



REPUBLIC OF KENYA



KENYA LAW
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**Zuma & 46 others v Said & 4 others (Environment & Land Case
E005 of 2022) [2023] KEELC 310 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E005 OF 2022**

AE DENA, J

JANUARY 26, 2023

BETWEEN

BAYA MKAHA ZUMA & 46 OTHERS PLAINTIFF

AND

TAHIR MOHAMED OSMAN SAID & 4 OTHERS DEFENDANT

RULING

The Application

1. Before court is a Notice of Motion application dated 14/4/2022 brought pursuant to the provisions of section 1A,1B,3A and 7 of the [Civil Procedure Act](#) and Order 2 Rule 15, Order 51 Rule 1 of the [Civil Procedure Rules 2010](#) and all other enabling provisions of the law. The defendants seek the following orders;
 - a. That the Plaintiffs originating summons dated March 21, 2022 and filed on the same date be struck out with costs to the defendants.
 - b. That the costs of this suit and the application be awarded to the defendants/Applicants.
2. The application is premised upon grounds listed on its face and which summarily allude to this court lacking jurisdiction to hear and determine the originating summons dated March 21, 2022 by virtue of the same being *res judicata*. That the defendants remain the registered owners of land parcel No Kwale/Mavumbo/4 the suit property herein and are in occupation of the same. It is averred issues relating to the suit parcel have previously been dealt with by the court in Kwale ELC No 24 of 2021 (formerly Mombasa 97 of 2021) and Mombasa ELC No 39 of 2020. That in the latter the illegal occupants were ordered by the court to vacate the suit property. That 18 of the 21 squatters vacated the land while the remaining 3 were evicted by the registered owners sometime in May 2021.



3. The defendants state that immediately the suit property became vacant, 54 strangers filed Kwale ELC No 24 of 2021 and laid claim over the land by way of adverse possession. That after deliberations and a fact-finding mission it was established that none of the 54 persons was in occupation of the land and consequently a consent dated 1/3/2022 was recorded and adopted as an order of this court on 3/3/2022 and the matter was withdrawn and all orders thereto discharged. It is also averred that it was while proceeding with Kwale ELC No 24 of 2021 that it became apparent that a similar suit being the instant suit had been filed seeking similar orders and hence necessitating this application as the suit offends the provisions of sections 7 and 8 of the Civil Procedure Act. It is also stated that Baha Mkaha the plaintiff lacks authority to swear the affidavit on behalf of 46 others for want of their authority.
4. The application is supported by an affidavit sworn by one Tahir Mohamed Osman Said. The deponent reiterates the facts stated in the grounds in support of the application. It is further averred that Abubakar Maddy Physical planners in their report dated 4/6/2020 confirmed that the suit property was unoccupied and undeveloped. The Plaintiffs are accused of misusing the judicial process by forum shopping and filing multiple suits hence depriving the defendants their use and occupation of the suit parcel.

Response

5. In response to the application, the plaintiffs filed a replying affidavit sworn by Baya Mkaha Zuma and filed before court on 16/5/2022. The deponent states that he has the authority of the other applicants to swear the affidavit. That the plaintiffs have an interest in the land by virtue of their occupation on the same for generations since 1773. That the 1st to 3rd defendants who are currently the registered proprietors of the suit premises acquired the same through transmission from the estate of Ahmed Mohamed Osman Said. That since 1991 the plaintiffs peacefully occupied the suit premises and buried their deceased thereon until the year 2021 when there was an attempt to forcefully evict them pursuant to an eviction order allegedly obtained fraudulently in Mombasa ELC No 39 of 2020. That the advocate on record for the defendants in the said matter disowned the consent order and a report over the same was made vide OB No 48/12/1/21 at the Kwale Police Station.
6. It is further averred that an application to set aside the said consent order was also filed in court but the same has never been determined. That out of the 21 defendants sued in Mombasa ELC No 39 of 2020 only 6 are the plaintiffs in this suit. In ELC No 24 of 2021 out of the 47 plaintiffs herein only 10 are listed as plaintiffs in the suit. It is stated that the consent recorded in ELC No 24 of 2021 does not bind the Plaintiffs herein as at the time of the same being recorded they were not parties to the suit. Amendments to the said pleadings were effected on 11/1/2022 where the 10 Plaintiffs were excluded from the pleadings following some disagreements on a settlement that was being negotiated.

Submissions

7. The application was canvassed by way of written submissions which parties filed and exchanged.
8. The defendants' submissions are dated 17/7/2022. It is submitted that Mombasa ELC No 39 of 2020 and Kwale ELC No 24 of 2021 bear the same parties, cause of action and prayers in common. That the fundamental principle of res judicata is that litigation must come to an end. The defendants place reliance in the case of CK Bett Traders Limited & 2 Others Versus Kennedy Mwangi & Another [2021] eKLR where the court analyzed the doctrine by stating that res judicata will successfully be raised as a defence in instances where previous litigation or suit was between same parties as those in the current suit, and same issues that were dealt with by the previous court. Further reference was made to the case



of *IEBC Versus Maina Kiai & 5 Others* [2017] eKLR and in *Diocese of Eldoret Trustees [Registered] Versus AG & Another* [2020] eKLR.

