



Ahmed & 2 others v Kenya United Steel Company (2006) Limited (Land Case E051 of 2024) [2024] KEELC 7133 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE E051 OF 2024
NA MATHEKA, J
OCTOBER 30, 2024**

BETWEEN

HARITH RASHID AHMED 1ST PLAINTIFF

AMRAN MOHAMED TIMANY 2ND PLAINTIFF

ABDUL-REHMAN ABDALLAH SAID 3RD PLAINTIFF

AND

KENYA UNITED STEEL COMPANY (2006) LIMITED DEFENDANT

RULING

- 1 The application is dated 31st May 2024 and is brought under section 34 and 63(e) of the [Civil Procedure Act](#) CAP.21 Laws of Kenya and Order 40 Rule 1, 3 & 4 of the [Civil Procedure Rules](#) seeking the following Orders;
1. That this application be certified as extremely urgent and be heard on a priority basis.
 2. That pending the hearing and determination of this application inter-parties, the Defendant by themselves, their servants and/or assignees or agents be restrained by way of a temporary injunction from construction of illegal steel structures, permanent buildings, concrete walls/gates and any other construction activities or restrain 3rd parties carrying out unauthorized wastage activities on the parcel of land known as plot number 780/VI/MN CR2155 measuring 20.5 acres and registered in the name of Asila Binti Mwijabu.
 3. That pending the hearing and determination of this suit and Civil Appeal No.E141 of 2022, the Defendant by themselves, their servants and/or assignees or agents be restrained by way of a temporary injunction from construction of illegal steel structures, permanent buildings, concrete walls and any other construction activities or restrain 3rd parties carrying



out unauthorized wastage activities on the parcel of land known as plot number 780/VI/MN CR.2155 measuring 20.5 acres and registered in the name of Asila Binti Mwijabu.

4. That costs be in the cause.
- 2 It is based on the supporting affidavit of Amran Mohamed Timamy and the following grounds that the Defendant is not the registered owner of Plot Number 780/V/MN measuring 20.5 acres which is registered in the name of Asila Binti Mwijabu (Deceased) and the Defendant is carrying out illegal activities of construction without any authorization from the representatives of the deceased and a prima facie case has been established against the Defendant who is damaging and wasting the subject land matter in issue to the detriment of the beneficiaries who are entitled to inherit the same through a judgement and decree of this court and an interim injunction is urgently needed to preserve the subject land pending the hearing and determination of this suit that seeks vacant possession of the whole parcel of land.
- 3 That the property known as Plot Number 884 (original no. 780/1) Section VI/MN NORTH is in danger of being wasted, damaged or alienated by the Defendant steel company since the Defendant without color of authority has continued heavy construction including steel building structures, permanent buildings, concrete walls/gates and subletting to 3rd parties and the 20.5 acres of land rightfully belonging to the Plaintiff/Applicants is being wasted and damaged to their detriment since they are beneficiaries of the said parcel of land through a judgement delivered on 13th October 2017 by Lady Justice A. Omollo who had ordered that 20.5 acres shall vest in the name of the deceased settler ASILA Binti Mwajibu. That the Defendant obtained orders of stay of execution pending appeal Civil Appeal ELC 41 of 2022 KUSCO (2006) vs Ahmed Mohamed & 5 Others against the judgement of Lady Justice A. Omollo in ELC Civil Suit No. 470 of 2011 Ahmed Mohamed Ahmed - vs- Ahmed Mohideed & KUSCO(2006) and is abusing the court process by wasting and damaging the subject land-matter to the detriment of the beneficiary applicants by continued construction which shall render nugatory the decree and judgement of Hon. Lady Justice Omollo since the whole land measuring 20.5 acres would have been wasted with steel structures that would be difficult to remove when distribution of the land takes place amongst the beneficiaries which shall occasion irreparable damages that cannot be compensated monetarily to the 40 beneficiaries.
- 4 The Respondent stated that Plot Number 780/VI/MN measuring 20.5 Acres is the subject of Waqf donated by Asila Binti Mwijabu registered on 19th August 1943. Annexed hereto and marked as "AA1" are copies of the Waqf registered on 19th August. 1943. They admitted the terms of the Judgement delivered 31st October 2017 by Hon Lady Justice A. Omollo and that there is stay of execution of the said judgement pending the hearing and determination of the appeal before the Court of Appeal. That there being subsisting stay orders pending appeal from a Court of competent jurisdiction. That the prayers sought in this entire suit together with the current application amounts to this Court sitting on appeal of the said orders for stay pending appeal which is a decision of its sister court that would then contravene the Constitutional hierarchy of Courts. That they were aggrieved the Judgement delivered 31st October 2017 and appealed to the Court of Appeal vide Civil Appeal Number E141 of 2021, which appeal is yet to be determined. Annexed hereto and marked as 'AA-3" copy of the Notice of Appeal. That the same parties herein, vide an application dated 24th May 2024, have applied to be enjoined as parties in the same appeal now still pending before the Court of Appeal. Annexed hereto and marked as "AA-5" copy of the Notice of Motion dated 24th May 2024., That the issues presented before this Court are similar to the ones heard and determined by a Court of competent jurisdiction being High Court Civil Suit Number 470 of 2011 finalised in the Judgement as delivered 31st October 2017 by Hon Lady Justice A. Omollo. As such, the entirety of this suit together with the current application is res judicata and an abuse of this Court's processes. That this application is res judicata.



5 This court has considered the application and the submissions therein. The respondents have raised the issue that this suit is res judicata and that this Court lacks the jurisdiction to determine the same. This is a pure point of law and the parties have made references to the said case involving the suit property and this is not contested. I shall now therefore consider the merits or otherwise of the respondent's Objection.

6 Section 7 of the *Civil Procedure Act* Provides

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.”

7 The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estopped. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

8 Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. In that respect, the Court of Appeal held in The *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, (2017) eKLR, that.

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

9 Expounding further on the essence of the doctrine this Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR pronounced itself as follows;

The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”



- 10 The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* (supra), the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is;
- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.
 - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

- 11 On the issue as to whether this application and/ suit is res judicata, the court wishes to rely on the case of *George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another* (2014), eKLR, where the Court held that;

I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

- 12 I have perused the court record and find that indeed the parties have litigated before in a similar matter and that the respondents state that they are beneficiaries of the said suit land through the judgement delivered on 13th October 2017 by Lady Justice A. Omollo who had ordered that 20.5 acres shall vest in the name of the deceased settler Asila Binti Mwajibu. It is not disputed that the Defendant/ Respondent obtained orders of stay of execution pending Appeal Civil Appeal ELC 41 of 2022 KUSCO (2006) vs Ahmed Mohamed & 5 Others against the judgement of Lady Justice A. Omollo in ELC Civil Suit No.470 of 2011 Ahmed Mohamed Ahmed -vs- Ahmed Mohideed & KUSCO (2006) (Annexed and marked as 'AA-3" copy of the Notice of Appeal). It appears the Applicants herein, vide an application dated 24th May 2024, have applied to be enjoined as parties in the same appeal now still pending before the Court of Appeal. (Annexed and marked as "AA-5" copy of the Notice of Motion dated 24th May 2024) . . The matter is pending before the Court of Appeal and is yet to be determined. For these reasons this suit is clearly res judicata. The application for joinder is indeed an option for the Applicants. Having found so the court will not proceed to determine the application dated 31st May 2023 but order that the application and this suit be struck off with costs.

- 13 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF OCTOBER 2024.

N.A. MATHEKA

JUDGE

