



**Dindi v Otieno (Environment and Land Appeal E009 of 2022)
[2024] KEELC 4819 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E009 OF 2022**

DO OHUNGO, J

JUNE 20, 2024

BETWEEN

THOMAS ONDIMO DINDI APPELLANT

AND

MICHAEL OJAY OTIENO RESPONDENT

*(Being an appeal from the ruling and order of the Senior Resident
Magistrate's Court at Mumias (W K Cheruiyot, Senior Resident Magistrate)
delivered on 28th March 2022 in Mumias MCELC No. E001 of 2020)*

JUDGMENT

1. The background of this appeal is that the Appellant moved the Subordinate Court through Originating Summons (OS) dated 18th November 2020 through which he sought determination of whether he had acquired title to the parcel of land known as South Wanga/Bukaya/1012 (the suit property) by adverse possession. The Respondent herein later filed Notice of Motion dated 18th August 2021, through which he sought striking out of the suit on the ground that the Subordinate Court lacked jurisdiction since the court in ELC No. 298 of 2015 had pronounced itself on the suit property by ordering eviction of the Appellant therefrom.
2. Upon hearing Notice of Motion dated 18th August 2021, the Subordinate Court (W K Cheruiyot, Senior Resident Magistrate) delivered its ruling on 28th March 2022 wherein it upheld the Respondent's argument and dismissed the OS with costs to the Respondent.
3. Aggrieved, the Appellant filed this appeal through Memorandum of Appeal dated 14th April 2022. He prayed that the order of the Subordinate Court be set aside and that this appeal be allowed with costs.
4. The following grounds are listed on the face of the Memorandum of Appeal:



- i. That the honourable court erred both in law and fact by holding that the appellant's suit was res judicata.
 - ii. That the honourable court erred both in fact and law by holding that the appellant's claim under customary trust and adverse possession had been determined and yet the issues had not been determined by any competent court.
 - iii. That the Honourable court erred both in fact and law in analyzing the pleadings and issues before himself and hence arrived at a wrong finding.
5. The appeal was canvassed through written submissions, which both parties duly filed. The Appellant argued that the Subordinate Court erred in holding that his case was res judicata, yet all the issues raised in the OS had not been determined in ELC No. 298 of 2015. That the judgement in ELC No. 298 of 2015 ordered eviction of the appellant from the suit property on the basis that the respondent was the registered owner but did not deal with the issues of adverse possession and fraud in obtaining title. That in the circumstances, the OS was not res judicata. The Appellant went on to argue that the Subordinate Court erred in holding that adverse possession and customary trust had been determined or should have been raised in ELC No. 298 of 2015. That in doing so, the Subordinate Court violated his right to a hearing. The appellant therefore urged this court to allow the appeal with costs of this appeal.
 6. In response, the Respondent argued that the Appellant's father filed Kakamega HCC No. 123 of 2009 where he sought adverse possession and that the said suit was dismissed on 18th March 2015. That in ELC No. 298 of 2015, he sought and was granted eviction orders against the Appellant. The Respondent further argued that the Appellant neither filed any counterclaim in ELC No. 298 of 2015 nor appealed against the decision. He therefore contended that the suit in the Subordinate Court was res judicata and that having been evicted from the suit property, time for purposes of adverse possession stopped running in favour of the Appellant. The Respondent therefore urged this court to dismiss the appeal with costs.
 7. As the first appellate court in this matter, this court has an obligation to re-consider and re-evaluate Notice of Motion dated 18th August 2021, the pleadings, and the material on record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
 8. I have considered the grounds of appeal, the pleadings, the affidavits, and the parties' submissions. The issues that arise for determination are whether the suit before the Subordinate Court was res judicata and whether the Subordinate Court had jurisdiction.
 9. It is plain enough that jurisdiction is the entry point in any matter that the court is called upon to determine and is the very life and soul of any judicial proceedings. Without jurisdiction, the proceedings come to a certain end and the court cannot take any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
 10. As the Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

....



11. One of the ways in which a court of law can be deprived of jurisdiction in a matter is through the doctrine of res judicata. The doctrine has been immortalized at Section 7 of the [Civil Procedure Act](#) as follows:

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. For an objection based on res judicata to be upheld, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined on the merits by a competent court and the issue is raised once again in the new suit. See [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR.
13. As noted in the opening paragraph of this judgment, the Appellant moved the Subordinate Court through OS dated 18th November 2020, seeking determination of whether he had acquired title to the parcel of land known as South Wanga/Bukaya/1012 (the suit property) by adverse possession. The OS was filed on 19th November 2020.
14. There is no dispute that the parties herein also litigated in Kakamega ELC No. 298 of 2015 where the Respondent herein was the Plaintiff while the Appellant was the Defendant. The Respondent's case was that he was the registered proprietor of the parcel of land known as South Wanga/Bukaya/1012 and that the Appellant was illegally occupying it. Upon hearing the matter, N. A. Matheka, J. delivered judgment on 26th June 2019 as follows:

I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. The defendant whether by himself and or other family members and/or other family members and/or agents are to vacate from the suit land parcel No. S. Wanga/Bukaya/1012 and demolish any buildings and or structures erected thereon by the defendant and or family members and or agents within the next 6 (six) months from the date of this judgement and in default eviction notice to issue forthwith.
 2. No orders as to costs as the parties are relatives.
15. Subsequently, an application for eviction orders was brought and the court resolved it in a ruling delivered on 25th November 2020. The court stated:

This court has carefully considered the application and the submissions therein. Judgement was entered in this matter way back on 26th June, 2019 whereby the respondent were to vacate the suit land within six months from the date of the said judgement. There is no order of stay in this case and the respondent cannot disobey court orders by saying he was not aware of the judgement. On perusal of the court file I find that the respondent was present in person when the judgement was delivered. I find this application is merited and I grant the same with costs to the applicant.

It is so ordered.



16. The Appellant has contended that adverse possession and customary trust were not determined in Kakamega ELC No. 298 of 2015 and that consequently, the OS before the Subordinate Court was not res judicata. It would help to remind the Appellant that since he was facing a claim for eviction orders, he ought to have raised every possible defence, including adverse possession and customary trust. The doctrine of res judicata does not permit him to keep some tricks up his sleeve only to unleash them later through a new suit. That indeed is the expectation of explanation number 4 of Section 7 of the [Civil Procedure Act](#) which provides:

Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

17. The whole idea behind res judicata is to avoid multiplicity of suits, with a view to bringing litigation to an end. The Supreme Court emphasized as much in [Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another](#) [2016] eKLR where it stated:

The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

18. I have no doubt in my mind that in filing Mumias MCELC No. E001 of 2020 on 19th November 2020, fully aware of the judgment delivered against him in Kakamega ELC No. 298 of 2015 a year earlier on 26th June 2019, the Appellant was attempting a second bite at the cherry. He knew fully well that his eviction had been ordered and its enforcement was imminent. He filed the OS on the eve of delivery of the ruling of 25th November 2020.

19. I find that the Appellant's suit before the Subordinate Court was res judicata and that consequently, the Subordinate Court lacked jurisdiction to hear and determine the suit.

20. This appeal is without merit, and I therefore dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Mondia holding brief for Mr Manyoni for the Appellant

Mr Amasakha for the Respondent

Court Assistant: M Nguayai

