



Wanyande v Ashibambo (Deceased) & 2 others (Environment & Land Case E042 of 2022) [2024] KEELC 4763 (KLR) (19 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4763 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E042 OF 2022**

**DO OHUNGO, J
JUNE 19, 2024**

BETWEEN

WILLIAM NJEGA WANYANDE PLAINTIFF

AND

ELIJAH ANDAMA ASHIBAMBO (DECEASED) 1ST DEFENDANT

JEMIMAH PENZI MUKUNGU 2ND DEFENDANT

DISTRICT LAND REGISTRAR, KAKAMEGA 3RD DEFENDANT

RULING

1. This ruling is in respect of three applications: the plaintiff's Notice of Motion dated 11th October 2022, the second defendant's Chamber Summons dated 13th December 2022 and the plaintiff's Notice of Motion dated 14th June 2023.
2. Notice of Motion dated 11th October 2022 is supported by an affidavit sworn by the plaintiff and seeks the following orders:
 1. [Spent]
 2. [Spent]
 3. That pending the hearing and determination of this suit, the court do issue an order of temporary injunction restraining the defendants/respondents either by themselves or through their agents, servants, employees or any other persons claiming to act under them from evicting, issuing a sale notice, directing any sale whatsoever or selling, disposing off or alienating by sale of public auction, construction, or in any manner interfering with registration of Land Parcel No/Kisa/Mukaha/598 and/or resultant sub-divisions Kisa/Muhaka/918, 919, 920, 921 and 922.



4. That the costs of this application be in the cause.
3. The second defendant's Chamber Summons dated 13th December 2022 is supported by an affidavit sworn by the second defendant and seeks the following orders:
 1. [Spent]
 2. That the plaintiff's suit be dismissed with costs to the 2nd defendant.
 3. That the costs of this Application be awarded to the 2nd defendant against the plaintiff.
4. Lastly, the plaintiff's Notice of Motion dated 14th June 2023 is supported by an affidavit sworn by the plaintiff and seeks the following orders:
 1. [Spent]
 2. That an order be granted to enjoin the Attorney General as the 2nd respondent/defendant in this suit.
 3. That an order be granted for the removal/struck off (sic) of the initial enjoinder of 1st defendant/respondent: "Elijah Andama Ashibambo (deceased)".
 4. That an order be granted to amend (sic) the plaint by enjoining the Attorney General as the 2nd respondent/defendant and removal of Elijah Andama Ashibambo (deceased) as 1st defendant/respondent.
 5. That the cost of the suit (sic) be in cause.
5. I will deal first with Chamber Summons dated 13th December 2022 since it raises issues that go to the jurisdiction of the court. I will return to the other applications if Chamber Summons dated 13th December 2022 is dismissed.
6. The grounds of the application, as listed on its face, are inter alia that the matter was determined on merit by a court of competent jurisdiction and that the plaintiff's case is therefore res judicata.
7. In her supporting affidavit, the second defendant deposed that the first defendant who was her father in law filed Kakamega RMCC No. 293 of 1980 against Hezron Wanyande who was the plaintiff's father and that the Subordinate Court determined the matter in favour of was her father in law. She annexed a copy of a decree issued in the matter and added that she is the administrator of the estate of the first defendant who is deceased. She also deposed that she was the proprietor of land parcel number Kisa/Muhaka/598 which she acquired through Kakamega HC Succession Cause Number 321 of 1990 and which she subdivided into Kisa/Muhaka/918 to 922 with a view to transferring to beneficiaries. She went on to depose that this suit is an abuse of the court process and an attempt at reviving Kakamega CMCC No. 897 of 2018.
8. The plaintiff opposed Chamber Summons dated 13th December 2022 through a replying affidavit in which he deposed that Kakamega RMCC No. 293 of 1980 dealt with a boundary dispute as opposed to transfer of land parcel number Kisa/Muhaka/598.
9. Chamber Summons dated 13th December 2022 was canvassed through written submissions. The second defendant filed submissions dated 30th March 2023. She relied on Section 7 of the *Civil Procedure Act* as well as the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR and argued that this matter is res judicata in view of ruling delivered on 17th September 2018 in Kakamega CMCC No. 897 of 2018. She further cited the cases of *Republic v The Attorney General & Another ex parte James Alfred Koroso* [2013] eKLR and *Ali K Ahmed t/a Sky Club*



Restaurant v Kabundu Holdings Ltd [2005] eKLR and urged that this suit is an abuse of court process and should for that reason be dismissed with costs.

