



**Were v Onyango (Environment & Land Case E021 of 2022)
[2023] KEELC 177 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT & LAND CASE E021 OF 2022
AY KOROSS, J
JANUARY 26, 2023**

BETWEEN

JENIPHER ONOKA WERE PLAINTIFF

AND

PAMELA EUNICE ACHIENG ONYANGO DEFENDANT

RULING

1. For determination is an amended notice of motion dated October 24, 2022 brought by the plaintiff under the provisions of sections 1A and 1B of the [Civil Procedure Act](#) and orders 40 rules 1, 2 & 4 and 51 rule 1 of the [Civil Procedure Rules](#) which sought the following orders:
 - a) Spent;
 - b) Spent;
 - c) An order of temporary injunction be issued against the defendant, her agents, employees, servants or assigns or anyone acting on her behalf from trespassing onto, selling, charging, occupying, accumulating any materials therein or evicting the plaintiff therefrom or in any manner interfering with land parcel number South Gem/Wagai/1902 pending hearing and determination of the present suit; and
 - d) Costs of the application be provided for.
2. The application is premised on the grounds enumerated on the face of the motion and the annexed supporting affidavit of the plaintiff dated October 24, 2022.
3. In brief, the plaintiff deposed *inter alia*, she had been in occupation of South Gem/Wagai/1902 (hereinafter referred to as ‘the suit property’) for 30 years and desired to be declared its owner by adverse



possession; the defendant had threatened to evict her from the suit property thus necessitating the present motion; she intended to safeguard the substratum of the suit and stop interference from the defendant.

4. In addition, the plaintiff filed a supplementary affidavit dated October 24, 2022 averring that just as her counsel was to serve the directions issued by this court, the defendant proceeded to demolish permanent structures that had been erected on the suit property and urged this court to intervene as the suit would be rendered nugatory.

Defendant's case

5. The defendant through her advocate on record swore a replying affidavit dated November 03, 2022 in opposition to the motion. She deposed *inter alia*, the motion was *res judicata* as the plaintiff had filed a similar motion in Siaya ELC OS Number 1 of 2022 which was between Jenipher Onoka Were and Pamela Anyango wherein this court dismissed the motion and the instant motion had been overtaken by events as she had already demolished the structures on the suit property, taken possession, begun ploughing it and being the proprietor, she had the right to evict the plaintiff.

Parties' submissions

6. As directed by the court, both parties' counsels disposed of the motion by written submissions. Mr Abande, counsel for the plaintiff filed written submissions dated November 02, 2022.
7. In reiterating the averments contained in the supporting affidavit, counsel relied on the well settled case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 where the court laid out the principles of temporary injunctive orders as thus, an applicant must show she has a *prima facie* case with probability of success; an applicant must demonstrate she would suffer irreparable injury that could not be adequately compensated by an award of damages and if the court was still in doubt, it could decide the application on a balance of convenience.
8. Mr Abande submitted the plaintiff had lived on the suit property for 30 years and had houses on it. On the first principle, counsel relied on the Court of Appeal decision of *Naftali Rutbi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR where the court expressed itself as follows;

‘With reference to the establishment of a *prima facie* case, Lord Diplock in the case of *American Cyanamid vs Ethicon Limited* [1975] AC 396 stated thus,

“If there is no *prima facie* case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief.” ‘

9. Further, counsel relied on the Court of Appeal decision of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* [2015] eKLR where the court cited with approval the decision of *Habib Bank Ag Zurich v Eugene Marion Yakub*, Ca No. 43 Of 1982 which held:-

“Probability of success means the court is only to gauge the strength of the plaintiffs case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

10. Counsel for the defendant, Mr Ooro F, filed undated submissions which focused on 3 issues he identified for this court's determination; (i) whether the motion was *res judicata*, whether it had been overtaken by events and whether the plaintiff had demonstrated sufficient reasons to warrant granting of injunctive orders.



