



**Ayoo v Misigo & another (Environment & Land Case E014 of 2024)
[2024] KEELC 13388 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E014 OF 2024
E ASATI, J
NOVEMBER 14, 2024**

BETWEEN

EMILY ATIENO AYOO PLAINTIFF

AND

RICHARD OLIECH MISIGO 1ST DEFENDANT

MUNICIPALITY OF KISUMU 2ND DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion application dated 25th April, 2024 seeking for an order that the court be pleased to set aside the judgement of the Resident Magistrate's court at Winam Civil Case No.24 of 2005.
2. Her case is that in the year 2005, the 1st Respondent secretly filed Civil Case No.24 of 2005 against her and the 2nd Respondent at Wiman Court. That she was not served with pleadings in the case and it proceeded and heard on formal proof.
3. The application was opposed by the 1st Respondent who filed Notice of Preliminary Objection dated 10th June, 2024 and Replying Affidavit sworn by the 1st Respondent on 12th June, 2024.
4. Directions were given by the court on 24th June, 2024 that both the Preliminary Objection and the application be argued together by way of written submissions
5. I have considered the application, the response thereto and particularly the preliminary objection. The Preliminary Objection was raised on the grounds that in light of the provisions of Section 7 of the *Civil Procedure Act* the court cannot proceed to hear and determine the suit as it involves the same parties and the same subject matter which matter was heard and determined in Winam PMCC No.24 of 2005.
6. Secondly, that the suit was time barred in light of the provisions of the *Limitation of Actions Act*.



7. Both parties exhibited copies of the judgement in the former suit. Perusal of the said judgement reveals that the parties were the same as the parties in the present suit, save that the Plaintiff herein was the 1st Defendant and the 1st Defendant herein the Plaintiff in the former suit. The subject matter of the former suit was Land parcel Number Migosi Plot No.1 – 53 which is the suit land in the present suit.
8. The judgement in the former suit shows that the suit was heard, albeit ex parte, and judgement entered in favour of the 1st Defendant herein. The competence and or jurisdiction of the trial court in the former suit is not being challenged.
9. I find that all elements of *res judicata* as explained in section 7 of the [Civil Procedure Act](#) are present in the present suit.
10. I find that the Preliminary Objection has merit and hereby uphold it. The application seeks that this court sets aside the judgement in the former suit. This is an application to be heard by and a relief to be sought in the trial court.
11. Having found that the suit is *res judicata*, the only option open to me is to strike it out, which I hereby do. The application dated 25/4/2024 and the entire suit commenced vide the plaint of even date are hereby struck out.

Costs to the 1st Defendant.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Applicant in person.

Ochieng for the 1st Respondent.

