



**Keen & another (The Personal representatives of the Estate of John Keen) v Kenya Forest Service (Environment & Land Petition E013 of 2023) [2024] KEELC 13416 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13416 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E013 OF 2023  
AA OMOLLO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**ROSEMARY KEEN ..... 1<sup>ST</sup> PETITIONER**

**PAMELA KEEN ..... 2<sup>ND</sup> PETITIONER**

**THE PERSONAL REPRESENTATIVES OF THE ESTATE OF JOHN KEEN**

**AND**

**THE KENYA FOREST SERVICE ..... RESPONDENT**

**RULING**

1. Before this court is a Notice of Preliminary Objection dated 4<sup>th</sup> of June 2024 filed by the Attorney General; on behalf of the Respondent; who entered appearance on the same date. The Preliminary Objection constitutes points of law that the suit; Rose and Pamela Keen [suing as the personal representatives of the estate of John Keen (deceased) versus Kenya Forest Service (KFS) was res judicata the Nairobi ELC case number 521 of 2014.
2. The Notice of Preliminary Objection is premised on the title LR Ngong/Ngong/12673 expressed in Title Deed number 267905 (hereinafter referred to as ‘the suit property’) re-issued and registered under the name of the deceased; John Keen on 3<sup>rd</sup> May 2010;
3. The Petition dated 14<sup>th</sup> September 2023 was premised on the Respondent’s contravention of Articles 22, 23, 162(2), 40, 47(1) as well as the fundamental rights under Articles 40 & 47 (1) of *the Constitution*.
4. The PO is the nature of ELC Case Number 521 of 2014 John Keene versus Kenya Forest service (hereinafter referred to as ‘the 2014 suit’) as against the Land Petition Nairobi ELC L Petition E013 of 2023; Rosemary Keen & Pamela Keen (personal representatives of the estate of John Keen [deceased] versus the Kenya Forest Service (hereinafter referred to as ‘the Petition’).



5. In the 2014 suit, the prayers sought by the Plaintiff in the Plaint were that;
  1. He be declared the registered proprietor of the suit property and be given free, uninterrupted possession of the suit property;
  2. Restraining orders against everyone associated with the Kenya Forest Service from in any way interrupting his proprietorship and possession of the suit property;
  3. Damages for trespass and loss of user;
  4. Damages for destruction of property;
  5. Aggravated and exemplary damages; and
  6. Costs of the suit.
6. John Keene had been the Plaintiff in the 2014 suit until he died on 25<sup>th</sup> December 2016. Pursuant to his evidence, he had been the proprietor of the suit property having purchased the same from the previous owner; Joyce Leitepan Kimojino. He was thereafter re-issued with a title on 3<sup>rd</sup> May 2010. The Respondent; KFS; on the other hand, whose objects are to conserve develop, and sustainably manage forest resources in Kenya; would not permit the Plaintiff physical occupation to the suit property.
7. The Defence denied all the contents of the Plaint and stated that the Plaintiff's narrative was inaccurate and that the land Registrar, Kajiado or the relevant Registrar be directed to cancel the registration of the suit property and costs of the suit and the Counterclaim be granted to the Defence.
8. The Respondents' authority in this Petition was the 2014 suit ELC Case Number 521 of 2014 John Keene versus Kenya Forest service dated 4<sup>th</sup> June 2024; a Ruling delivered by Lady Justice Lucy N. Mbugua on 2<sup>nd</sup> March 2023. The Ruling's opening statement was that the 2014 suit had abated by operation of the law a year after John Keen's death. The ruling was pursuant to a Notice of Motion dated 19<sup>th</sup> September 2021, where the Plaintiff's estate sought an extension of time for the purpose of substituting the deceased. The grounds of the application and the Supporting Affidavit sworn by Pamela S. Keen [an executrix of the Will] dated 19<sup>th</sup> September 2022 were that the Grant of Probate issued for the deceased's estate was issued on 4<sup>th</sup> April 2017 In addition, their advocate Mr Maina Wachira; who was also an executor; passed away on 27<sup>th</sup> March 2021. The result was that they were unable to get their file and documents. The Deponent also averred that the Covid 19 also partly contributed to the delay. The application was opposed.
9. Lady Justice Mbugua in the ruling stated that Covid 19 having emerged in March 2020 was not a valid reason for the delay and the application made 6 years later; was made after inordinate delay; and the suit had already abated. That their second ground sought to enjoin the estate rather than the legal representative was in non-compliance with Order 24 Rule 3(1) of the Civil Procedure Rules.
10. In the Ruling, the judge stated that an abated suit could not be revived unless sufficient cause was established citing the case of Kishor Kumar Dhanji versus Amolak Singh & 4 other [2016] eKLR, the Court of Appeal stated that 'sufficient cause' ought to be rational, plausible, logical, convincing, reasonable and truthful; without any unexplained gaps in the sequence of events.
11. She determined that the reasons given by the Applicant were not sufficient to warrant the revival of the suit. The application for revival dated 19<sup>th</sup> September 2021 and filed on 19<sup>th</sup> September 2022 was dismissed with costs and the file was marked as closed.



