Kenya Railways Corporation v Mamusu Enterprise Ltd & 6 others (Land Case E017 of 2023) [2024] KEELC 13415 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13415 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

LAND CASE E017 OF 2023

EO OBAGA, J

NOVEMBER 21, 2024

BETWEEN

KENYA RAILWAYS CORPORATION ..... PLAINTIFF

AND

MAMUSU ENTERPRISE LTD ..... 1ST DEFENDANT

KUYANG AGENCIES LIMITED ..... 2ND DEFENDANT

MABAKI LIMITED ..... 3RD DEFENDANT

ELDORET HOTEL LIMITED ..... 4TH DEFENDANT

NATIONAL LAND COMMISSION ..... 5TH DEFENDANT

COUNTY LAND REGISTRAR UASIN GISHU ..... 6TH DEFENDANT

HON ATTORNEY GENERAL ..... 7TH DEFENDANT

RULING

1. By a Notice of Motion Application dated 17th May, 2024; the 1st to 4th Defendants/ Applicants sought the following Orders: -

    a. That the Plaint herein dated 23rd October, 2023, be and is hereby struck out for being frivolous and vexatious and for being otherwise an abuse of the court process.

    b. That the costs of the suit and the application be borne by the Plaintiff and be payable to the 1st – 4th Defendants.

2. The application is premised on the 12 grounds on its face and the Supporting Affidavit sworn on even date by Japheth Kipkemboi Magut, the Managing Director of the 4th Defendant, on behalf of the 4th defendant and on behalf of the 1st- 3rd defendants.

3. It was his claim that the suit as filed offends the doctrine of Res Judicata and is therefore an abuse of the court process. It is his claim that the instant suit vide Plaint dated 23/10/2023 is wholly res judicata; that the plaintiff's claim was litigated and finally determined in Eldoret ELC Case No. 632 of 2012 vide the judgment delivered on 25th July, 2023. He went ahead to outline the elements of res judicata in terms of the parties and the reliefs sought and how the instant suit offends the said doctrine.

4. He averred that the allegation made at paragraph 15 of the plaint, that the previous suit was dismissed for failure to enjoin the 2nd and 3rd defendants cannot be used as an excuse and the same is not a bar to a claim of res judicata.

5. It was also his assertion that a claim founded under the doctrine of res judicata touches on the jurisdiction of the court to entertain the suit and hence the same should be struck out.

6. He further averred that by dint of section 44 of the *Evidence Act*; that the judgment delivered on 25th July, 2023 in ELC Case No. 632 of 2012, the plaintiff is by law estopped from founding any new claim for proprietorship over the suit parcel Eldoret Municipality Block 3/58.

7. It was also his claim that the reliefs sought in prayers (a), (b), (c) and (d) of the plaint are reliefs that are by law time barred; that the right to use accrued in the year 1997, when the suit land was registered in the name of 1st – 3rd defendants, which period is more than 12 years. Therefore, the plaintiff is barred by dint of section 7 of the *Limitation of Actions* from making such claims. This ground was however wholly abandoned in their submissions where they acknowledged that a fresh leave was sought and granted prior to the filing of the plaint.

8. He thus urged the court to strike out the suit with costs in the interest of justice.

9. The application was opposed. The Plaintiff/Respondent filed a Replying Affidavit dated 12th July, 2024 and sworn by Stanley Gitari, the Acting Corporation Secretary and Legal Services Manager of the Plaintiff; he dismissed the application as being devoid of merit, an abuse of the court process and urged the court to dismiss the same with costs.

10. He admitted that the plaintiff had previously instituted a suit against the 1st, 4th, 5th and 7th defendants vide Eldoret ELC No. 632 of 2012, claiming fraudulent land allocation and/or acquisition of part of its property. It was however his contention that in the said suit, they failed to include the 2nd and 3rd defendants as parties in the said suit.

11. He avers that it is on the basis of parties that Hon. Justice Kibunja declined to make a substantive determination on the process of allocation and issuance of title to the 1st – 4th defendants as the same would amount to condemning the 2nd and 3rd defendants herein unheard in violation of their constitutional rights. He thus maintained that the Hon. Judge in Eldoret ELC No. 632 of 2012 did not make a finding on merit over the issue of ownership.

12. In addition, it was his assertion that prior to the institution of the instant suit; the relevant notices under section 136(2) of the *Government Land Acts*, section 13A of the *Government Proceedings Act* and the plaintiff had also moved the court vide Eldoret ELC Misc. Application No. E009 of 2023, seeking leave to institute this suit which leave was granted.

