



Waweru v Julius t/a State High School & Deliverance International Centre Church (Environment and Land Appeal E003 of 2023) [2024] KEELC 13331 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13331 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E003 OF 2023
AA OMOLLO, J
NOVEMBER 21, 2024**

BETWEEN

MOLLY NDUTA WAWERU APPELLANT

AND

**PASTOR AGANI M JULIUS T/A STATE HIGH SCHOOL & DELIVERANCE
INTERNATIONAL CENTRE CHURCH RESPONDENT**

(Being an Appeal from the judgment and decree of Honourable L. M. Njora Senior Principal Magistrate, Milimani Commercial Courts, Nairobi, in MCELC No. E277 of 2022 delivered on 23rd June 2023)

JUDGMENT

Background of the Appeal

1. The background of this appeal takes us to MCELC No E204 of 2021; where a Plaintiff was filed on 15th June 2021 by the current Appellant praying for the following orders:
 - i. An order evicting the Defendant from the Plaintiff's parcel of land known as Dagoretti/Riruta/4931 Kawangware-Nairobi County;
 - ii. arrears of rent amounting to (Kenya shillings Eight Hundred and Twenty-Five Thousand) Ksh 825,000/-;
 - iii. mesne profits of (Kenya shillings Twenty-Five Thousand) Ksh 25,000/- per month from 16th June 2021 until vacant possession;
 - iv. Costs of the suit;
 - v. Interest on arrears of rent at court rate from the time of filing suit until payment in full; and
 - vi. Any other or further relief deemed appropriate.



2. The Defendant neither entered appearance nor took any action in the suit. The Plaintiff then requested for interlocutory judgment under Order 10 Rule 6 of the Civil Procedure Rules dated 22nd September 2021 which was endorsed on 15th November 2021 and an interlocutory decree issued on 3rd December 2021. At the formal proof hearing on 26th May 2022 the Plaintiff adopted her witness statement and produced the documents contained in the list dated 28th July 2022.
3. In brief, the Appellant stated that the Respondent was her Tenant at a rental income of Kshs.25,000 per month. That since October 2018, the Respondent had not paid due rents and that he had been issued with a notice to vacate (Pex-2) but he failed to heed to the demand. Counsel Ombete for the Plaintiff submitted that their attempts to serve the Respondent had been fruitless and the claim had not been contested.
4. In a brief account of the court's judgment rendered on 15th July 2022 by Hon Kagoni E. M PM, the learned magistrate held that the orders the Plaintiff/Appellant sought could not be granted. His honour referred to the provisions of section 3 (3) of the Law of Contract Act for defining a contract and its nature and several Rules of the Civil Procedure Rules; Order 10 Rule 4 on judgment upon a liquidated demand, Order 10 Rule 5 on liquidated demand against several Defendants, Order 10 Rule 6 on interlocutory judgment, and Order 10 Rule 7 on interlocutory judgment where there are several Defendants and Order 10 Rules 9 on the general rule where no appearance is entered.
5. Then came the second lower court suit; Milimani MCELC E277 of 2022; subject of this appeal. The Appellant filed a Plaint dated 28th July 2022 against the Respondent. The suit centred around the Appellant initially as Landlady and Respondent as Tenant and as a licensor and licensee in the 2022 suit and therefore as trespasser. The Appellant alleged that the Respondent was its licensee since 15th June 2017. The Appellant's Counsel stated that they had sent the Respondent a demand letter dated 29th April 2021 to vacate the premises within 30 days.
6. The Appellant's prayers were akin to the 2021 suit prayers but divergent in a few instances outlined in the judgment dated 23rd June 2023. The Respondent prayed for (1) ejectment of the Respondent from the suit property; (2) mesne profits at the rate of Ksh.25,000/- per month from 16th October 2018 until the Respondent delivered vacant possession as well as (3) costs for the suit, (4) interest at court rates; (5) and any further reliefs in regard to the suit property.
7. The Respondent made no response so the suit proceeded undefended. The suit was heard on 28th March 2023 with the Appellant and her Counsel present and the Appellant; PW1; adopted her Witness Statement as her Evidence in Chief and her copy of the List of Documents as Exhibits 1; the title deed for the suit property, 2; the demand notice dated 29th April 2021 for the Respondent to evacuate the suit property within 30 days from the date of service; and 3; a copy of the judgment in the 2021 suit.
8. She further told the court that she was the proprietor of the suit property where the Respondent as her Tenant had constructed a small church and a school on the suit property. There was no written contract between the two which was produced. At first the Appellant was paid through Mr Mahinda but she alleged that he had not paid rents a few months after the tenancy began.
9. The issues brought up in the impugned judgment in Milimani MCELC E277/2022 were:
 1. Whether the suit was res judicata?
 2. whether the court ought to eject the Respondent from the suit property; and
 3. whether the courts should issue the Appellant mesne profits as she had outlined in her Plaint.



