



Sammy (Suing as Personal Representative to the Estate of Sammy Maitha Muoki alias Sammy Maithya) v Kioko (Environment & Land Case 220 of 2015) [2024] KEELC 7023 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7023 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 220 OF 2015
A NYUKURI, J
OCTOBER 23, 2024**

BETWEEN

SYOMBUA SAMMY PLAINTIFF

**SUING AS PERSONAL REPRESENTATIVE TO THE ESTATE OF SAMMY
MAITHA MUOKI ALIAS SAMMY MAITHYA**

AND

NANCY KAVINYA KIOKO DEFENDANT

RULING

Introduction

1. Before court is a notice of motion dated 17th July 2024, filed by the defendant seeking orders that delivery of judgment in this matter be deferred pending hearing and determination of Machakos ELC (OS) No. 6 of 2022. The application is supported by the affidavit sworn by the applicant on 17th July 2024.
2. The applicant's case is that the matter was slated for judgment in this case on 25th July 2024, and that the plaintiff in this suit seeks eviction against the defendant from the parcel of land known as Ndalani/Mavoloni Block 1/357, while the defendant herein has claimed ownership of the suit property under the doctrine of adverse possession by a suit Machakos ELC (OS) No. 6 of 2022 which he alleges was previously filed as Machakos ELC No. 193 of 2015.
3. The defendant stated that the hearing of this matter proceeded in her absence. That hearing of ELC (OS) No. 6 of 2022 could not proceed on 30th April 2024 as the court was indisposed and that in fixing a hearing date on 30th April 2024, the court appreciated a likelihood of conflicting judgments. She stated further that ELC (OS) No. 6 of 2022 has a mention date of 27th November 2024, which means the plaintiff will have ample time to institute execution proceedings to the applicant's detriment. She stated



that it was only fair and just that Machakos ELC (OS) No. 6 of 2022 is heard first before judgment is delivered herein because if judgment is delivered and the defendant is evicted, his claim for adverse possession in Machakos ELC (OS) No. 6 of 2022 will be rendered moot and an academic exercise. She attached a copy of the causelist of the court dated 17th July 2024.

4. The application was opposed. The plaintiff/respondent filed a replying affidavit sworn on 24th July 2024 opposing the application. She stated that the prayer to defer judgment was sought in the defendant's application dated 4th March 2022 which application was dismissed by the court hence the application herein is *res judicata*.
5. She further stated that the applicant had sought to stay proceedings herein pending hearing of Machakos ELC (OS) No. 6 of 2022 knowing that the two matters are not consolidated and that both courts handling the two matters are of equal standing.
6. In addition, the respondent averred that the dispute herein is on ownership of land Parcel Ndalani/Mavoloni Block 1/357 and that the defendant herein filed defence and counterclaim for the suit property claiming ownership through the doctrine of adverse possession and hence she cannot seek to stay delivery of judgment on the basis of her claim for adverse possession and therefore, the judgment herein will address the defendant's claim for adverse possession.
7. The respondent further averred that the application herein was not made in good faith and that it was brought inordinately late with intention to delay this matter further. She attached a copy of the defendant's application dated 4th March 2022 and the defendant's statement of defence herein dated 12th November 2015.
8. Parties filed submissions in support of their respective cases, which this court has duly considered.

Analysis and Determination

9. The court has carefully considered the application, response and the parties' rival submissions. Two issues arise for determination;
 - a. Whether the application herein is *res judicata*; and
 - b. Whether the applicant deserves orders for stay of delivery of judgment.
10. Section 7 of the [Civil Procedure Act](#) provides for the doctrine of *res judicata* 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 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.

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.

11. Therefore, a court is barred by law from trying a matter or an issue involving an issue that is directly and substantially in issue in a previously determined suit between the same parties or their privies, where the matter or issue was determined with finality by a competent court.