13. He further contended that the plaintiff's claim is for the recovery of public land which includes all that land along the railway lines and the claim is therefore not frivolous, vexatious or an abuse of the court process as alleged nor time barred. He urged the court to dismiss the application and to allow for a finding on merit to be made on the allocation process and the ownership of the suit land.

14. The Application was canvassed by way of written submissions; the Applicants filed their submissions dated 13th September, 2024 together with authorities while the Respondent filed its written submissions dated 19th September, 2024 together with authorities. I have read and considered the rival submissions and taken the same into account in arriving at my decision as hereunder;

Analysis and Determination;

15. I have considered the Application, the various Affidavits and the annexures thereto and the rival submissions and it is my considered view that the main issues for determination before me is whether the Application dated 17/05/2024 is merited and I will proceed to discuss the same on account of;

    i. Res Judicata

    ii. Exturpi causa non oritur action

Res Judicata;

16. The Applicants herein contend that the plaintiff's suit as filed offends the doctrine of res judicata as enshrined in section 7 of the *Civil Procedure Act*; the claim and the reliefs sought in the instant suit are similar to the claim and the reliefs sought in Eldoret ELC Case No. 632 of 2012 which was already heard and determined by a court of competent jurisdiction vide the judgement delivered on the 23rd July, 2023.

17. Consequently, the doctrine of res judicata goes to the jurisdiction of the court in entertaining the suit as filed and they maintained that the court lacks the requisite jurisdiction to entertain the suit as filed. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia -vs- Kenya Commercial Bank & 2 Others*, Civil Appl. No. 2 of 2011, in addressing the issue of jurisdiction held that: -

> "A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings... Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

18. The Plaintiff/ Respondent on the other hand admitted the existence and filing of Eldoret ELC Case No. 632 of 2012 but maintained that the said suit was never determined on merit; the questions on the ownership and the acquisition of the suit property were never determined by the court, on the basis of parties. That the court in the previous suit went on to state that determining the suit without the 2nd and 3rd defendants herein would amount to condemning them unheard.

19. Section 7 of the *Civil Procedure Act* defines the doctrine of Res Judicata as follows: -

> "No court shall try any suit 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."

20. The *Civil Procedure Act* has also provided explanations with respect to the application of the res judicata rule under Explanation 1-6 are in the following terms: -

> 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.
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> 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.

21. The Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) while discussing the issue of res judicata held as follows: -

> 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.
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> 58. Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

22. Further, the court in the *Estate of James Karanja alias James Kioi (Deceased)* [2014] eKLR in discussing the conditions that must be met in a claim of res judicata stated as follows: -

> " For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: -
>
> a. That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.

b. The matter in issue in the latter suit must have been directly and substantially in issue in the former suit.

c. That a court competent to try it had heard and finally decided the matters in controversy between the parties."

23. The Applicants outlined the parties, cause of action, issues and the reliefs sought in both the present and the previous suit instituted and how the same was contrary to section 7 of the *Civil Procedure Act*. They maintained that the respondent was fully aware of the 2nd and 3rd defendants at all material times during the pendency of the previous suit and their relevance to that case, but due to the plaintiff's indolence and negligence, it failed to enjoin them.

24. In the circumstances of the case; it is not in contention that the cause of action and the reliefs sought in both cases are similar. However, what remains in dispute is on the parties and whether the determination on the substantive issues in dispute on the ownership and acquisition of the suit property was done on merit.

25. With regards to parties; the applicants dismissed the allegation made at paragraph 15 of the Plaint and maintained that the failure to enjoin the 2nd and 3rd defendants, who were parties relevant to the suit, was attributed to negligence on the part of the plaintiff and the same should not be used as an excuse or a bar to a claim of res judicata. The respondent on its part admitted that they failed to include the 2nd and 3rd defendants as parties in the previous suit but maintained that it is on that basis that the court declined to make substantive determination on the issues in dispute.

26. In the case of *Omondi v National Bank of Kenya Limited and others,* (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.'

27. This position was reiterated by Odunga J. (as he then was) in the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR on the ground of parties in a claim of res judicata held that: -

> " However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the *Civil Procedure Act*, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

28. In view of the above; it is the finding of this court that the inclusion of the 2nd and 3rd defendants herein; Kuyang Agencies Limited & Mabaki Limited, is not a complete bar to the claim on res judicata. As stated in the above decision, the doctrine will still be invoked since the added parties still peg their claim under the same title as the parties in the previous suit. Further, I have noted at paragraph 2 of the Judgment in ELC Case No. 632 of 2012; the judge referred to the observation made by Munyao J. that the plaintiff had filed an application for leave to amend the plaint to include some parties but that application was never pursued.

