



REPUBLIC OF KENYA



Zuma & 46 others v Said & 4 others (Environment & Land Case E005 of 2022) [2024] KEELC 7125 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E005 OF 2022**

AE DENA, J

OCTOBER 30, 2024

BETWEEN

BAYA MKAHA ZUMA & 46 OTHERS & 46 OTHERS & 46 OTHERS PLAINTIFF

AND

TAHIR MOHAMED OSMAN SAID & 4 OTHERS & 4 OTHERS & 4 OTHERS DEFENDANT

RULING

1. The Notice of Motion subject of this ruling has been brought before court pursuant to the provisions of Sections 1A,1B,3A and 7 of the Civil Procedure Act, Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The 1st 2nd 3rd and 4th Defendants/Applicants seek for orders; -
 1. That the Plaintiffs originating summons dated 21st March 2022 and filed on the same date be struck out with costs to the Defendants
 2. That the costs of this suit and the application be awarded to the Defendants/Applicants.
2. The application is premised upon grounds on its face listed 1-35 and the supporting affidavit of Tahir Mohammed Osman Said sworn on behalf of the rest of the defendants. In summary, it is stated that this suit offends the mandatory provisions of Section 7 of the Civil Procedure Act.
3. It is averred that the Defendants are the legal registered owners of LR No Kwale/Mwavumbo/4 the suit property herein by way of transmission pursuant to the death of their father. That as registered owners of the suit property, the Applicants filed Mombasa ELC No 39 of 2020 Tahir Mohamed Osman Said & Others Vs Chimera Mzungu & 20 Others wherein the suit sought to evict 21 unlawful occupiers of the suit property. The Applicants state that they entered into a consent with the Defendants therein and who were to vacate the property within 7 days of adoption of the consent. Consequently, the consent



was adopted and 18 of the Defendants vacated the property and only 3 remained. Immediately the suit property fell vacant 54 strangers filed Kwale ELC No 24 of 2021 claiming the land by way of adverse possession.

4. It is further averred that Kwale ELC No 24 of 2021 was withdrawn vide a consent order of 21/3/2022 and all orders in it discharged. That again the 1st to 10th Respondents in Kwale ELC No 24 of 2021 filed the instant suit seeking similar orders. The Applicants state that they instructed their advocate on record to file an application for striking out the suit for being res judicata. In its ruling delivered in 26/1/2023 the court held that the motion partly succeeded as the suit was subjudice owing to the fact that ELC No 39 of 2020 now ELC 180 of 2021 was pending before court and was co related with this suit. The application however failed on res judicata as ELC 180 of 2021 was yet to be decided.
5. The Applicants state that ELC 180 of 2021 was stayed. On 25/11/2022, the court made orders that ELC 180 of 2021 was marked as settled and the file be marked as closed. Consequently, the Applicant's Advocates filed an application dated 9/2/2023 seeking to review the orders of 26/1/2023 staying the suit for being sub judice and an application was slated for hearing on 18/5/2023. Before the hearing of the application dated 9/2/2023 an application dated 18/4/2023 was filed by the Plaintiffs herein and whereby the court issued orders allowing the Plaintiffs into the suit property for cultivation. An application was filed to review the said orders and the court ordered for a site visit which took place on 17/11/2023 and a report dated 29/12/2023 was shared with the parties over the visit. That this matter came up for mention for directions before court on 26/2/2024 and the court ordered that in view of it being the rainy season the Plaintiffs were allowed to cultivate the suit property. A request for status quo was made.
6. In giving further history of ELC 180 of 2021 the applicants state that an application had been made in the said suit to vary the proceedings post consent and the court in its ruling delivered on 24/6/2024 stated that it was functus officio. The proceedings and orders issued post dismissal of the suit on 24/11/2022 were set aside and the record reverted back to the record on 24/11/2022. It is stated that the instant suit is similar to Kwale ELC No 24 of 2020 and Kwale ELC No 180 of 2021 as they all seek that the Plaintiffs be declared the legal owners of the suit property by way of adverse possession.
7. The deponent at paragraph 33 of the affidavit states that the claim for adverse possession cannot arise as the suit property is not occupied. That the report dated 4/6/2020 by one Abubakar Maddy Physical Planners confirm that indeed the suit property is not occupied. That the suit offends the mandatory provisions of Section 7 of the Civil Procedure Act. In concluding the supporting affidavit, the deponent states that Baya Mkaha Zuma lacks the legal authority to swear the supporting affidavit to the originating summons on behalf of the 46 others. That the Plaintiffs have engaged in multiplicity of suits and this suit should be dismissed with costs to the Defendants.
8. The application is unopposed. I have perused the affidavit of service sworn by one Amina Mohamed, it indicates that the firm of Marende Necheza & Co Advocates was served with the hearing date of the application through their email address i.e. maredenecheza@gmail.com. This affidavit confirms that the plaintiffs advocate was duly served with the application and hearing notice thereof.
9. At the time of writing this ruling, none of the parties had filed written submissions over the application.
10. The Notice of Motion is brought under the provisions of Order 2 rule 15 of the Civil Procedure Code which deals with striking out of pleadings, and provides as follows: -
 15. (1) "At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) It discloses no reasonable cause of action or defence in law; or



- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

11. The principles guiding the striking out of pleadings and cases are now well settled. These principles, were set out in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another*[1980] eKLR thus:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that ‘is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits’ without discovery, without oral evidence tested by cross-examination in the ordinary way”. (Sellers, L.J. (supra)).

