



**Archer & another v Archer & 2 others (Civil Application  
E078 of 2021) [2022] KECA 384 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 384 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E078 OF 2021  
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA  
MARCH 4, 2022**

**BETWEEN**

**JAMES ARCHER ..... 1<sup>ST</sup> APPLICANT**

**JOANNA TRENT ..... 2<sup>ND</sup> APPLICANT**

**AND**

**INGER CHRISTINE ARCHER ..... 1<sup>ST</sup> RESPONDENT**

**ANNELISE ARCHER CLARK ..... 2<sup>ND</sup> RESPONDENT**

**HELLEN KAY HARTLEY ..... 3<sup>RD</sup> RESPONDENT**

*(An application for an order of injunction pending the hearing and determination of the pending appeal being Msa Civil Appeal 39 of 2020 arising from the judgement and decree of the Environment and Land Court of Kenya at Mombasa delivered by Hon. C.K. Yano, J on 26th November, 2019 In ELC No. 345 of 2017)*

**RULING**

1. The Applicants in their application dated 26<sup>th</sup> October, 2021 brought pursuant to Rules 5(2)(b), 41 and 47 of the [Court of Appeal Rules](#) seek six (6) orders pending the hearing and determination of the Appeal No. 39 of 2020. Firstly, they seek an injunction restraining the respondent from transferring, leasing or any way dealing with the properties Title Numbers Kwale/Diani Beach Block/1745 to 1752; secondly, that the court orders the respondents to deposit half of the purchase price received from Anne Vaughn with respect to the suit land assessed at Kshs. 10m; thirdly, that the respondents be ordered to deposit half of the monthly rents they received as from January, 2020 from their lessee Hannah Wambui Gatundu from the suit land that is assessed as Kshs 250,000/- per month; fourthly, that the respondents be ordered to deposit half of any monies collected from the disposition of the suit properties; fifthly, that the respondents be restrained from removing from the jurisdiction of the court any monies so collected from the transfer of the suit lands; and finally, that a mandatory injunction



be issued compelling the respondents to deposit in the bank account of this court, any monies they received from the disposition of the suit properties.

2. The background to the dispute is that the Applicants sued the Respondents in Mombasa ELC 345 of 2017 where they claimed to have acquired a resulting trust over  $\frac{3}{4}$  of the properties Kwale/Diani Beach Block/806 to 808; that the said properties were excised from Land Reference Number 55 (5004/60) that was stated to have been registered in the names of the late Christopher John Archer; the Applicants averred that they assisted the deceased with a loan that he sought towards the purchase of the suit land.
3. The ELC, in its judgment dated 26<sup>th</sup> November, 2019 found that the loan that was advanced to the late Christopher John Archer could not be a basis for which the Applicants could claim a beneficial interest in the suit land, whether through constructive or resulting trust. It was also found that the Applicants were guilty of laches for making their claim long after the properties had been sub-divided and developed. The ELC dismissed the Applicants suit.
4. The Applicants being aggrieved with the decision of the ELC filed a notice of appeal on 4<sup>th</sup> December, 2019.
5. The instant application is supported by the undated sworn affidavit of James H. Archer. It reiterates the grounds on the face of the notice of motion, which are in brief that the Applicants and the Respondents entered into a consent dated 27<sup>th</sup> June, 2012 which inter alia provided that the Respondents would stop all dealings in the suit properties pending the hearing and determination of the suit in the ELC. That pending the judgment of the ELC, the Respondents consolidated the suit properties and sub-divided them by a new scheme, selling off some, thus effectively converting them. It is also averred that the Applicant filed an appeal being Civil Appeal No. 22 of 2020 in which he has filed a memorandum of appeal setting out four grounds in which the judgment of the ELC is challenged for finding there was no resulting trust; for finding that the Applicants were guilty of laches; for finding that the Appellants had no beneficial interest in the suit property; and, for totally ignoring their written submissions.
6. The application is opposed by way of a replying affidavit deposed by the 2<sup>nd</sup> Respondent, in which she avers that the Applicants are not deserving of the discretion of the court because they brought a similar application in this court being Civil Application 22 of 2020, which application was dismissed vide ruling delivered by this court on 29<sup>th</sup> January, 2021 and which has not been appealed. The 2<sup>nd</sup> Respondent stated that the Applicants' claim is for  $\frac{3}{4}$  of the suit land on the basis of a resulting trust yet the suit properties were bequeathed to the 3 Respondents by their father, and that they have since registered them in their names as Plot Nos. 806 to 808; that the Plot Nos. 806 to 808 were further subdivided giving a total of 8 parcels being Plot Nos. 1745 to 1752; and that the 3<sup>rd</sup> Respondent was registered as proprietor of Plot 1750 to 1752; whereas the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were registered as proprietors of Plot Nos. 1745 to 1749. She averred that the suit land was leased to Hannah Gatundu and that the injunctions being sought have been overtaken and will serve no useful purpose.
7. The application was heard virtually on the 7<sup>th</sup> December, 2021. Mr. Bryant learned counsel appeared for the Applicants, while Mr. Omondi Okothe learned counsel held brief for Mr. Muthama for the Respondents. Learned counsel for the Applicants, in his opening remarks stated that his clients have filed Civil Appeal No. 39 of 2020, in which they filed an application seeking similar orders. Mr. Bryant submitted that the suit properties were in danger of being lost. Counsel urged that when they filed the case in 2021, they were advised to enter into a consent order which they did. Secondly that on a human rights perspective, the Applicants have not been heard because the documents they relied upon, a letter dated 1982, together with a Map, the Superior court failed to consider them. He urged that his clients contributed to the purchase of the suit properties, yet their fundamental claim has not been heard, and



