



**Ajuok (Suing as personal representative of the Estate of Hagai Ajuok - Deceased) v Okoko & 2 others (Land Case E008 of 2023) [2024] KEELC 6267 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6267 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
LAND CASE E008 OF 2023  
AY KOROSS, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**PAMELA AKECH AJUOK (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HAGAI AJUOK - DECEASED) ..... PLAINTIFF**

**AND**

**PETER NICHOLAS YAHUMA OKOKO ..... 1<sup>ST</sup> DEFENDANT  
EDWIN OWINO ODUOR ..... 2<sup>ND</sup> DEFENDANT  
DISTRICT LAND REGISTRAR (UKWALA) ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**2<sup>nd</sup> defendants case**

1. The notice of motion dated 12/02/2024 that is the subject of this ruling is filed by the 2<sup>nd</sup> defendant and in it, this court is moved under several provisions of law whereby he sought for the entire suit to be struck out or dismissed.
2. The motion is predicated on grounds thereon and it is supported by an affidavit sworn on 14/02/2024 by the 2<sup>nd</sup> defendant's counsel Mr. George Miyare.
3. The grounds in support of the motion are inter alia, the court is bereft of jurisdiction to entertain the suit; the suit is res judicata, it did not disclose a reasonable cause of action, it is scandalous, frivolous, vexatious, and abuse of court process.
4. These matters of law are replicated in the supporting affidavit and to demonstrate res judicata, counsel availed proceedings of Siaya land disputes tribunal Case No. SYA/894/01 (tribunal case) which was filed by John Odongo Ajuok (John) against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. This tribunal case was adopted as a court judgment on 16/10/2003 in Siaya SRM Misc. Civil Appli. No. 18 of 2003.



5. Counsel asserted that the suit was statutorily barred since the plaintiff discovered alleged fraud over land parcel no. South Ugenya/Yiro/672 (mother parcel) that has been subdivided into South Ugenya/Yiro/1999, 2000, and 2001 (suit properties) several years ago and the particulars of fraud were vague.
6. Lastly, he averred the claim was full of deceptions and thus scandalous, frivolous, vexatious, and abuse of the court process. The 1<sup>st</sup> and 3<sup>rd</sup> defendants did not participate in the proceedings.

### **Plaintiff's case**

7. The motion is strenuously opposed by the plaintiff's replying affidavit which is deposed on 5/03/2024 and in summary, she stated this court has jurisdiction to handle the suit; the plaintiff's suit is not statutorily barred as she discovered fraud over the mother parcel in March 2016; the suit is not res judicata as the subject matter is different, in the tribunal case, John could not institute suit as he was not an administrator of the plaintiff's estate and, the motion is unmeritorious and should be dismissed.

### **2<sup>nd</sup> defendant's submissions**

8. As directed by the court, the 2<sup>nd</sup> defendant's counsel M/s. Obonyo filed written submissions dated 19/03/2024 and submitted that this court should consider 3 issues which were whether the suit is time-barred, res judicata, and amenable for striking out.
9. On the 1<sup>st</sup> issue of res judicata, counsel submitted that the doctrine was founded on Section 7 of the Civil Procedure Act and that this case and the tribunal case bore the hallmarks of res judicata. In making her arguments, counsel relied on the Supreme Court of Kenya decision of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR which summarized the principles of res judicata thus:-

“This test is summarized in Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

10. Counsel's submission on the 2<sup>nd</sup> issue echoed averments contained in the supporting whereas on the 3<sup>rd</sup> issue, counsel submitted the suit did not disclose a reasonable cause of action as fraud is not specifically particularised.
11. In submitting the suit was frivolous, scandalous, vexatious, and prejudicial, counsel waded into matters of facts as alluded to in the plaintiff's witness statement. Lastly, counsel submitted that advocates are not barred from swearing affidavits. The 1<sup>st</sup> and 3<sup>rd</sup> defendants did not file submissions.

### **Plaintiff's submissions**

12. His law firm on record M/s. Achach & Associates Advocates LLP filed written submissions dated 22/03/2024 in which counsel acknowledged 3 issues as arising for determination, whether the suit is statutorily barred, res judicata, and, whether the court has jurisdiction to hear and determine the suit.
13. On the 1<sup>st</sup> issue, counsel submitted the relevant provisions were Sections 7 and 26 of the Limitation of Actions Act and as submitted by counsel, time has not lapsed as time started to run in 2016 and relied on the decision of Mintina Ene Keton Koponi (Suing as a legal representative of the estate of Keton Ole



*Koponi Parsena (Deceased) v Francis Njakwe Gathiari & 2 others* [2018] eKLR where in the persuasive decision, the court stated thus:-

“The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it.”

14. On the 2<sup>nd</sup> question of res judicata, counsel reiterated averments contained in the replying affidavit and stated the suit is not res judicata and on the 3<sup>rd</sup> issue, maintained that this court has jurisdiction to deal with the suit.

### **Issues for determination**

15. Having carefully given thought to the motion, its grounds, affidavits, and rival submissions, the issues that arise for resolution and shall be addressed consecutively are: -
- a. Whether the suit is res judicata.
  - b. Whether the suit is statutory barred.
  - c. Whether the suit is scandalous, vexatious, frivolous, does not disclose a cause of action, and an abuse of the court process.
  - d. What orders should this court issue including an order as to costs?