10. According to Senior Principal Magistrate Honourable L. M Njora’s analysis and determination; the suit Milimani MCELC E277/2022 was res judicata MCELC no. E204 of 2021. She proceeded to dismiss it with no order as to costs. The learned Magistrate defined res judicata according to section 7 in the *Civil Procedure Act* and cited the case of Edwin Thuo versus Attorney General & another; Petition 212 of 2011 [2012] eKLR on courts to be vigilant and guard against litigants filing a similar suit under the doctrine of res judicata.
11. Initially, the Appellant swore that the Respondent had rented the suit property from 15th June 2017. In the 2022 suit, the Appellant now claimed that she licenced the suit property to the Respondent from 15th June 2017. The Appellant never defined what a tenancy was in the 2021 suit so as to distinguish it from the licensee relationship pleaded in the 2022 suit. That the Appellant should have been able in the 2021 suit to include the prayers of a licensee as well and it is on this account that the learned trial magistrate dismissed the 2022 suit.

Appeal to this Court

12. Aggrieved and dissatisfied with the whole judgment delivered on 23rd June 2023 by the Senior Principal Magistrate Honourable L. M Njora, and the decree issued on 21st March 2023 in Milimani Commercial courts, Nairobi in MCELC No. E277 of 2022, the Appellant filed a Memorandum of Appeal dated 17th July 2023 where she raised 5 grounds of appeal as set out below;
 1. That the Honourable SPM Honourable L. M. Njora grossly erred in law and fact in holding that the Appellant’s suit was res judicata in terms of section 7 of the *Civil Procedure Act*;
 2. That the Honourable SPM grossly erred in law and in fact in failing to find that the first action MCELC no. E204 of 2021 was a cause of action based on tenancy while the above action was a cause of action based on licence and the two causes are distinct;
 3. That the Honourable SPM grossly erred in law and fact by failing to hold that the proprietor of the suit property could allow another person to occupy his/her land either as a tenant or licensee and in each suit he/she has the right to terminate that right/ privilege upon which he can have that person ejected from his/her land;
 4. That the Honourable SPM grossly erred in law and fact in failing to hold that once the right or privilege of a proprietor grants to another person has been withdrawn and that person continues to occupy the landowner’s land, he becomes a trespasser; and
 5. That the Honourable SPM grossly ignored the Appellant’s right to her parcel of land and permitting the trespasser to continue trespassing on the Appellant’s parcel of land.
13. The Appellant prayed for orders that;
 - i. The appeal be allowed;
 - ii. the Judgment and Decree of the trial court be set aside;
 - iii. all the Appellant’s prayers in the trial be allowed; and
 - iv. the costs of this appeal and the trial be awarded to the Appellant.

The Appellant’s submissions

14. Appellant’s Counsel; L. M. Ombete; filed submissions dated 21st June 2024. He condensed the issues into two. One was that the 2022 suit was not res judicata the 2021 suit and the second issue



was Counsel's fear that the Honourable SPM's judgment would probably lead to the Respondent succeeding as proprietor by adverse possession after twelve years.

15. Counsel stated that the 2021 suit had been filed in error as a tenancy suit. Counsel reiterated that a tenancy was quite the opposite to a license. He submitted that two suits are res judicata when the cause of the action is the same as the previous suit. However, a suit is not res judicata if the remedies sought by a party are the same as the previous suit. Therefore, the 2022 suit ought to have been heard to its determination.
16. Counsel adamantly proffered that a proprietor granting tenancy [Tenant] differed from a proprietor giving a licence [Trespasser]. He stated that while a tenancy demanded possession of the suit property, a licence demanded recovery of possession of the suit property.
17. Counsel submitted that a suit is not res judicata because the remedies sought were the same as in the previous suit; but it was res judicata because the cause of action was the same as the previous suit.
18. Counsel referred to the case of C. K. Bett Traders Limited & 2 others versus Kennedy Mwangi; High Court Civil Appeal No. 7 of 2020 [attached] determined by Justice E. C. Mwita on section 7 and the Court of Appeal decision and IEBC versus Maina Kiai & 5 others [2017] eKLR that defined 'res judicata'.
19. It was Counsel's submission that since he filed the 2021 suit in error, it would be followed by devastating consequences for the Appellant.
20. Counsel prayed that the honourable court set aside the trial court's judgment and decree and send the suit back to the trial court for hearing under a different magistrate. Counsel also prayed for costs.