9. The defendants submit that based on the evidence from the plaintiffs replying affidavit to the application, it is confirmed that there have been 3 different suits over similar issues and similar parties. That it has been successfully satisfied that all the requirements of *res judicata* have been met and as such the suit should be dismissed in its entirety.
10. On whether the Plaintiff lacks authority to swear the affidavit on behalf of 46 others, it is submitted that no written authority has been attached to the replying affidavit as stipulated under Order 1 and Order 4 of the *Civil Procedure Rules*. Reference is made to the holding in *Abdulla Absbir & 38 Others Versus Yasmin Farah Mohamed* [2015] eKLR. The defendants invited the court to dismiss the suit and award them costs of the application.
11. The plaintiff's submissions were filed on 14/9/2022 and highlighted on four issues for determination. It is contended that the two suits Mombasa ELC No 39 of 2020 and ELC No 24 of 2021 fall short of the requirements of *res judicata* for reasons that Kwale ELC No 24 of 2021 was withdrawn on 3/3/2022, while Mombasa ELC No 39 of 2020 is still pending before court. The contents of the replying affidavit are reiterated on who the actual parties sued and being sued are in the respective suits. That out of the 21 defendants in Msa 39 of 2020 presently 180 of 2021 only 6 are plaintiffs in the present suit and who were isolated therefrom to frustrate them as true claimants. That at the time of recording the consent they were not party to the suit. That out of the 54 plaintiffs in 24 of 2021 only 10 were genuine and who are the plaintiffs in the present suit.
12. On whether the suit should be struck out it is submitted that the 1st plaintiff has demonstrated to court that he has the legal authority to swear affidavits on behalf of the other plaintiffs in the replying affidavit sworn on 16/5/2022. Further that striking out of the suit was not one of the remedies provided under the rules which provide for stay under the marginal notes.
13. This court is also urged to uphold the objectives of article 159(2)(d) and disregard undue procedural technicalities and the application be dismissed with costs.

Analysis And Determination

14. I have considered the application and the response thereto, the submissions by both parties and the authorities cited.
15. The legal provisions on the doctrine of *res judicata* are set out under Section 7 of the *Civil Procedure Act* as follows:

“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”.
16. As highlighted by both parties the threshold to be met for a suit to be termed as being *res judicata* was enunciated by the Court of Appeal in the case of *The Independent Electoral and Boundaries*



Commission v Maina Kiai & 5 others, [2017] eKLR), and which spells out the factors to be considered as follows;

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

17. In the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR the essence of the doctrine of res judicata was expounded as follows:

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

18. From the foregoing the first main requirement is that there ought to have existed previous proceedings being the former suit/s that is said to be related to the present suit that is alleged to be *res judicata*. The present suit was commenced by way of Originating summons and it is stated that before its commencement there initially existed two former suits. Firstly, Mombasa ELC No 39 of 2020 Tabir Mohamed Osman Said & Others v Chimera Mzungu & 20 Others instituted by the defendants in this suit who it is not in dispute are the registered proprietors of the suit property. Its main cause of action was for eviction of the defendants therein for unlawful occupation and vacant possession of the suit property. On 6/10/2020 orders were granted by Justice Sila Munyao for the said defendants’ occupants to vacate which were enforced.
19. The other suit said to exist before the present suit is said to be Kwale ELC No 24 of 2021 (formerly Msa ELC No97 of 2021) Baya Mkaba Zuma & 54 Others v Tabir Mohamed Osman Said & 8 Others. A copy of the amended originating summons in ELC No 24 of 2021 is attached to the application and the prayers sought by the applicants are for adverse possession and registration of the suit property in their names. It is stated that the parties compromised the suit by way of consent on March 1, 2022 following a realization that the parcel was unoccupied. Then there is the present suit, commenced by way of originating summons dated March 21, 2022 wherein the plaintiffs seek a declaration that they are entitled to be the legal and registered owners of the suit property by way of adverse possession.