12. In the case of the *Independent Electoral and Boundaries Commission v. Maina Kiai* [2017] eKLR, the Court of Appeal held as follows;

For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That the 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.

13. In the case of *Uhuru Highway Development Ltd v. Central Bank of Kenya, Exchange Bank Ltd (In Voluntary Liquidation) and Kamlesh Mansukhlal Pattni*, the court held as follows;

That is to say there must be an end to applications of similar nature, that is to further, under principles of *res judicata* apply to applications within the suit if that was not the intention, we can imagine that the courts could and would be mandated by new application filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of the *Civil Procedure Act* caters for.

14. In the instant case, the plaintiff has contended that the defendant's application dated 4th March 2022 seeking orders of stay of proceedings pending hearing and determination of Machakos ELC (OS) No. 6 of 2022 raised the same issue that has been raised in the instant application.

15. I have considered the record and it is clear that the plaintiff sued the defendant for trespass seeking eviction as per the plaint filed herein, and in the defendant's statement of defence, the defendant denied the plaintiff's claim and stated that she had acquired the suit property by way of adverse possession, and made a counterclaim under the doctrine of adverse possession. On the hearing date of 14th February



2022, the defendant failed to attend court. Upon conclusion of the plaintiff's evidence, the defendant's defence and counterclaim were dismissed for want of prosecution.

16. The above decision prompted the defendant to file a notice of motion dated 4th March 2022 seeking orders to set aside proceedings conducted in the defendant's absence; orders that the plaintiff's suit begins denovo and orders that there be stay of proceedings pending hearing and determination of Machakos ELC (OS) No. 6 of 2022. The basis for that application was that in Machakos ELC (OS) No. 6 of 2022, the defendant had claimed for ownership of the suit property on the doctrine of adverse possession and that if this court proceeds to make judgment, there is a possibility of conflicting decisions and that she would suffer prejudice for being condemned unheard.
17. The court considered the defendant's application dated 4th March 2022, and delivered its ruling on 24th July 2023 dismissing the said application in its entirety.
18. In the current application, the defendant has sought for "stay of delivery of judgment pending hearing of Machakos ELC (OS) No. 6 of 2022" on the basis that there will likely be conflicting decisions in the two matters and that the defendant shall be evicted from the suit property before prosecuting her claim based on adverse possession.
19. From the above history, it is clear that the instant application although framed as seeking stay of judgment, it obviously seeks stay of proceedings just like the application dated 4th March 2022. The cosmetic reframing of the issue is obvious as what is sought in the previous application is to ensure this matter is not concluded and judgment is not delivered. In fact, the grounds relied upon in the former application are the same grounds invoked in the current application. One thing however that the defendant is studiously silent about, is the fact that his claim for adverse possession which he had raised in this suit by way of counterclaim was dismissed and therefore there was no legal basis to resurrect that claim in a fresh suit being Machakos ELC (OS) No. 6 of 2022; as there is already a determination by this court on the question of whether the defendant is entitled to the suit property under the doctrine of adverse possession. That determination was a dismissal made by this court on 14th February 2022, which decision has not been set aside and therefore remains a final decision of this court on that question.
20. It is therefore, not rocket science to decipher that Machakos ELC (OS) No. 6 of 2022 is not only *res judicata*, but also an abuse of the court process because the order of dismissing the defendant's claim of the suit property under the doctrine of adverse possession remains in force, and has not been challenged by the defendant either by way of review or appeal.
21. In view of the fact that the prayers sought in the instant application are the same prayers sought in the previous application dated 4th March 2022, involving the same parties, where the decision in the former application was made by a court of competent jurisdiction, which is this court, and which orders are final orders, I find and hold that the application herein is *res judicata*.
22. The upshot is that this court finds no merit in the application dated 17th July 2024 and the same is hereby dismissed with costs.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE



In the presence of;

Mr. Ruto holding brief for Mr. Wachira for defendant/applicant

Mr. Nzei for plaintiff

Court assistant – Abdisalam