### **Analysis and determination**

#### **I. Whether the suit is res judicata.**

16. The guiding principles of res judicata are set out in Section 7 of the *Civil Procedure Act* which states 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.”

17. The essence of this doctrine is to thwart a party claiming under the same title, from seeking a second bite of the cherry by returning to court claiming a similar relief or additional reliefs other than the ones earlier claimed in the previous suit.
18. As illuminated in *Kenya Commercial Bank Limited (Supra)*, this doctrine enhances the effectiveness of the adjudication process, eliminates multiplicity of suits, reduces backlog, brings litigation to an end, and saves parties from unnecessary costs.
19. The doctrine of res judicata is a substantive issue that touches on the jurisdiction of the court. The Court of Appeal in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary*



*for Transport and Infrastructure & 3 Others* [2015] eKLR expressed itself as follows on the process of moving the court when the doctrine of res judicata was imminent in a suit;

“The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of process ...”

20. The principles of res judicata are conjunctive and since the existence of the tribunal case is undisputed, that case and this case will be assessed based on the principles drawn from Section 7 of the *Civil Procedure Act* and *Kenya Commercial Bank Limited (Supra)*.
21. In the amended plaint dated 24/01/2024, the plaintiff’s claim was on fraud over the mother parcel and suit properties and claimed he was the rightful owner and sought for the suit properties and or mother parcel to be reverted to his estate.
22. A close examination of the tribunal’s case shows the suit properties were South Ugenya/Yiro/1999 and 2000 which all emanated from the mother parcel. In the tribunal case, the claimant was John who is the plaintiff’s son and the respondents are the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. The claim therein was on illegal transactions over the suit property and John sought a reversion of the mother parcel and or some of the suit properties.
23. Apart from the plaintiff in this suit and the claimant in the tribunal case being different, in this suit the 3<sup>rd</sup> defendant has been added as a party.
24. The two suits fall on all fours on the doctrine of res judicata as the subject matter in both is the mother parcel and or some of the suit properties, the claims are on land, and their improper acquisition by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the tribunal case was heard on merits before adoption as a judgment of the court by a competent court.
25. Even if the claimants in the two cases were different, it is not lost to this court that the plaintiff in this case has by craft conjured new parties for purposes of circumventing res judicata. By explanation 6 of Section 7 of the Civil Procedure Rules, this cannot pass the test.
26. The claimant in the tribunal case derived his claim through the plaintiff herein and it is superfluous for the plaintiff to assert that the claimant in the tribunal case did not at the time, obtain letters of administration yet he never raised this issue with either the tribunal or the court which later adopted the decision of the tribunal as its judgment.
27. It is trite law that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a superficial enhancement to his pleadings. I therefore find the suit is res judicata.

## **II. Whether the suit is statutory barred.**

28. The plaintiff’s claim is silent on when the plaintiff discovered the alleged fraud and though her witness statement admits she discovered the fraud in 2016, this is an issue that would await a formal hearing of the suit.
29. Nonetheless, I must clarify that the plaintiff is of the mistaken belief that the applicable provision of law on claims of fraud is Section 7 of the *Limitation of Actions Act* which provides a 12-year timeline. Absolutely not, fraud is a tortious action, and as envisaged by Section 4(2) of this *Act*, it must be filed



within 3 years from when the cause of action arose or as stipulated by Section 26, within 3 years of discovery.

30. In arriving at this conclusion, I am guided by the Court of Appeal decision of *Ogaga (Suing as the Legal Representative of the Estate of Turufena Kemunto Ogaga-Deceased) v Ogaga & 3 others* (Civil Appeal 45 of 2018) [2022] KECA 1422 (KLR) (16 December 2022) (Judgment) which held:-

“She was therefore within the requisite time frame as the limitation of time with respect to a claim alleging fraud is three years. She cites section 4 (2) of the Limitation of Action that provides that an action founded on tort should not be brought after the expiry of 3 years from the date on which the cause of action accrued...The appellant is correct with regard to the law on limitation of time with respect to fraud- that time does not begin to run for purposes of limitation until the plaintiff discovers the fraud-see the decision of the Supreme Court in *Kenya Ports Authority Vs Timberland(K) Ltd* (2017) eKLR.”

31. Therefore, having found I have no jurisdiction to entertain the suit as it is res judicata, I hereby down my tools and find it unnecessary to address issue (c) while on issue (d), I find the notice of motion dated 14/02/2024 merited and I hereby allow it. Since it is trite law costs follow the event, I award costs to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> and 3<sup>rd</sup> defendants have not Ultimately, I hereby issue the following final order:-

- a. The plaintiff's suit is hereby struck out with costs to the 2<sup>nd</sup> defendant.

Orders accordingly.

**DELIVERED AND DATED AT SIAYA THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**26/9/2024**

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

In the Presence of:

Miss. Kwanikwar h/b for Mr. Achach for the respondent/ plaintiff

N/A for the defendants

Court assistant: Ishmael Orwa