20. We therefore have the two suits and the present third suit. The next criterion is whether the subject matter is the same in other words if the parties were litigating under the same title. Indeed, it is evident to me that the land in contestation is the same in all the three suits namely parcel No Kwale/Mavumbo/4. In any event this is not in dispute.
21. In the first case the registered owners had moved to court to enforce their propriety interest or ownership to the property by applying the eviction orders to enable them get vacant possession of the suit property. In the subsequent case the applicants want a declaration that they are entitled to be the legal and registered owners of the suit property by way of adverse possession. They ask the court to facilitate registration of the same in their names once a finding is made that they are indeed entitled to the property. The two issues may be different in terms of the cause action and the law and considerations to be deployed by the court in arriving at a determination. Infact there is a school of thought that adverse possession goes against the very tenets of right to property. But looking at the totality of the facts before me it is clear that this contest has been around for quite sometime but there has been no proper closure. And this will become clearer shortly as I delve into how the suits have been resolved or closed.
22. The rationale for res judicata is that there must be end to litigation and which I view as closure. To me this is the very essence of the requirement that the former suit must have been finally heard and determined. It is to satisfy that the court had an opportunity to listen to the parties to the dispute. One of the requirements set out for a suit to be deemed res judicata is the issue must have been heard and finally determined in the former suit. A look at Justice Munyao's order of October 6, 2020 shows that the matter was marked as settled by way of a consent. The defendants were to vacate the suit premises within 7 days of the adoption of the said consent. ELC No 24 of 2021 was also compromised by way of a consent and infact it was withdrawn. Indeed, two consents have been exhibited and which amount to judgements. But the question that I must answer is if they satisfy the requirements of Section 7 of the *Civil Procedure Act* as to hearing and final determination. This question was aptly answered by the Court of Appeal in the case of *Michael Bett Siror v Jackson Koech* (2019) eKLR in response to an argument that a suit dismissed for want of prosecution was res judicata the dismissal being a judgement of the court. The court stated; -
- (29) Both the appellant and the respondent in their affidavit sworn in support and in response to the appellant's motion, were in agreement that two of the previous suits filed by the respondent were dismissed for want of prosecution, while another was abandoned and withdrawn by the respondent. This means that none of the suits was fully argued nor were the issues finally determined.
- [30] We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the *Civil Procedure Act*, as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout.
23. Clearly Mombasa ELC No 39 of 2020 and ELC No 24 of 2021 cannot be deemed res-judicata as long as they were not heard on merit though the court that recorded the consent was seized of the requisite jurisdiction. Moreover, the consents filed are highly contested with allegations of fraud being raised by 10 plaintiffs in the present suit who are said to have delinked themselves from the consent in ELC 24/2021 but who on the other hand contend that the pleadings were strategically amended by removing them from the proceedings. That they were not parties to the suit when the consent was recorded and did not bind them.



In *Michael Bett Siror v Jackson Koech* (supra) the court went further to state that;-

- (31) Thus, we reject the appellant's contention and find that the application of the doctrine of res judicata was very contentious and required full investigation at the trial, more so in a longstanding land dispute involving a big parcel of land and several other people.
24. I recognize the registered proprietors desire to bring litigation to an end but the end cannot be achieved in the manner envisaged under the doctrine of res-judicata as the threshold has not been met. Indeed, I have also noted the depositions that the report by Maddy physical planners confirms that the suit property is vacant, undeveloped and there also averments that the registered owners are in occupation. These are matters of facts to be canvassed at the hearing. Guided by the above excerpt and noting that every case must be decided on its own facts and merits it is my view that this dispute must go through the motions of an entire hearing where the claims by both parties will be weighed on the scales of justice. To me this is the only way to attain justice for all the parties. This is of course subject to determining if any of the former suits is subjudice.
25. In the replying affidavit of Baya Mkaha Zuma filed on May 16, 2021 in reply to the instant application it is averred that Mombasa ELC No 39 of 2020 is still active and is now Kwale ELC No180 of 2021. The proceedings were exhibited. From the attached proceedings I noted that a notice of Motion application dated January 19, 2021 filed under certificate of urgency was placed before my brother Justice Yano in chambers when the court directed that the application is served for inter parties hearing on March 4, 2021. On the said date further directions on the disposal of the application were issued by Justice Sila Munyao. There appears (this is because the proceedings in the court file end at page 6) to have been filed another application dated March 12, 2021 which was placed before the same judge on March 12, 2021 where orders to stop demolition of some structures were being sought. Clearly from the foregoing it appears that the file is active for purposes of the two applications and which if determined in the applicants favor therein may require that the suit is heard on merit. Case No, 24 of 2021 was withdrawn and no longer exists.
26. From the pleadings my understanding is that after the 1st- 10 applicants/plaintiffs in the present suit disagreed with their counsel in case No24 of 2021, they proceeded to file the present suit through Ms Otunga advocate for the same reliefs. This is being termed as forum shopping and an abuse of the court process. Looking at the facts presented at glance one may want to agree with this contention. But I think there is a need for very a keen consideration of this matter. Firstly, the applicants in the present suit appear to be a faction that delinked from 24 of 2021. They have filed their own proceedings and instead of filing the suit alone they have brought on board 37 other parties of which 6 comprise the 21 sued in 39 of 2020. I will not dwell much on the 44 plaintiffs in 24/2021 who are said to have been 'imposters' since the suit was withdrawn. In any event this court's finding that the present suit is not subjudice renders the submission that that this suit is an abuse of the court process not sustainable.
27. Having made a finding that the present suit is not resjudicata the two suits that were resolved by way of consent and having found that suit No 39 of 2020 now ELC 180 of 2021 is subjudice I'm inclined to stay the proceedings in the present suit pending the hearing and determination of the applications in ELC 180 of 2021.
28. The upshot of the foregoing is that the application partly succeeds on the submission that this suit is subjudice and fails on the point that it is resjudicata. Costs shall be in the cause.

DELIVERED and DATED at KWALE This 26th Day of JANUARY,2023

A.E. DENA



JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Iman Holding Brief for Mr. Khalid For the applicants/defendants

Ms. Otunga for the respondents/plaintiffs

Mr. Daniel Disii - Court Assistant.

