



Weyusia (Suing as the administrator of the estate of Zebedayo Nalume Wabomba) v Biketi (Environmental and Land Originating Summons E005 of 2023) [2024] KEELC 13931 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13931 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023
EC CHERONO, J
DECEMBER 17, 2024

BETWEEN

PIUS WAMALABE WEYUSIA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ZEBEDAYO NALUME WABOMBA) APPLICANT

AND

JOANNES LUNYOLO BIKETI DEFENDANT

RULING

1. This ruling determines the application dated 18/06/2024 which seeks the following orders;
 - a. That this honourable court be pleased to dismiss the present suit in its entirety owing to the fact that this honourable court lacks jurisdiction to hear the application and the suit as the same is res judicata.
 - b. That costs of this application be awarded to the defendant/applicant.
2. The Applicant averred that the Respondent had previously filed a suit against him vide HCCC No.73 of 1999(OS) regarding land parcel no. N.Malakasi/S.Wamono/1110 (hereinafter referred to as 'the suit land') which is registered in his name. That in its judgment delivered on 03/10/2017, the High Court noted that the Applicant herein had already been declared as the rightful owner of the suit land in Civil Suit no. 8 of 1982 and one Maurice Wafula Nalime(dcd) who was the plaintiff's brother had been evicted therefrom. That despite previous litigation, the Respondent went ahead and filed Bungoma ELC Case no. E005 of 2022 where he filed a notice of preliminary objection which was upheld by Justice B.N.Olao in his ruling dated 21/07/2022. It was argued that litigation must come to an end and that it was in the interest of justice that the orders sought be granted.
3. In response, the Respondent filed a replying affidavit sworn on 22/07/2024 and averred that he has peacefully resided on the suit land which measures 7.8ha since 1973. That his brother Maurice Wafula



Nalime(dcd) filed Bungoma SPMCC No.8 of 1982 against the Applicant herein. He confirmed that indeed he filed Bungoma HCCC No.73 of 1999(OS) and Bungoma ELC Case no. E005 of 2022 which cases were prematurely dismissed by the court which assumed he filed Bungoma SPMCC No.8 of 1982.

4. When the application came for directions, the parties to have the same canvassed by way of written submissions.
5. The Applicant filed submissions dated 11/10/2024 and cited the provisions of Section 7 of the Civil Procedure Act and the case of Njagu Wambugu & Another Nairobi HCC No. 2340 of 1991(unreported), Republic vs. Attorney General & Another Ex parte James Alfred Koroso and Kennedy Mokuia Ongiri vs. John Nyasende Mosioma & Florence Nyamoita Nyasende (2022) eKLR. He reiterated the averments contained in his supporting affidavit as summarized above.

Legal Analysis And Decision

6. I have considered the application, the affidavits in support, the replying affidavit and the submissions on record. The single issue for determination in this application is whether the Applicant is entitled to the orders sought.
7. To contextualize the application before the court, it is important to note that this suit was instituted by the Respondent vide an originating summons dated 13/10/2023 claiming entitlement over the suit land by way of adverse possession. He sought to have the Applicants title cancelled and registered in his name.
8. The Applicant in this case claims that the Respondent's case is res judicata. The substantive law on Res Judicata is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“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”
9. The Black's law Dictionary 10th Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
10. The import of this provision and the principle generally is that a person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.
11. To determine whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question. Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’



12. The Respondent in the current suit seems to have done what Kuloba J in Njangu vs Wambugu and another referred to as a cosmetic facelift in an attempt to get what was not achieved in the previous suit. As a matter of fact, the Respondent does not deny having filed Bungoma HCCC No.73 of 1999(OS) and Bungoma ELC Case no. E005 of 2022. It is his argument that the said suits were prematurely dismissed on a wrong presumption. The Respondent seems to be misguided on the procedures of the law as on one hand he confirms having filed previous suits against the Applicant over the same subject matter but and on the other hand asks the court to proceed with this suit simply because the others in his view were prematurely dismissed. This court hold the opinion that if at all the Respondent was aggrieved by the court's determination in the said suits, he ought to have preferred an appeal.
13. The issue for determination in this application is whether or not the Respondent's current suit commenced by way of originating summons claiming adverse possession is barred by the doctrine of res judicata. It is trite that parties must go to court with all their causes of action and must sue all the persons they ought to sue. The doctrine of res judicata prohibits parties from suing in bits and pieces or giving a subsequent case a legal face lift by removing parties who are part of the earlier dispute and/or case filed and determined.
14. In conclusion, I find that the Applicant's Notice of Motion application dated 18/06/2024 is merited and the same is hereby allowed with costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF DECEMBER, 2024

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Masika H/B M/S Masengeli for the Applicant.
2. Plaintiff-present.
3. Bett C/A.

