



Mwalingo & 542 others v Hedge Farm Limited (Environment and Land Case Civil Suit 224 of 2017) [2024] KEELC 14060 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 224 OF 2017
EK MAKORI, J
DECEMBER 17, 2024**

BETWEEN

**MWALUNGO MWAMBUI MWALINGO 1ST PLAINTIFF
JULIUS JALO MWADEGE 2ND PLAINTIFF
GABRAEL KARISA KENGA 3RD PLAINTIFF
CHIKO MWALUNGO 4TH PLAINTIFF
DONALD DZOMBO & 538 OTHERS & 538 OTHERS & 538
OTHERS 5TH PLAINTIFF**

AND

HEDGE FARM LIMITED DEFENDANT

RULING

1. On the 15th of August 2022, this Court (Odeny, J) delivered a ruling striking out the Applicants’ Originating summons in this manner:

“On the issue as to whether this suit is res judicata, Section 7 of the *Civil Procedure Act* provides:

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. — (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.



28. It is noteworthy that the judgment delivered in Mombasa ELC Petition No. 2 of 2018 on 22 October 2020 shows that the suit property herein was part of the subject properties in the former case. The issue raised herein is substantially similar to those raised in the aforementioned Petition.
29. Even though the Plaintiffs claim that they never took part in those proceedings in Mombasa hence the doctrine of res judicata cannot apply. The Plaintiff's argument is erroneous as Explanation 6 above is quite clear that 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. The Plaintiff's claim is for adverse possession, which claim had already been adjudicated upon and determined vide Mombasa ELC Petition No. 2 of 2018
30. Having found that the Plaintiffs do not have locus standi to bring this case on behalf of 538 others for lack of authority and having found that this suit is res judicata, I will, therefore, not deal with the application for injunction as it is superfluous.
31. The upshot is that the Defendant's application to strike out the Plaintiffs 'Originating Summons is hereby allowed as prayed, and the Originating Summons is struck out with costs to the Defendant.'

2. The Applicants have once again approached this Court for review, this time via application dated 18th June 2024, claiming that the Court erred in finding that the Mombasa case bound them even though they were not parties. They are desirous of proceeding with the matter on merit.
3. The Respondents oppose the application, claiming nothing new has been presented to warrant a review.
4. From the materials placed before me, I frame the issues for this Court to determine whether the Applicants have disclosed germane reasons to warrant the review of the subsisting orders striking out the entire suit by operation of the doctrine of res judicata.
5. Review is provided in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
6. Section 80 of the *Civil Procedure Act* provides as follows:

“ Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

7. Order 45 of the Civil Procedure Rules provides as follows:

“ 1.

(1) Any person considering himself aggrieved—



- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

8. The court’s discretion in allowing a review is a weighty decision not to be taken lightly. The court may allow a review on three grounds: the discovery of new and vital evidence, an apparent error on the face of the record, or any other sufficient reason. The application for review must be made without undue delay. The third reason for review on sufficient reason(s) has been held not to be exhaustive. Those reasons can be deciphered on a case-to-case basis; see *Zablon Mokua v Solomon M. Choti & 3 others* [2016] eKLR:

“To the statutory grounds, may also be added instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see *Serengeti Road Services -v- CRBD Bank Limited* [2011] 2 EA 395. Also, to be included as part of sufficient reason is where the impugned order, if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see *Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited* (supra).

37. It is practically impossible to itemize what would be ‘sufficient reason’ for purposes of review under the courts’ “residual jurisdiction” or inherent powers. The exceptional instances when obvious injustice would be worked by a strict adherence to the terms of the order or decree as originally passed are copious.

38. However, given that a review application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, ‘sufficient reason’ ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline.”



9. The reason for review here is that the court erred in concluding that res judicata applied to the Applicants, who were never parties in the Mombasa case. No new facts, grounds, sufficient reasons, apparent error on record, or statutory grounds have been provided. In other words, the Applicants have appealed against this Court's decision. In my view, they should have approached the Court of Appeal. They cannot have a second bite.
10. That being the case, the application dated 18th of June 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 17TH DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Amal, for the Respondents

Happy: Court Assistant

In the absence of:

Mr. Mokaya, for the Applicants

