



REPUBLIC OF KENYA



KENYA LAW
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**Olang v Njeru & 13 others (Environment & Land Case 52 of 2019)
[2024] KEELC 6201 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6201 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 52 OF 2019
SM KIBUNJA, J
SEPTEMBER 25, 2024**

BETWEEN

MARGARET AKOTH OLANG PLAINTIFF

AND

LUCAS NJAGI NJERU 1ST DEFENDANT
MARY YOSI 2ND DEFENDANT
MARGARET MUENI 3RD DEFENDANT
PAUL MUTINDA 4TH DEFENDANT
DANIEL MAKUNYI MWITHI 5TH DEFENDANT
ANDEGE 6TH DEFENDANT
CLARA KAKULA 7TH DEFENDANT
PATRICIA MUSINI 8TH DEFENDANT
REV. ERNEST OMBEVA 9TH DEFENDANT
SIMON D WEKESA 10TH DEFENDANT
SAMUEL OUMA AWUOR 11TH DEFENDANT
TITUS CALEB WEGULO 12TH DEFENDANT
MARIAM WANJIRU NJERU 13TH DEFENDANT
CATHERINE WAITHERA MUHORO 14TH DEFENDANT



RULING

(Notice of Motion Dated 20th February 2024)

1. The defendants moved the court through the notice of motion dated 20th February 2024 seeking for orders inter alia:

- “ 1. Spent.
2. Spent.
3. That the honourable court be pleased to enlarge and/or extend time for compliance with the court’s orders issued on 6th December 2023.
4. That the honourable Court be pleased to grant leave to the Defendants/ Applicants to enter appearance and file their statement of defence within 14 days.
5. That costs of this Application be in the cause.”

The application is premised on the thirteen (13) grounds marked (a) to (m) on its face and supported by the affidavit of Lucas Njagi Njeru, the 1st defendant, sworn on 20th February 2024. It is the defendants’ case inter alia that the court ordered the defendants to file their defence with or without counterclaim, and a list of documents within 30 days from 6th December 2023; that they failed to comply with the orders because of the time it took to fund raise for the Advocate’s instruction fees, and to conduct investigations at the lands registry and other pertinent government offices on how the suit property was handed over to the plaintiff; that they were unsuccessful in their efforts as most government offices had scaled down their operations during the December holidays hence the delay; that time stopped running from 21st December 2023 to 13th January 2024, and after taking those excluded days, the delay is not inordinate; that no prejudice will be suffered by the plaintiff if the orders sought are granted; that they have a tenable defence which raises triable issues, and a counterclaim with high probability of success and that the application has been filed without undue or prolonged delay.

2. The application is opposed by the plaintiff through the replying affidavit sworn on 23rd February 2024, in which she inter alia deposed that a similar application has already been adjudicated upon, and cannot be heard afresh; that the defendants had appointed the firm of Nzaro Chai & Co. Advocates to represent them as per the consent dated 14th August 2023, and a notice of appointment dated 17th August 2023; that as a result the said advocates filed an application to set aside judgment and annexed a copy of defence and counterclaim; that as early as 16th April 2019, the defendants had appointed the firm of Nabwana and Nabwana Company Advocates, and that the aforesaid notice of appointment was done with consent from Mkan & Company Advocates, who were never appointed, and hence the appointment of Nzaro Chai & Company Advocates is not properly on record; that consequently this application is founded on a nullity and should be struck out; that having filed the notice of appointment of advocate on 16th April 2019, the defendants were served with summons and have not been able to file a defence in those five years; that the court gave them a second chance by unconditionally setting aside of the exparte judgment and taking 60 days to file defence and counterclaim that had already been drafted and annexed in their previous application is a show of indolence, and inordinately long time and inexcusable; that failing to raise instruction fees is not true because the defendants had as early as 2019 and August 2023 appointed advocates to act for them, who also failed to file a defence; that the application is prejudicial to the plaintiff as there was inordinate



delay by advocates who watched the whole suit go through hearing, and even after judgment, made an application to set aside the *ex parte* judgment; that she is an elderly citizen aged 75 years and it is unfair that she is being dragged through court proceedings while the defendants continue restricting her from using her land; that this application is incompetent as the defendants had already filed a defence out of time, and made an application for the same to be admitted which was rejected, hence their remedy does not lie in extension but on appeal or review; that as a result of the above, the application is *res judicata*, and it should be struck out as it was filed by a stranger.

3. The learned counsel for the defendants and plaintiff filed their submissions dated the 29th April 2024 and 8th May 2024 respectively, which the court has considered.
4. The following are the issues for the court's determination;
 - a. Whether or not the application is *res judicata*.
 - b. Whether the defendants have met the threshold for extension of time to comply with the orders of 6th December 2023.
 - c. Who pays the costs?
5. The court has after considering the grounds on the application, affidavit evidence, submissions, superior courts decisions cited thereon come to the following determinations:
 - a. The doctrine of *res judicata* is set out in section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya 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 can 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.”
 - b. In the English case of [Henderson v Henderson](#) (1843-60) All ER 378, the court observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
 - c. It is trite to note that a defence and counterclaim have already been filed, albeit out of time, and that this same application was made orally during the court session of 12th February 2024. Mr. Nzaro counsel requested the court to deem the document as properly filed as he was instructed on 6th February 2024. Mr. Jengo counsel for the plaintiff opposed the application and the court gave the following directions:



- a. “That the defence and counterclaim and accompanying documents having been filed outside the 30 day period granted on 6th December 2023, and without time having been extended are hereby struck out.
 - b. Matter be placed on mention.”
 - d. It is therefore abundantly clear that the counsel for the defendants is attempting a second bite at the cherry, as the instant application has already been heard and determined. To seek for the same prayers again that were sought and declined on the 12th February 2024, amounts to abuse of the court process.
 - e. This application having been found to be *res judicata*, which finding effectively determines the application, there is no need to deal with the issue of whether or not the defendants had met the threshold for extension of time to comply with the earlier orders.
 - f. Section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya provides that costs follow the event unless where there is a good reason to depart from the general rule. I find no reasonable cause to depart from that edict, and the defendants will pay the costs.
6. Flowing from the foregoing, the court finds and orders that as follows:
- a. That the notice of motion application dated 20th February 2024 is *res judicata*.
 - b. The said application is therefore struck out.
 - c. Costs to be borne by the defendants.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF SEPTEMBER 2024.

S.M. KIBUNJA, J.

ELC MOMBASA

In the presence of:

Plaintiff: Mr. Kioko

Defendants: M/s Sidinyu holding brief for Nzaro

Court Assistant: Leakey

S. M. KIBUNJA, J.

ELC MOMBASA

