



Marete v Mwidau; Prime Bank Limited (Intended Interested Party) (Environment & Land Case 296 of 2016) [2024] KEELC 6247 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 296 OF 2016
NA MATHEKA, J
SEPTEMBER 24, 2024**

BETWEEN

JANE GAKII MARETE PLAINTIFF

AND

AHMED ABDALLA MWIDAU DEFENDANT

AND

PRIME BANK LIMITED INTENDED INTERESTED PARTY

RULING

1. The Intended Interested Party raised at the commencement of the hearing of the Plaintiffs Notice of Motion application 8th February 2024, the following Preliminary Objection;
 1. That by virtue of this Honourable Court's Judgment delivered on the 17th of October 2019 this Honourable Court is now functus Officio and/or alternatively;
 2. The Plaintiff has no Locus standi legal capacity to lodge the application or even sue the Intended Interested Party and/or to sue over the parcel of land known as L.R. No.2544/I/MN situate at Nyali within Mombasa County;
 3. The application is res judicata as the issues raised and/the substratum of the said application has already been determined by this Honourable Court in ELC. Case No.224 of 2021 between the parties herein.
2. In response Advocate for the Defendant stated that from the onset the Defendant was not involved and or had not entered appearance in person and or through any Advocate till Judgement was delivered on 19th October, 2019. The first time the Defendant appointed an Advocate it is when they filed their Notice of Appointment on 06th March, 2024. That the Provisions of Order 9 Rule 9 in the above circumstances cannot at all apply since the Defendant was not being represented in the earlier



Proceedings, hence there is no change of Advocate which needed to be filed, hence there is absolutely no need to effect any change of Advocate and or Intention for the Defendant to act in person, hence no need for any Court Order and or Consent to give a go ahead for filing of any Notice of Appointment of Advocates. That the Plaintiffs Preliminary Objection is misconceived, a waste Court's time, resources and a total abuse of the Court process and it lacks merits and the same ought to be dismissed with costs to the Defendant.

3. Having perused the application and the reply thereto, the issue that arises is whether the court is functus officio and if there is an abuse of the court process. The Supreme Court of Kenya discussed the doctrine of functus officio in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others (2013) eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:

The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

4. In *Wanjala Mutonga vs William Barasa Wanjala* (2016) eKLR Mukunya, J held inter alia;

The suit was dismissed by the court under Order 17(2) of the Civil Procedure Rules. Under that Order, it is the court that summons the parties to show cause why their suit should not be dismissed for want of prosecution for pending for over one year without any action being taken. If no cause is shown the suit is dismissed. In this case a Notice went out to the Applicant asking him to come and show cause on 1/7/2015. The Applicant did not come to show cause why his case could not be dismissed. It was therefore dismissed. At that stage the court's order was perfected. Under order 17(2) there is no provision for varying or setting aside the order, the court becomes functus officio once the suit is dismissed. The only option open to the party is to appeal against the dismissal.

5. I have perused the court file and find that this was a suit for adverse possession and after the hearing was conducted on the 30th September 2019 Justice A. Omollo struck out the suit with no orders as to costs. On the 8th February 2024 the applicant herein Prime Bank limited filed a notice of motion to be enjoined as an interested party. Further I concur with the plaintiff that this application is res judicata as the issues raised and/the substratum of the said application has already been determined by this Honourable Court in ELC Case No.224 of 2021 between the parties herein. This application in my opinion violates the principle of res judicata. Res judicata is described in Sec 7 of The [Civil Procedure Act](#) as;

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 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".



6. Edwin Thuo *vs Attorney General and Anor Petition No. 212 of 2012*, it was stated that the Court must be vigilant and guard against evading the doctrine of res judicata by introducing new causes of action. It was stated as follows;

The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction”

7. In the case of Kenya Hotel Properties Limited vs Willisden Investments Limited & 4 Others (2013) eKLR the purpose of Res judicata doctrine was discussed. It was held to be a doctrine of law founded on public policy and aimed at ensuring two objectives, namely, there must be a finality to litigation and that parties who have gone through litigation should not be subjected to the same tests.
8. I find that this court became functus officio at the time of the said judgement and the attempt to revive the same issues by applying to be enjoined in this suit is vexatious and abuse of the court process. There is no suit in existence as it was struck out way back in 2019. I find the preliminary objection is merited and it is upheld. The application is dated 8th February 2024 is struck off with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