## The Petitioners' and Respondent's Counsels' oral arguments

12. The PO was heard orally on 16<sup>th</sup> September 2024. It rested on section 7 of the *Civil Procedure Act*. According to Counsel, the matter was res judicata the 2014 suit. The 2014 suit had abated and so the present suit could not revive the earlier suit. In addition, Counsel mentioned that the suit was also time barred on account of section 7 of the Statute of Limitations Act.
13. Counsel for the Petitioner stated that the deceased-John Keen had obtained title in 2010 and so the right to recover the suit accrued from 2010; more than 12 years from when the suit was filed.
14. Opposing Counsel stated that they had annexed the pleadings in the 2014 suit to give credence to the Petition. According to Counsel Echessa; the 2014 suit sought declaratory orders as to who is the proper and registered owner of the property and the Defendant counter-claimed for the cancellation of that title. That the transfer of the suit to the Personal Representatives were two very separate subjects. But the 2014 suit abated owing to the fact that the parties never reached a good and worthy decision.
15. In this Petition, the Petitioners are personal representatives of the estate of John Keen [deceased] so that it was erroneous to state that the cause of action didn't survive the deceased as the title was still registered in the deceased's name. They concluded that the case was not res judicata. The Petitioner submitted that the PO should be dismissed.
16. In the case of limitation, the Petitioner relied on Article 40 of *the Constitution*; that the Personal Representatives had a right to the suit and the suit was therefore not time barred.
17. To emphasise, the Respondent's Counsel stated that the right to recover the suit was lost and the suit abated. The right could not be transferred to the present suit. They prayed that the PO be upheld and that the Petition be struck out.
18. The Petitioners relied on the following caselaw for the hearing of the PO; *Accredo AG & 3 others versus Steffani Uccelli* [2019] eKLR

## Analysis and Determination

19. Having considered the Notice of Preliminary Objection the Petitioner's Affidavit supporting the Petition sworn by Pamela S. Keen and the oral arguments, this court I proceed to analyse whether the Preliminary Objection has merit.
20. In *Oraro v Mbaja* [2005] KEHC 3182 (KLR), the judge stated that the principle is abundantly clear.

‘A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.’
21. The Judges; Kalpana Rawal, P. K. Tunoi, Mohammed K. Ibrahim, J.B. Ojwang, N. Ndungu in the Supreme Court case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014]eKLR restated the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors* (1969) EA 696:

“ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

22. Counsel mentioned that the suit was also time barred on account of section 7 of the Statute of Limitations Act which wasn't highlighted in the PO and will therefore not be considered in this Ruling. In regard to the 2014 suit dated 4<sup>th</sup> June 2024; Lady Justice Lucy N. Mbugua on 2<sup>nd</sup> March 2023; delivered a Ruling stating that the suit stood abated on 12<sup>th</sup> February 2020 by operation of law a year after the deceased's death.
23. By a Notice of Motion dated 19<sup>th</sup> September 2021 but not filed till 19<sup>th</sup> September 2022; the personal representatives of the estate of John Keen sought for extension of time to substitute the deceased with the estate. They received the grant in 2017 but did not substitute the deceased even in 2022 stating that from 2019 there were barriers; even though; from their own words; they were aware of the case. The Petitioners were also non-compliant in attempting to substitute the deceased with the estate. Based on the reasons given by the Petitioners to revive the suit; the judge found that those were not plausible reasons. The judge on the 2<sup>nd</sup> day of March 2023 dismissed the application with costs and marked the case as closed.
24. Order 24 Rule 7 of the Civil Procedure Rules on the effect of abatement or dismissal; states that:
  1. Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
25. In the case of Said Sweilem Gheithan Saanum versus Commissioner of Lands (being sued through The Attorney General), Municipal Council of Mombasa, Norman Taherali Dawoodbhai, Hassan Taherali Dawoodbhai, Ali Ramandhan Mwatsau & Mohamed Naman Mohamed [2015] KECA 284 (KLR), the judges of appeal stated that,

“Where a suit abates no fresh suit can be brought on the same cause of action. ... The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.”
26. In the Court of Appeal case of Rebecca Mijide Mungole & Cleophas Ongau Omwenga versus Kenya Power & Lighting Company Ltd, Atlas Copco Eastern Africa Ltd & Falcon Signs Ltd [2017] KECA 544 (KLR), the three judges emphasized the sequence of a suit similar to this;

“The sequence of the application under this procedure of what should happen in case of the death of a Plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the Defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased Plaintiff. Referring to a differing suit, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may



have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the Plaintiff no application is made to cause the legal representative of the deceased Plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased Plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party.

27. It is a mandatory duty of the court under Article 23 of *the Constitution* that it exercises its authority to uphold and enforce the Bill of rights. In addition, under Article 47 (1) and sections 2, 3 and especially 4 of the *Fair Administrative Action Act*, the court must ensure that administrative action be taken expeditiously, efficiently lawfully and that access to justice is not impeded.
28. This court is therefore bound by the stated Articles of *the Constitution*, different sections of the *Civil Procedure Act* and the *Fair Administrative Action Act*. It is the duty of the court under section 1A, 1B and 3A of the *Civil Procedure Act* to do its duty which contravention the Petitioner has failed to show. The duty is not only for the court, but in section 1A (3) of the *Civil Procedure Act*, the parties to civil proceedings are under a duty to assist the court to further the overriding objective of the Act and therefore participate in the processes of the court and to comply with the directions and orders of the Court.
29. In the Supreme Court case John Florence Maritime Services Limited & another versus Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR), the judges stated that:

‘The doctrine of res judicata was based on the principle of finality which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of res judicata prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively.

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.

That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus: the courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. 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.’

30. In this the Petitioners prayed for:
- a. a declaration that the Petitioners’ protected right over the suit property had been violated by the Respondent’s act of preventing access, possession and occupation;
  - b. an injunction restraining the Respondent and anyone attached to it from in any way interfering with the Petitioners’ ownership, possession, access and use of the suit property;
  - c. compensation for the violation of the Petitioner’s property rights over the suit property;
  - d. appropriate relief in redress of the violation and threatened violation of the Petitioners disclosed rights and freedoms; and
  - e. an order for payment of costs for this Petition.
31. It is worth noting that the prayers sought in this Petition are similar to those sought in the 2014 suit. While the deceased was asking for the same prayers for his own person; in the Petition, they have sought the same prayers clouded by articles of the Constitution and the alternative of the deceased with the Public Representatives. The prayers sought in both suits are therefore indistinguishable.
32. In the 2014 case, the suit abated, then substitution failed and the application for revival was dismissed. The Petitioners are therefore trying to get around all their failures in the 2014 suit which was abated and the later application dismissed and the file closed due to no fault but their own. The principles of res judicata may not be applicable to the present case but the provisions of order 24 rule 7 precludes the petitions from instituting a fresh case to revive a suit that had already abated.
33. Under section 8 of the CPA, the Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action. Consequently, this court allows the Notice of Preliminary Objection by the Respondent and strikes out the Petition with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024**

**A. OMOLLO**

**JUDGE**