Analysis and Determination

21. The judges of appeal in Christopher Kioi & another versus Winnie Mukolwe & 4 others [2018] e KLR had this to say concerning appeals:

“As the first appellate court in this matter, we are obliged to consider the evidence adduced before the trial court, evaluate it and draw our own conclusions. In so doing we must bear in mind and make allowance for the fact that, unlike the trial court, we did not have the benefit of seeing or hearing the witnesses who testified at the trial. (See Hahn v. Singh [1985] KLR 716). Similarly, it bears repeating that this Court will not interfere with a finding of fact by the trial judge unless such finding is based on no evidence or is based on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings that he/she did. (See Susan Munyi v. Keshar Shiani CA. No. 38 of 2002). Nevertheless, we are entitled to and will interfere if it appears that the trial judge failed to take account of particular circumstance or probabilities material to an estimate of the evidence or where his impression, based on the demeanour of material witness, is inconsistent with evidence in the suit generally. (See Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88] 1 KAR 278).”

22. Section 78 of the *Civil Procedure Act* on the powers of appellate court state that:
 - (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-
 - (a) to determine a suit finally;
 - (b) to remand a suit;



- (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein
23. The major subject in this appeal is whether the 2022 suit was res judicata the 2021 suit. Section 5 of the [Civil Procedure Act](#) states that Courts to try all civil suits unless barred by any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.
24. Section 7 of the [Civil Procedure Act](#) defines the doctrine of res judicata as: QUOTE{startQuote “{
- No Court shall try any suit in which the matter is directly and substantially in issue has been directly [without deviation; Black’s Law dictionary, 9th edition; 1. in a straightforward manner; 2. in a straight line or course; and 3. Immediately;] and substantially [fundamentally; essentially; actually; truly; basically] 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.”
25. The latter section gives explanations so that parties can see if their suit fits with the character of res judicata.
- 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.
26. The Supreme Court suit of Kenya Commercial Bank Limited versus Muiiri Cofee Estate Limited & another [2016] eKLR explains the necessity for this doctrine;
- “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.

27. The Supreme Court suit of John Florence Maritime Services Limited & another versus Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) cited Wigram, V-C in Henderson versus Henderson (1843) 67 ER 313, as follows:

“Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole suit, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of 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 suit. The plea of *res judicata* applies, except in special suits, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, 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”

28. The first parameter was whether the issues raised in the 2021 suit were similar to the issues raised in the 2022 suit. It was the Appellant’s submission that the definition and prayers of both suits differed. Prayer one in the former suit sought eviction of the Respondent from Dagoreti/Riruta/4931. It also sought mesne profits at the rate of Kshs.25,000 which essentially refers profits accruing to a person entitled to the land but who has been denied possession.
29. The definition of tenancy and licence are almost at par as a Landlady goes into an agreement for use of the land whereas a licensee is allowed to do some action in relation to the land. Under the [Land Registration Act](#), “licensee” means the person occupying land in accordance with the terms of a license. Under the Landlord & Tenant Act, Cap 301, “tenant” in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a sub-tenant.
30. I hold that the issues in both suits were uniform as the parties and the reliefs in the 2022 suit were equivalent and or similar as in the 2021 suit. Even with a variation of the Respondent being referred as a licensee in the later suit, there is nothing which stopped the Appellant from bringing all claims in one suit. Explanation 4 of section 7 bars her from trying to distinguish the two claims. It was a ploy and play on the titles of parties but both refer to some sort of holding of land; with permission of the Appellant and for which she now want orders to obtain vacant possession.
31. The second requirement was whether the 2021 suit and 2022 suit would have the same parties or parties under whom they or any of them could claim. I already made my comments on the term ‘tenancy’ and ‘licence’. Though the parties are the same with different titles, the Appellant’s claim in the 2021 suit and the 2022 suit are similar.
32. In regard to the parties litigating under the same title, the Appellant changed the title so that she could rectify the suit. But in both suits, the Appellant is the supposed owner of land searching for recourse from the Respondent; whether as tenant or licensee. The issue was heard and finally determined in the former suit (E204 of 2021). Even though the Appellant failed in the first suit, the suit was finally heard and determined. It is not that the 2022 suit set differing coordinates to the 2021 suit.



33. Both suits were filed in the magistrates' court which were both competent to hear the suit; so, there is no question on incompetency.
34. I uphold the same finding as Honourable L. M. Njora in MCELC No. E277 of 2022; Molly Nduta Waweru versus Pastor Agani M Julius T/A High School & Deliverance International Centre Church delivered on 23rd June 2023 that the suit MCELC No. E277 of 2022 is res judicata and is hereby dismissed with the Appellant bearing the costs.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 21ST DAY OF NOVEMBER 2024.

A. OMOLLO

JUDGE