10. In response, the plaintiff filed submissions dated 2nd October 2023. He argued that Kakamega RMCC No. 293 of 1980 was a boundary dispute and that the second defendant had misinterpreted the decree in the said case. He added that the problem between the parties was caused by the second defendant's actions in Kakamega HC Succession Cause Number 321 of 1990 where she sought grant for the whole of Kisa/Muhaka/598 contrary to the decree in Kakamega RMCC No. 293 of 1980. The plaintiff further argued that the decree in Kakamega RMCC No. 293 of 1980 is self-explanatory and it dealt with only a portion of Kisa/Muhaka/598. He went on to urge that second defendant fraudulently obtained grant in Kakamega HC Succession Cause Number 321 of 1990. He concluded his submissions with a passionate plea that his case is a cry for justice with a view to getting a portion of Kisa/Muhaka/598 as decreed in Kakamega RMCC No. 293 of 1980.
11. The third defendant did not participate in the hearing of Chamber Summons dated 13th December 2022.
12. I have considered Chamber Summons dated 13th December 2022, the affidavits, and submissions. The sole issue for determination whether res judicata has been established.
13. Res judicata is a doctrine of general application which has found statutory expression in Section 7 of the *Civil Procedure Act* which provides 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.
14. The prerequisites for the success of an objection based on res judicata are that there must be a previous suit in which the matter was in issue; the parties in both matters were the same or litigating under the same title; the previous matter was heard and determined 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. Res judicata operates as a complete estoppel against any suit that runs afoul of it. See also *Maitihene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
15. As the Supreme Court stated in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* [2016] eKLR, the doctrine of res judicata allows a litigant only one bite at the cherry by preventing the litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action or submitting to court issues that have been heard and determined by a competent court. The doctrine prevents a multiplicity of suits and ensures that litigation ends. Its resolve in doing so is so firm that cosmetic facelifts such as changing some parties to an old dispute will not escape its iron shield. See *E.T. v Attorney General & another* [2012] eKLR.
16. A perusal of the plaint herein shows that the plaintiff is seeking judgment inter alia for revocation of registration of land parcel numbers Kisa/Muhaka/918 to 922 so as to revert to Kisa/Muhaka/598. He also seeks an order compelling the third defendant to register Kisa/Muhaka/598 in his name. The plaintiff's grounds for seeking those reliefs, as pleaded in his plaint, are that the first defendant obtained title to Kisa/Muhaka/598 fraudulently and that the second defendant equally obtained title to the said parcel fraudulently through succession proceedings in respect of the estate of the first defendant and in violation of decree issued in Kakamega RMCC No. 293 of 1980.



17. Among the documents that the plaintiff included in his list and bundle of documents are a copy of the register for Kisa/Muhaka/598 certified by the Land Registrar on 21st July 1998, a copy of decree issued on 8th September 1981 in Kakamega RMCC No. 293 of 1980 and a copy of an application for confirmation of grant filed in Kakamega HC Succession Cause Number 321 of 1990.
18. I have perused the decree in Kakamega RMCC No. 293 of 1980 and I note that the plaintiff in the said case was Elijah Wandama while the defendant was Hezron Wanyande. The plaintiff herein has joined the said Elijah Wandama or Elijah Andama to this case as first defendant even though he is since deceased. There is no dispute that the second defendant is the administrator of Elijah Andama's estate. There is also no dispute that the plaintiff herein is the son of Hezron Wanyande who was the defendant in Kakamega RMCC No. 293 of 1980. Thus, parties in this case and Kakamega RMCC No. 293 of 1980 are litigating under the same title. It is equally not in dispute that proceedings in Kakamega HC Succession Cause Number 321 of 1990 concerned the administration of Elijah Andama's estate.
19. The decree in Kakamega RMCC No. 293 of 1980 shows that the said case was a claim among others for "rectification of the register to record [Elijah Andama] as the owner of the portion of land forming part of parcel No. Kisa/Muhaka/598." [Emphasis added]. There was also a prayer for "such further or other relief" as the court deemed fit. The decree shows that the matter went through formal proof hearing and that there was final judgment for orders, among others, that "the register in respect of L.R. No. Kisa/Muhaka/598 be and are hereby rectified to reflect [Elijah Andama] as the owner thereof."
20. Thus, it is indisputable that land parcel number Kisa/Muhaka/598 was the subject of Kakamega RMCC No. 293 of 1980 as it is the subject of this suit. Arising from the relief of "rectification of the register" claimed in Kakamega RMCC No. 293 of 1980 and the final judgment that the register be rectified to reflect Elijah Andama as the owner, I do not agree with the plaintiff that the case was merely a boundary dispute. If any of the parties was of the view that the order conferring ownership on Elijah Andama was not properly made, their recourse was in an application for setting aside or an appeal and not a new suit.
21. The plaintiff's claim that Elijah Andama and the second defendant fraudulently acquired land parcel number Kisa/Muhaka/598 cannot be resolved in this case in view of the decree in Kakamega RMCC No. 293 of 1980 and the confirmation of grant in Kakamega HC Succession Cause Number 321 of 1990. The matter is res judicata and cannot therefore be raised in this suit.
22. As I conclude, I recall the plaintiff's enthusiastic plea for justice and his desire to get a portion of Kisa/Muhaka/598. A desire for justice is a noble aspiration. The obligation to render justice is a duty at the core of our constitutional architecture. Nevertheless, the quest for justice must be in fidelity to the law and the applicable procedure. Procedure is also a handmaiden of just determination of cases. See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.
23. In the result, the plea of res judicata is upheld. Considering that outcome, I need not determine the plaintiff's Notice of Motion dated 11th October 2022 and Notice of Motion dated 14th June 2023.
24. I strike out the plaintiff's suit. In view of the close family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



Lucas Samuel Owino present for the plaintiff

No appearance for the first and third defendants

Ms Lugulu for the second defendant

Court Assistant: M Nguyayi

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