29. The court in *Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR in addressing what amounts to res judicata held as follows: - "To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

30. The question that follows is whether the previous suit ELC Case No. 632 of 2012 was determined on merit, did the judgment rendered on 23rd July, 2023 conclusively determine the issues in controversy between the parties therein? The respondent maintains that the judgment in the previous suit was not on merit, that the issues on the ownership and the acquisition of the suit property were not discussed on merit, the applicants contend that the previous suit was determined on merit.

31. I have had the benefit to read the judgement by my brother Kibunja J. delivered on 23/7/2023 in Eldoret ELC Case No. 632 of 2012 and particularly paragraph (e) at page 21 – 23 of the judgment and which I seek to reproduce in part stated as follows:-

> "... As already pointed out in 2 above, the plaintiff's application dated 1st March, 2012 to amend its plaint to enjoin Kuyang Agencies Limited and Mabaki Limited was never prosecuted and the two are not therefore parties in this suit. The court is not therefore in a position to make any determination that is likely to adversely affect their proprietary rights, that they obviously held over the suit property, without according them an opportunity to file their pleadings and be heard. To do otherwise, as the plaintiff has moved the court to do through this suit, would amount to a contravention of their rights to property and fair hearing under Articles 40 and 50 of the *Constitution* 2010. The court is aware that the protection of the right to property that has been unlawfully acquired is not protected under Article 40(6) of the *Constitution*. While, that may be what the plaintiff position is in their endeavour to reclaim the suit property, there is as of today no determination made that the suit land was unlawfully obtained. That such a determination has to be done through a litigation process involving all the parties concerned before a court of competent jurisdiction....."

32. I have looked at plaint in the instant suit and while I acknowledge that the cause of action and the subject matter is similar in both suits, it is imperative to point out that the issues in dispute/controversy, and which primarily touches on the ownership, the alleged fraud and illegality in the acquisition of the suit property were never determined on merit.

33. The applicants contend that the suit was determined on merit but they have not clearly outlined the said alleged determination particularly on the issue of ownership, the alleged fraud and the process of acquisition of the suit property.

34. The Supreme Court in the case of *Dina Management Ltd vs County Government of Mombasa & 5 Others* Petition No. 8 of 2021 held that: -

> "The elements set out above are to be conjunctive rather than disjunctive before a suit or an issue is to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action."

35. It is therefore my finding that the issues directly and substantially in issue in the previous suit were not determined on merit. Consequently, I find that the present suit as filed is not res judicata

Exturpi causa non oritur actio

36. Loosely translated; the doctrine of ex turpi causa non oritur action means that no action arises from a dishonourable cause, no man shall benefit from the wrong doing that he does.

37. The applicants contend that the plaintiff's suit as filed offends the doctrine of ex turpi causa non oritur actio; that the plaintiff's suit is an abuse of the court process and is founded on transgression of the law as outlined under section 7 of the *Civil Procedure Act*, codifying the principle of res judicata.

38. The doctrine of ex turpi causa non oritur action is ordinarily invoked in the law of contract where a contract is especially illegal or contrary to public policy. According to *Brooms Legal Maxims* 10th Edition by R. H. Kersley, at page 499: -

> 'It is moreover a general proposition that an agreement to do an unlawful act cannot be supported at law (g) that no right of action can spring out of an illegal contract (h) and this rule, which applies not only where the contract is especially illegal, but whenever it is opposed to public policy (h) or founded on an immoral consideration (i) is expressed by the well-known maxim ex turpi non oritur action..."

39. Taking the circumstances of the case in entirety and having addressed the issue on res judicata at length; it is my finding that the doctrine of ex turpi causa non oritur action is not applicable in the instant case.

40. In addressing circumstances that may lead to the striking out of a suit; Mativo J. (as he then was) in the case of *Satya Bhama Gandhi v Director of Public Prosecution and 3 others* [2018] eKLR held that; -

> " The situation that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations:-

a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

b. Instituting different actions between the same parties simultaneously in different Court even though on different grounds.

c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and Respondent notice.

d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.

e. Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.

h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.

41. In the premises, it is the finding of this court that the applicants have not proved their claim to the required standard to warrant the striking out of the plaintiff's suit instituted vide the Plaint dated 23.10.2023.

Conclusion

42. The totality of the foregoing is that the 1st – 4th Defendants/Applicants Notice of Motion Application dated 17th May, 2024 is not merited and is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2024.

E. OBAGA

JUDGE

In the virtual presence of; -

M/s Moraa for the Plaintiff/ Respondent.

Mr. Bwire for the 1st – 4th Defendants/Applicants.

Court Assistant – Laban

E. OBAGA

JUDGE

21ST NOVEMEBR, 2024