



REPUBLIC OF KENYA



**Ndirangu v Oyaro (Environment & Land Case E252 of 2021)
[2023] KEELC 283 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E252 OF 2021**

**MD MWANGI, J
JANUARY 26, 2023**

BETWEEN

HARRY KARIUKI NDIRANGU PLAINTIFF

AND

GODFREY MONG'ARE OYARO DEFENDANT

RULING

(In respect of the notice of motion application dated October 12, 2022 brought under the provisions of sections 7 & 8 of the [Civil Procedure Act](#), sections 7 & 9 (a) of the [Limitation Of Actions Act](#), cap 22 Laws of Kenya order 2 rule 15 & order 50 rule 1 of the [Civil Procedure Rules](#) and all other enabling provisions of the law.)

Background

1. The application under consideration is by the defendant in this case seeking the striking out of the plaint dated June 28, 2021 on the basis that this matter is *res judicata* to ELCC 1042 of 2014 and further that the plaintiff's suit is time barred. The defendant too prays for the costs of the suit and this application.
2. The application is premised on the grounds on the face of it and the affidavit of Caroline Kagoya sworn on the October 12, 2022.
3. The defendant avers that the plaintiff's suit seeks eviction orders against her from Land parcel Nairobi/ Block 136/9519 also known as Plot K244 (hereinafter referred to as 'the suit property' but has not come clean of the fact that he had instituted another suit being Nairobi ELCC 1042 of 2014 pertaining to the same parties, same facts and evidence as in the instant case.



4. The defendant asserts that the said case Nairobi ELCC 1042 of 2014 was dismissed on or about April 2019 for want of prosecution. It is also the defendant's position that the plaintiff's claim is time barred as it has been filed 21 years after the defendant took possession of the suit property.
5. The defendant terms the plaintiff's case an abuse of the process of court.
6. In her supporting affidavit, the deponent reiterates the averments on the face of the application and attaches the pleadings in Nairobi ELC 1042 of 2014 as exhibits and marked CK – 1.
7. It is the defendant's case that the plaintiff ought to have filed an application to set aside the dismissal order and reinstate the dismissed suit instead of filing the current suit between the same parties over the same subject matter.

Response by the plaintiff.

8. The plaintiff responded to the defendant's application by way of a replying affidavit sworn by Caroline W Kinuthia. In her brief affidavit, the deponent denies that this matter is *res judicata* since the earlier suit Nairobi ELCC 1042 of 2014 was never heard and determined. The deponent insists that for a matter to be said to be *res judicata*, the earlier one must have been heard and determined and a judgment rendered by a court of competent jurisdiction.
9. On the issue of time bar, the deponent states that the defendant's allegations are misguided since he only acquired title to the suit property on August 14, 2020 while the defendant has never been issued with a title to the suit property.

Court's Directions.

10. The court's directions were that the application be canvassed by way of written submissions. Both parties have complied and filed their respective submissions. I have had the opportunity to read the submissions.

Issues for determination.

11. The issues for determination in this matter are clear cut, namely: -
 - a. Whether the plaintiff's suit is *res judicata*.
 - b. Whether the plaintiff's case is time barred.
 - c. What orders should issue in regard to costs.

Analysis and Determination.

A. Whether the plaintiff's suit is *res judicata*.

12. The fact that the plaintiff had filed an earlier suit against the defendant over the same subject matter is not disputed; neither the fact of its dismissal for want of prosecution. The plaintiff's position is that the earlier suit Nairobi ELCC 1042 of 2014 was not heard and determined by a court of competent jurisdiction. In other words, that a dismissal for want of prosecution cannot be the basis for raising the plea of *res judicata*. The plaintiff therefore prays for the dismissal of the defendant's application.
13. On his part, the defendant in his submissions has made reference to a number of authorities to augment his position. He made reference to the Court of Appeal decision in the case of [*Njue Ngai v Ephantus*](#)



Njiru Ngai & Another (2016) eKLR, where the court considered the issue whether a dismissal of a suit for non- attendance of the plaintiff or for want of prosecution amounts to a judgment in that suit.

