



Sciborski v County Government of Nairobi (Environment and Planning Civil Case E008 of 2023) [2024] KEELC 6046 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND PLANNING CIVIL CASE E008 OF 2023
AA OMOLLO, J
SEPTEMBER 19, 2024**

BETWEEN

PROF ROMUALD JOSEF SCIBORSKI PLAINTIFF

AND

COUNTY GOVERNMENT OF NAIROBI DEFENDANT

RULING

1. For determination is the application dated 19th March, 2024 brought by the 3rd Defendant hereinafter referred to as the Applicant and which seeks for orders;
 - i. That the stay orders issued by the court on 6th March, 2024 be lifted pending hearing and determination of this application.
 - ii. That the stay orders issued by the court on 6th March, 2024 be lifted pending hearing and determination of this suit.
 - iii. That the plaintiffs' suit be struck out on account of the same being res judicata.
 - iv. That the costs of this suit and the Application be awarded to 1st, 2nd and 3rd Defendants/Applicants.
2. The application is premised on the grounds inter alia;
 - a. That the Plaintiffs' suit is a total abuse of court process as the issues raised herein have been ventilated before this and other courts between and as between substantially the same parties and decision given in conclusion of the issues raised therein.
 - b. That previously, the 2nd and 3rd Plaintiffs filed ELC Misc. 12 of 2022 which was dismissed for failure to exhaust the statutory mechanism of dispute resolution on 10th July, 2023.



- c. That yet again on 4th August, 2022 the 2nd plaintiff similarly instituted ELC Misc. No. E581 of 2022, Sciborski Romuald Josef v. Golden Century Limited which Chamber Summons application sought the following orders;
- i. That this Application be certified as urgent and fit to be heard ex parte in the first instance during this Court's August recess.
 - ii. That pending the inter-parties hearing and determination if this application an injunction be issued restraining the Respondent by itself and/or its agents, servants, assigns employees or any other person acting on its behalf from evicting the 1st Applicant/plaintiff from Apartment No. B-004, Block B on the Ground Floor of Golden Century Apartments on L.R. No. 3734/1478 Original Number 3734/345) or taking any adverse action against the Applicant in relation to the property.
 - iii. That pending the hearing and determination of the intended Arbitration, an injunction be issued restraining the Respondent by itself and/or its agents, servants, assigns, employees or any other person acting on its behalf from evicting the 1st Applicant/Plaintiff from Apartment No. B-004, Block 4, on the Ground Floor of Golden Century Apartments on LR No. 3734/1478 Original number 3734/345) or taking any adverse action against the plaintiff in relation to the property.
 - iv. That as an interim measures of protection, an interlocutory mandatory injunction order do issue compelling the Respondents by itself and/or its agents/servants and assigns to forthwith avail the documents required for the release of the monies being held by the Alior Bank SA namely;
 - a. Current registration documents of the beneficiary entities and in the case of the other entities – owners or co-owners of the entities as well as the registration data.
 - b. Up to date declarations of the final beneficiaries of the entities.
 - c. Up to date statements by members of the bodies of those entities and beneficiaries including directors, on the absence of the business relationship and capital links with Russian entities and persons from special list.
 - d. The current legal Title, including an invoice/notice to the Applicant and his Co-purchaser namely, the European Foundation for the Polish Kenyan Co-operation or another subsidiary of the European Foundation for Polish – Kenyan Co-operation signed by all parties.
 - e. The costs of this application be borne by the Respondent
3. That ELC Misc. E581 of 2022 was stayed pending hearing and determination of an arbitration cause. The arbitration instituted by the 2nd plaintiff against Golden Century Limited sought the following;
- i. A declaration that the sale agreement dated 22nd July, 2022 was terminated by effluxion of time.
 - ii. A refund of Kshs.12,500,000.00 as special damages being the refund on purchase price.
 - iii. Kshs.7,500,000 as special damages on repairs and improvement of apartment.
 - iv. Damages equivalent to 10% totaling Kshs.2,450,000 and
 - v. Extension of completion period to facilitate renegotiation of outstanding monies.