more importantly, if the Respondents continue selling the suit property, the Applicants appeal will be rendered nugatory.

8. Submitting in support of the application, Counsel Bryant placed reliance on the case of *A.G. v Okiya Omtatab & Another*, Civil Application 331 of 2018 and submitted that they have an arguable appeal as they were denied their interest in the suit land based on a decision that they found erroneous. It was submitted that damages are not an adequate remedy because it will not compensate the memories of a life lived and time spent on the suit properties. It was added that the prayers ordering the Respondents to deposit monies, if granted will be the Applicants' saving grace to get what little remains of the suit properties.
9. Submissions in opposition to the application were filed by Ms. Munyao, Muthama & Kashindi Advocates. Counsel submitted that the instant application is res judicata Mombasa Court of Appeal Civil Application 22 of 2020; that there is no appeal against the said decision. It was posited that the application lacks merit because if the application is denied, the Applicants could be compensated by an award of damages if their appeal succeeded. It was argued that the instant application is overtaken by events as the suit properties have already been disposed to third parties for valuable consideration; that the third parties are not before the court.
10. In response to the application being res judicata, Mr. Bryant urged that the doctrine only applies where a case has been heard and determined.
11. We have considered this application, the affidavits sworn in support and in opposition to the application, the filed documents, and the submissions of counsel. we wish to deal with the issue raised of this application being res judicata, as that has a bearing on the court's jurisdiction.
12. In the Respondent's written submissions, it was posited that this application is res judicata for reason it has been heard before. Indeed, Mr. Bryant, learned counsel for the Applicants admitted it but urged that that principle was not applicable since the case has not been heard and determined.
13. In the case of *Independent Electoral and Boundaries Commission vs Maina Kiai & Others* Civil Appeal No. 105 of 2017, this court held:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act, 2010*;

“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 the 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.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (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. In *Uburu Highway Development Ltd v Central Bank of Kenya* [1999] eKLR this court dealing with the same issue rendered the elements as;

- “(a) the former judgment or order must be final;
- (b) the judgment or order must be on merits;
- (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- (d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”

15. The Applicants have been candid. The ruling of this court delivered in Civil Appeal No 39 of 2021 is annexure “TB-04” in the affidavit in support of urgency in this Motion, sworn by Timothy Bryant, learned counsel to the Applicants. In paragraph 14, he deposes”

“That the Appellant/Applicants herein have previously applied for an injunction to preserve the Suit property. The Hon. Court of Appeal issued a ruling dated 29<sup>th</sup> January, 2021 clearly stating that the Appellant/Applicants have an arguable appeal and that it is not frivolous.”

16. The deponent did not disclose what the outcome of that application was. The learned Justices of this court found that indeed the Applicants had an arguable case but failed in the proof the nugatory aspect. The application was for an injunction by the Applicants against the Respondents. The application was similar, between the same parties over the same subject matter and cause of action. It was decided on merits. We are persuaded that the application before us is *res judicata*, and for that reason we lack the jurisdiction to entertain it.

17. In the result, the application is accordingly struck out with costs to the Respondents.

**DATED AND DELIVERED AT MOMBASA THIS 4<sup>TH</sup> DAY OF MARCH 2022.**

**GATEMBU KAIRU, FCIArb**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**J. LESIIT**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*



**DEPUTY REGISTRAR**