14. The Court of Appeal while agreeing with an earlier decision of its predecessor, the East African Court of Appeal in Peter Ngome v Plantex Company Ltd (1983) eKLR, answered the question in the affirmative.
15. The East African Court of Appeal observed that the Civil Procedure Act did not define the term ‘judgment’. It therefore made reference to ‘Jowitt’s Dictionary of English Law’, 2nd Edition which defines ‘judgment’ in the following terms:

“Judgment is a judicial determination; the decision of the court; the decision or sentence of a court on the main question in a proceeding or/one of the questions if there are several.”
16. The court further made reference to ‘Mullas Indian Civil Procedure Code’, 13th Edition Vol 1, which too defines ‘judgment’ to mean;

“..the statement by the judge on the grounds of a decree or order’.
17. The court concluded that a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and included a dismissal of the proceedings or a suit under rule 4(1) of order 1XB or under any other provision of law. A dismissal of a suit under rule 4(1) therefore is a judgment for the defendant against the plaintiff.
18. The defendant too made reference to a decision by Mativo J (as he then was) in the case of Mumira v Attorney General (Constitutional Petition E007 of 2020) (2022) KEHC 271 (KLR). In the said case, the learned judge cited with approval the decision in Benjamin Koech v Baringo County Government & 2 others; Joseph C Koech (interested party) and stated that: -

“The issue here is whether res judicata applies after a case is dismissed for want of prosecution. Whereas I agree with the reasoning in Cosmas Mrombo Moka v Co-operative Bank of Kenya Ltd & another (supra) and Moses Mbatia v Joseph Wamburu Kihara (supra) that a suit dismissed or struck out for non-attendance or want of prosecution is not synonymous with a suit that has been heard and determined on merits, there is yet another important issue which was not addressed in the said cases, which is whether it is open for a party to file a fresh suit based on the same facts and circumstances after the earlier suit is dismissed for want of prosecution. My view is that it is not open for a party to file a fresh suit after the earlier suit is dismissed for want of prosecution. In my view, the proper cause of action for the petitioner was to either apply to set aside the order dismissing the petition for want of prosecution or to apply for review of the order or prefer an appeal against the dismissal. It is not open for the petitioner to institute a fresh suit disguised as a constitutional petition replicating the same issues now camouflaged as breach of constitutional rights. Such an approach is impermissible and if allowed, it would create endless litigation and open a window for parties to evade orders dismissing suits for want of prosecution or for non- attendance and then file fresh suits vexing respondents twice with the same suit.”

19. This court is bound by the decision of the Court of Appeal which in any event i entirely agree with. ‘A dismissal for want of prosecution is as good as a final judgment unless a successful application for setting aside was filed.’



20. I wish to strongly associate with the sentiments of Mativo J (as he then was) in the *Mumira v Attorney General Case* (supra) and restate that a party is barred from filing a fresh suit in respect of the same cause of action upon dismissal of a suit for want of prosecution. Such a party has the option though of applying to set aside the dismissal order.
21. The doctrine of *res judicata* is based on 3 maxims explained as follows; “Nemo debet bis vexari pro una et eadem causa’, which means that no man should be vexed twice for the same cause; Interest rei publicae ut sit finis litium,’ which means that it is in the interest of the state that there should be an end to a litigation, and Res judicata pro veritate occipitur’ meaning that it is judicially accepted as correct.”
22. In the old case of *Kamunye and others v Pioneer General Assurance Society Ltd* (1971) EA 263, the court explained the rationale behind ‘*res judicata*’ as “public interest”. There should be an end to litigation, coupled with the interest to protect a party from facing repetitive litigation over the same matter.
23. Having said that, I would allow the defendant’s application and strike out the plaintiff’s suit on the basis that it is *res judicata* and an abuse of the process of court. Moreover, order 12 rule 6(2) is clear that no fresh suit may be brought in respect of the same cause of action where a suit has been dismissed under rule 3 thereof.

B. Whether the plaintiff’s suit is time barred.

24. On this issue, my finding is that the defendant has not placed enough material/evidence before me to enable a determination on this issue at this stage. I decline to make a finding on this issue.

C. What orders should issue in regard to costs.

25. Consequently, and in view of my finding on the first issue, the defendant’s application dated October 12, 2022 is allowed and the plaintiff’s suit is hereby struck out with costs. The defendant too shall have the costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2022.

M D MWANGI

JUDGE

In the virtual presence of:

Ms Kinuthia for the plaintiff/respondent.

N/A for the defendant/applicant.

Court Assistant – Yvette.

M D MWANGI

JUDGE