4. The arbitrator dismissed the claim and entered judgment in favour of Golden Century Limited and directed the claimant to pay Kshs.14,650,000 plus interest of Kshs.4,287,487 within 75 days. In default, certain charges was to be deducted from the monies held by the Respondent. The application was supported by the affidavit of LAN XIAO listed as the 3rd defendant and who described herself as a director of the 1st and 2nd defendants. She reiterated the contents of the previous proceedings and the current suit. She urged the court to find the suit against them is an abuse of the court process and ought to be struck out.
5. The Plaintiffs opposed the application vide the replying affidavit of the 3rd Plaintiff. Prof Romauld deposed that the application is ill conceived and an act to frustrate the plaintiffs from seeking redress in court. She deposed that for a matter to be rendered res judicata, the issues in former suit must be substantially the same with the current suit.
6. She avers that the 1st plaintiff was not a party in ELC Misc. 12 of 2022. The 1st and 2nd plaintiffs were also not parties in Misc. No. E581 of 2022 neither were they parties in the arbitration proceedings. The 3rd plaintiff deposes that the current suit include the following prayers;
 - a. That this court does declare the 1st plaintiff as owner of half shares in tenancy in common in equal share in respect of the property in the suit parcel on I.R No. 3734/478 Original Number 3734/345 on Apartment No. B-004, Block B on the Ground Floor of Golden Apartments located at Othaya Road, Lavington.
 - b. That this court be pleased to issue an environmental restoration order in the form of demolition of the offending structure in the oppose Residential 163 No. Apartment (18 no. floors) to be erected on Plot No. 3734/346.
 - c. That this court be pleased to issue a permanent order of injunction restraining the 1st and 3rd defendants from carrying out further developments on the property Plot Lr No. 3734/346 which neighbours the property Apartment No. B. 004. Block B on the ground floor of Golden Apartments on LR No. 3734/1478 Original Number 3734/345.
 - d. That this court be pleased to issue an order for compensation in favour of the 1st plaintiff for his investments in the property Apartments No. B-004m Block B on the ground floor of Golden Century Apartments on LR No. 3734/1478 Original Number 3734/345.
 - e. That this court is pleased to award the 1st plaintiff general damages for breach of what was clearly an implied term in the contract of sale dated 20th December, 2020.
7. She posited that the orders sought in the suits mentioned by the 1st – 3rd Defendants do not correspond to what she has highlighted above and urged this court to dismiss the application.
8. The 1st – 3rd Defendants/Applicants filed written submissions dated 4th June, 2024. They cited the provisions of section 7 of the [Civil Procedure Act](#) which defines the doctrine of resjudicata. They submit that the 1st plaintiff was incorporated in April, 2022 with the 3rd Plaintiff as its sole director. Hence the 3rd plaintiff should not hoodwink this court into believing its an independent entity to secure orders it has been previously denied.
9. It is their contention that prayers a, d and e in the current suit has been fully and finally ventilated before the Arbitration Tribunal while prayer (b) & (c) was dealt with in ELC Misc. No. 12 of 2022.



They cited the case of Kennedy Mokua Ongiri vs. John Nyasende Masioma & Another (2022) EKLK which held thus;

“A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. What issues were really determined in the previous Application;
- ii. Whether they are the same in the subsequent Application and were covered by the Decision.
- iii. Whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a Court of competent jurisdiction.

A Decision of the court must be respected as fundamental to any civilized and just judicial system, judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court. A Decision of the court, unless set aside or quashed in a matter provided for by the law, must be accepted as incontrovertibly correct. These principles would be substantially undermined if the court were to revisit them every time a party is dissatisfied with an Order and goes back to the same court particularly when there is a change of a Judicial Officer in the Court Station.”