As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.

Normally a law suit is for pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV” rule 2.”

12. It is the Defendants/Applicants case that the instant suit offends the provisions of section 7 of the [Civil Procedure Act](#). Section 7 of the [Civil Procedure Act](#), 2010 provides as hereunder:

“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.”

13. The court in *Margaret Wanjiku Henry v Road Touch Services* [2022] eKLR interpreted the provisions of Section 7 of the [Civil Procedure Act](#) as here below;

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.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

14. The pre-requisites to a plea of res judicata as held in the Nigerian case of *Abubakar v. Federal Mortgage Bank Ltd & Ors.* (2002) 4 NWLR (pt. 756) 29 @ 44(D-G):
 - i. That the parties or the privies involved in both the previous and present proceedings are the same;
 - ii. That the claim or issue in dispute in both proceedings are the same;
 - iii. That the res or that the subject matter of the litigation in the two cases are the same;
 - iv. That the decision relied upon to support the plea is valid, subsisting and final;
 - v. That the court that gave the previous decision relied upon to sustain the plea is a court of competent jurisdiction;
15. It is not in dispute that other than this suit, there exists two previous suits being *Mombasa ELC No 39 of 2020 Tahir Mohammed Osman Said & Others Versus Chimera Mzungu & 20 Others* and *Kwale ELC No 24 of 2021 [Formerly Mombasa ELC No 97 Of 2021] Baya Mkaha Zuma & 54 Others Versus Tahir Mohammed Osman Said & 8 others*. All the three suits are premised upon ownership of the suit property *Kwale/Mwavumbo/4* based on the doctrine of adverse possession. From the proceedings in *Mombasa ELC No 39 of 2020 [Kwale ELC No 180 of 2021]* the matter was marked settled as per the consent order of 6/10/2020. An application had been made in *ELC 180 of 2021* to vary the proceedings post consent and the court in its ruling delivered on 24/6/2024 stated that it was *functus officio*. The proceedings and orders issued post dismissal of the suit on 24/11/2022 were set aside and the record reverted to the record on 24/11/2022. The consent has never been set aside.
16. In the course of preparing this ruling, this court noted that an application similar to the one before court had initially been made on 14/4/2022. In my opinion, this is clearly abuse of the court process and a waste of judicial resources. I say so because the court in its ruling dated 26/1/2023 made a finding that unless a matter has been heard and finally determined by a court of competent jurisdiction, the same cannot be referred to as offending the doctrine of *res judicata*. A copy of the said ruling is in the court file and it is my firm belief that all the parties herein have had the benefit of familiarising themselves with the same.
17. The court is surprised that even after the said ruling, a similar motion is still up before court for determination. The fact that the court has had to still apply itself over issues that it had previously made a determination on should be frowned upon. It only leads to case backlog within the judiciary. In the



case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 (2009) eKLR 229, the Court of Appeal stated thus; -

"The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive'.

18. The court maintains its stance, that Mombasa ELC No 39 of 2020[Kwale ELC No 180 of 2021] and Kwale ELC No 24 of 2021[Formerly Mombasa ELC No 97 of 2021] have not been heard on merit. However, it is proper to point out that Kwale ELC No 24 of 2021[Formerly Mombasa ELC No 97 of 2021] is not in existence as the same was withdrawn vide a consent order of 21/3/2022 and all orders in it discharged. The proceedings in ELC No 39 of 2020 remain as at 24/11/2022 and where the last order was for dismissal of the matter. This court is now functus officio. As intimated in the ruling of 26/1/2023, let the parties herein be given an avenue to ventilate their remaining case on merit, it is now established that the only suit pending before court with regards to determination on ownership of the suit property is the instant suit. It is necessary for the litigants herein to bring forth every fact that needs to be proved and a decision to be made over the same before res judicata arises. This was aptly put in Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 the former East African Court of Appeal stated as follows:

"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 cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

19. The court appreciates the findings in the ground status report and which have been highlighted by the Applicants herein. However, the same have not been expounded upon by the Applicants. The Applicants have informed court that the doctrine of adverse possession cannot stand as relied upon by the Plaintiffs for the reason that the Plaintiffs/Respondents are not in occupation of the suit property. It is however noted that this allegation was simply mentioned in the affidavit in support of the instant application and no evidence was placed before court in support of the same save for the site visit report. A lot of effort was put in having the Originating Summons dismissed for being res judicata as opposed to not meeting the threshold set for a claim of adverse possession. Bearing this in mind, the court opines that a proper and detailed response should be filed challenging the claim for adverse possession.
20. Having found as above, it is proper to state that no case has been made to invoke the striking out of the Originating Summons instituting this suit. I am guided by the holding in the Court of Appeal in



The Co-operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 where it was held:

"A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

21. The upshot is that the Notice of Motion dated 10/7/2024 is unmerited and the same is hereby dismissed with no orders as to costs.

Orders accordingly.

RULING DELIVERED THIS 30TH OCTOBER 2024.

A E DENA

JUDGE

No Appearance for the Plaintiff

Ms. Amina for Defendant Applicant

Court Assistant-Asmaa Maftah

