1st and 2nd respondents.



2. The motion is based on grounds set out on its face and on the statutory statement dated 14/07/2023 and supporting affidavit of the applicant Maurice Adinda Ongo'ng'o deposed on 14/07/2023 together with annexures thereto.
3. It is observed that the applicant filed a supporting affidavit instead of a verifying affidavit. Be that as it may, the grounds, contents of the statement and supporting affidavit are related.
4. In summary, the applicant asserts the Bondo Land Disputes Tribunal (Tribunal) lacked jurisdiction to nullify the applicant's title over land parcel no. South South/Migwena/658 (suit property) and divide the suit property.
5. He contends that according to him, this decision is illegal, null and void and therefore, its adoption as a judgment of the court in Bondo SRM in Misc. Civil Case No. 2 of 2010 could not stand. Further, he contends the decision of the 2nd respondent which had declined to remove a caution registered by the 1st respondent is illegal, invalid, null and void.
6. In addition, he avers that being aggrieved by the decision of Bondo SRM in Misc. Civil Case No. 2 of 2010, he filed a suit before this court in Kisumu ELC Case no.554 of 2015 and by a decision rendered on 13/09/2019, his claim was dismissed.

1st respondent's case

7. In opposition, the 1st respondent who acts in person filed grounds of opposition dated 20/09/2023 and a replying affidavit which he deposed on 20/09/2023. His grounds of opposition raised the following grounds:-
 - a. By virtue of Section 9(3) of the Law Reform Act, the chamber summons was statutory barred.
 - b. The matter was res judicata to Tribunal proceedings and ELC Case no.554 of 2015.
 - c. The matter was sub judice to Bondo ELC Case no. E044 of 2023.
 - d. The applicant was guilty of forum shopping.
8. Some of these grounds of opposition were repeated in the replying affidavit and I need not rehash them. In addition, he avers the applicant lodged a claim before the Tribunal which he lost and judgment was entered in his (1st respondent) favour and that of their father. He avers this decision was adopted as an order of the court. Further, a suit to this court by the applicant was dismissed.
9. He avers he lodged a caution in order to safeguard his interests and on hearing both parties, the 2nd respondent declined to lift the caution. He avers that in the Bondo case, the applicant has sought an order of eviction. The 2nd and 3rd respondents did not participate in these proceedings.

Parties' submissions

10. The court directed parties to file written submissions. As this court pens down this ruling, the applicant's counsel has not complied with the directions of the court and if at all submissions will be filed, which as at now it has not, this court will consider them as having been filed out of time and will not consider them.
11. The 1st respondent filed written submissions dated 22/12/2023 which this court will consider in rendering this decision. It is noted the 1st respondent did not avail copies of the decisions he relies upon in arguing his position and on that basis, this court will not consider them.



Issues for determination and preliminary issues

12. I have carefully considered the chamber summons, affidavits, grounds of opposition, 1st respondent's submissions and provisions of law and it is the considered view of this court that the following issues arise for determination: -
 - a. Whether the chamber summons is time barred.
 - b. Whether the chamber summons is res judicata and sub judice.
 - c. If either (a) or (b) or both are not in the affirmative, whether the chamber summons is merited.
13. Nevertheless, before I delve into the issues, I must first deal with certain preliminary issues that emanate from the chamber summons and parties' affidavits.
14. Some of the parties in these proceedings were misdescribed or erroneously sued. For clarity, the republic is typically the applicant and not an aggrieved person and, in these proceedings, the proper applicant has not been properly intituled. Likewise, the applicant is erroneously referred as an applicant instead of ex parte applicant and the 1st respondent has not been described as an interested party.

a. Whether the chamber summons is time barred.

15. Section 9(2) and (3) of the [Law Reform Act](#) stipulates thus: -
 - (2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.
 - (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
16. These provisions of law are replicated within the provisions of Order 53 Rule (2) of the [Civil Procedure Rules](#) which provides as follows: -

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”
17. The Court of Appeal in [Wilson Osolo v John Ojiambo Ochola & Another](#) 1995 eKLR held: -

“It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from section 9(3) of the [Law Reform Act](#). Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure



Rules that procedure cannot be availed of for extension of time limited by statute, in this case, the Law Reform Act. There is no provision for extension of time to apply for such leave in the Limitation of Actions Act Cap 22 of the Laws of Kenya which gives some limited right for extension of time to the suits after expiry of a limitation period. But this Act also has no relevance here.”