11. On the 1st issue, counsel submitted the plaintiff had filed a similar motion in Siaya ELC OS Number 1 of 2022 between the same parties, over the same subject matter which was the suit property and, in both motions, the plaintiff had sought injunctive orders. Counsel contended the instant motion was *res judicata* and he placed reliance on the case of *Dr Ali Wario v Dr John Ngundu* [2011] eKLR where the court cited with approval the decision of *Mbeu Kithakwa v Phillip Muchiri Mugo* Civil case No. 87 of 2007 which held thus;

‘Section 7 of the *Civil Procedure Act* forbids the court from entertaining an action in which the matter directly or substantially had been directly and substantially in issue in a former action which has been heard and finally determined by a competent court.’

12. According to counsel, section 7 of the *Civil Procedure Act*, explanation note 5 was categorical that the doctrine applied not only to suits but to applications. This provision of law and explanation states thus;

‘7. Res judicata

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. (1)—.....

Explanation.(2)—.....

Explanation. (3)—

Explanation.(4)—

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—

13. On the second issue, it was counsel’s submission the motion had been overtaken by events and the orders sought could not be granted as the defendant had already demolished all the structures that were established on the suit property and the defendant had planted crops on it.

14. On the third issue, it was counsel’s submission that for one to be granted an injunctive order, the party had to meet the parameters of *Giella v Cassman Brown & Company Limited (supra)*; which the plaintiff had failed to fulfil. Counsel cited the case of *Kenleb Cons Limited v New Gatitu Service Station Limited & another* [1990] eKLR where the court expressed itself thus;

‘To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he has a right, legal or equitable, which requires protection by injunction.’

Analysis and determination

15. Having carefully considered the motion, affidavits, annexures, and rival submissions, the main issues falling for determination are;

I. Whether motion was *res judicata*;

II. If the answer to (I) above is in the negative, whether the motion is merited;



SUBDIVISION I - Whether motion was res judicata

16. Mr Abande did not address the court on the doctrine of *res judicata* in the the affidavits or submissions. In agreement with Mr Ooro, Section 7 of the [Civil Procedure Act](#) bars the retrial of a suit if it had been directly or substantively been dealt with in a previous suit and by explanation 5 of this Section, the doctrine similarly applies to applications.
17. To test the veracity of the defendant’s assertions, the court on November 16, 2022 directed for the court file in Siaya ELC OS Number 1 of 2022 to be remitted to it. Upon scrutinizing the file, the court established *inter alia*, in the former suit, the plaintiff had filed a notice of motion dated January 4, 2022 in which she had sought similar orders as those that had been sought in the instant motion, it was over the same suit property and the parties remained the same. After hearing the motion dated January 4, 2022, the court in a ruling dated March 10, 2022 rendered itself as follows;
- “It is my finding that the plaintiff’s motion dated January 4, 2022 is not merited and because it is trite law that costs follow the event, I award costs to the defendant. Ultimately, I make the following disposal orders: -
- a) The Notice of Motion dated January 4, 2022 is hereby dismissed with costs to the defendant.
 - b)
 - c)
18. It later emerged the plaintiff had failed to file a substantive suit and the file in Siaya ELC OS Number 1 of 2022 was closed.
19. The significance of this doctrine is to ensure litigation comes to an end. It goes to the jurisdiction of a court and it must be addressed in limine. Once a court finds a suit or an application is *res judicata*, it has no choice but to down its tools. The Court of Appeal in the decision of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR expressed itself thus on the doctrine;
- ‘it serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.’
20. I am therefore persuaded to hold that within the proviso of section 7 of the [Civil Procedure Act](#), the instant motion falls within the auspices of the doctrine of *res judicata*; it sought similar orders as those that had been determined by this court on March 10, 2022.
21. For the reasons stated above, it is my ultimate finding the amended notice of motion dated October 24, 2022 is *res judicata* and the order which commends itself to be given and which I hereby do is the amended notice of motion dated October 24, 2022 is hereby struck out with costs to the defendant. I direct the file in Siaya ELC OS Number 1 of 2022 to be remitted back to the registry.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF JANUARY 2023.



HON A Y KOROSS

JUDGE

26/01/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing

In the Presence of

Ms Mabaluh/b for Mr Abande for plaintiff

Mr. Ooro F for defendant

Court assistant: Ishmael Orwa