10. The Applicants proceeded to draw a table itemizing the similarities between the three suits. That great injustice is being occasioned upon the applicants by virtue of the existence of the interim orders of stay. They urged the court to grant the application dated 19th March, 2024.
11. The Plaintiffs/Respondents filed submissions dated 10th June, 2024 also citing the provisions of Section 7 of *Civil Procedure Act*. They also cited the case of Abok James Odera Vs. John Patrick Machira (2009) EKLK which paraphrased the contents of section 7 of *Civil Procedure Act*. The Respondent then reiterated the contents of their replying affidavit in terms that the 1st and 2nd Plaintiff were not parties in the former suits and that certain reliefs in the current suit were not dealt with in the previous suit. They urged the court to dismiss the application with costs.
12. I have perused and considered the pleadings and submissions filed and rendered. My simple task is to determine if the current suit is res judicata. The parties all agree res judicata is governed by section 7 of the *Civil Procedure Act*. In paragraph 3 of the plaint, the 1st plaintiff pleaded to acquiring rights in the subject apartment pursuant to a sale agreement dated 31st May, 2022 between it and the 2nd and 3rd Plaintiffs. They also stated that the 3rd Plaintiff is a major shareholder in the 1st and 2nd Plaintiffs.
13. In paragraph 10 of the plaint, it is pleaded by the Respondent thus;

“The 3rd and 2nd Plaintiffs ultimately sold their interest and obligations in the suit property to the 1st Plaintiff as per the particularized terms of the sale agreement dated 31/05/2022 at a consideration of 287,000.00 (Two hundred eighty thousand USD) which was paid in full and final settlement as evidence in the executed documents hence the plaintiff's shall be seeking the assignment in equity of the 3rd and 2nd Plaintiffs rights in favour of 1st plaintiff



and more specifically that the undisputed half share of the suit property for which payment is already acknowledged by the 2nd and 3rd Defendants be ultimately registered in favour of the 1st Plaintiff.”

14. In light of the above statement, it is not correct for the 3rd Respondent to aver that the 1st and 2nd plaintiffs were not parties in the former suit and thus not bound by the doctrine of res judicata. Section 7 of *Civil Procedure Act* states thus;

“Res judicata 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. Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it. Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court. Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Explanation. (4)—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.”

15. The Respondents’ pleadings indicate that the 1st plaintiff derived its rights in the subject property through purchase from the 2nd and 3rd Plaintiffs. The 2nd and 3rd Plaintiffs were co-tenants and the 3rd Plaintiff still described as a major/sole shareholder in the 1st and 2nd Plaintiffs. The nexus is laid bare in the plaint and so the 1st and 2nd Plaintiffs fall under the class of persons described in section 7 as “Under whom they or any of them claim, litigating under the same title.”

16. The other question is whether the matter in issue here is similar to what was already determined in the former suit. At paragraph 12 and 15 of the plaint, the plaintiffs plead that the 2nd defendant acted in flagrant breach of the terms of the agreement dated 20th December, 2020 executed with the 2nd and 3rd plaintiffs. Paragraph 13 and 16 – 19 refers to flagrant breach of the plaintiffs’ environmental rights. The particulars of the rights are pleaded in paragraphs 27 – 30 of the plaint.

17. The plaintiffs’ prayers sought in paragraphs (a), (d) and (e) are rights derived from the sale agreement executed between the 2nd and 3rd plaintiffs and Golden Century Limited. These are issues which ought to have been dealt with in ELC Misc. E581 of 2022 and or the Arbitral proceedings. This is premised on the provision of explanation 4 of Section 7 of *Civil Procedure Act* which states thus;

“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.”

18. The violation of the environmental rights now being raised ought also to have been raised in ELC Misc. 12 of 2022. If the former suit was struck out for want of jurisdiction by a court of concurrent jurisdiction then this court is barred by precedent to assume jurisdiction. The avenue open to the Respondents/plaintiff was to apply for review or appeal the order striking out their earlier suit and not commencing of fresh proceedings.



19. In light of the foregoing, I am satisfied that there is merit in the present application and find that the suit filed is res judicata and an abuse of the process of the court. The same is struck out with costs of the suit and the application to the 1st – 3rd Defendants/Applicants.
20. The application by the 5th Defendant seeking to have its name removed is now overtaken by events as there is now no suit. Since the parties had argued its application, I award the costs of the application and the suit to the 5th Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024

A. OMOLLO

JUDGE