18. From provisions of law as read together with settled precedent, judicial review applications must be filed within 6 months from the date of the impugned decision and this court has to interrogate if this chamber summons is competently before this court.
19. On scrutiny of several decisions the applicant is aggrieved against, it emerges that some of the dates he indicated on the face of the chamber summons as the dates the decisions were rendered are at variance with the actual dates they were rendered. I believe this was intended to mislead this court in order to obtain orders through the back door.
20. Anyway, the Tribunal’s decision was rendered on 20/04/2010, Bondo SRM in Misc. Civil Case No. 2 of 2010 on 25/06/2010 and that of the 2nd respondent on 30/12/2014. All these decisions were rendered within a period of 9 to 13 years ago and unquestionably, the chamber summons is filed outside the statutory period of 6 months. I must hold and find that the chamber summons is statutory barred.

b. Whether the chamber summons is res judicata and sub judice.

21. The doctrine of sub judice is explicated by Section 6 of the Civil Procedure Act which states as follows: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

22. Further, the doctrine of res judicata is provided for under Section 7 of the Civil Procedure Act in the following terms: -

“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.”

23. From the wordings of the law on these two doctrines, the factors to be considered by the court in both of them are almost similar only that in sub judice, the previous suit and the one that is the subject for determination must both be pending before courts of competent jurisdiction. The essence of the doctrine is to avoid issuance of conflicting orders caused by multiplicity of cases. See the Supreme Court of Kenya decision of Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR.
24. Whilst *res judicata* applies in situations where a suit has formerly been heard and determined on merits by a court of competent jurisdiction. The crux of the doctrine is to bring litigation to finality and affords parties closure and respite from the spectre of being vexed with multiple suits. See the Supreme Court of Kenya decision of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.



25. Now, turning to the doctrine of *sub judice*, although the 1st respondent alluded there were pending proceedings in Bondo ELC Case no. E044 of 2023 in which the applicant has sought eviction orders, he did not tender these proceedings before this court for testing the veracity of his claim and on that basis, I find and hold the current suit is not sub judice.
26. As for res judicata, having examined the proceedings of ELC Case no.554 of 2015, it is noted even if the court in the previous suit competently heard and determined the suit over the suit property on merits, it is observed that apart from the applicant and 1st respondent being parties therein, none of the other parties herein were parties.
27. In addition, in the former suit, the court considered the merits of whether it could declare the Tribunal's decision and that of Bondo SRM in Misc. Civil Case No. 2 of 2010 a nullity for want of jurisdiction whilst in the chamber summons, the applicant has invoked the supervisory powers of this court in which he seeks an interrogation of the decision-making process of public bodies. Put another way, the issues in dispute in the two cases are at variance. Therefore, I find and hold the instant suit is not res judicata. I need not say more on the 3rd issue.
28. In concluding, I must mention that the applicant and 1st respondent are siblings. In dismissing the applicant's suit in ELC Case no.554 of 2015, my brother S.M. Kibunja J determined the suit property albeit registered in the applicant's name, belonged to the applicant and 1st respondent's father one Ong'ong'o Arudo whom he had sued as a co-defendant in that particular suit.
29. There is no evidence this decision has been set aside by review or by the Court of Appeal. Hence, it is high time for the applicant to accept that this decision is binding upon him and he must learn to co-exist peacefully in the suit property with the 1st respondent without saddling him with court cases to no end.
30. I need not say more. In the end, I find the chamber summons dated 14/07/2023 is incompetent and bad in law. It is trite law costs follow the event. However, even if some of the parties are siblings and bearing in mind the history of various court proceedings, I award costs to the 1st respondent which shall be borne by the applicant.
31. Ultimately, based on the reasons and findings stated above, I hereby issue the following disposal orders:
- a. The applicant's chamber summons dated 14/07/2023 is hereby struck out.
 - b. Costs are awarded to the 1st respondent which shall be borne by the applicant.
- Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

14/3/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Jaoko for the applicant

1st respondent

N/A for 2nd and 3rd respondents



Court assistant: Mr. Ishmael Orwa.

