



**Warom v Ogalo & another (Environment & Land Case
E005 of 2022) [2023] KEELC 272 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 272 (KLR)

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

**AY KOROSS, J
JANUARY 26, 2023**

BETWEEN

JOAB ONYANGO WAROM PLAINTIFF

AND

JOAB ODENY OGALO 1ST DEFENDANT

OTIENO KADEBE 2ND DEFENDANT

RULING

1. When this suit came up for hearing before me on 7/11/2022, M/s Koceyo informed court she was unable to proceed because she had been served with a defence which she needed to respond to.
2. Upon perusal of the parties' pleadings, it came to the court's attention the plaintiff and 1st defendant had litigated in Siaya PM ELC No 35 of 2015 between *Joab Odeny Ogalo v Joab Onyango Warom*. The plaintiff therein is the 1st defendant herein whilst the plaintiff herein was the defendant and counter claimant therein. The 2nd defendant was not a party in the previous proceedings.
3. M/s Koceyo notified court the plaintiff could only comply with the orders issued in Siaya PM ELC No. 35 of 2015 if the remains of deceased persons were not exhumed from the non-disclosed suit property. With the likelihood the suit was res judicata, the court ordered for the court file in Siaya PM ELC No. 35 of 2015 to be remitted to it and reserved the matter for ruling.
4. Sections 1A and 1B of the *Civil Procedure Act* and section 3(1) of the *Environment and Land Court Act* bid this court to facilitate the overriding objective of the *Civil Procedure Act* and the *Environment Land Court Act* by enabling the just, expeditious, proportionate and affordable resolution of civil disputes. section 3 of the latter Act stipulates as follows;

'3. Overriding objective



- (1) The principal objective of this Act is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.
 - (2) The court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1).
 - (3) The parties and their duly authorised representatives, as the case may be, shall assist the court to further the overriding objective and participate in the proceedings of the Court.’
5. The doctrine of res judicata is provided for under section 7 of the [Civil Procedure Act](#) in the following terms: -
- “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”
6. Section 7 of the [Civil Procedure Act](#) is expounded by giving 6 elucidations that govern the said doctrine and one such description is explanation no. 4 which states as follows:
- “Any matter which might and ought to have been made a ground of defence and attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”
7. Jurisdiction is a matter of law which this court can raise suo moto as it goes to the authority of the court and the court does not need to necessarily invite the parties to file written submissions. The Court of Appeal in the case of [John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) [2015] eKLR expressed itself as follows on the process of moving the court when *res judicata* was imminent in a suit;
- “The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court may be raised as a valid defence to a constitutional claim even on the basis of the court’s inherent power to prevent abuse of process ...”(Emphasis added)
8. It is trite law jurisdiction is everything and without which the court must down its tools. In the celebrated case of [Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil \(Kenya\) Limited](#) [1989] KLR the Court of Appeal held inter alia that:-
- ‘A question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forth with on the evidence before the court.’ (Emphasis added)
9. Having laid down the legal basis of the doctrine of res judicata, I will now turn to the facts of this case. In the lower court suit, the 1st defendant sought inter alia, a declaration he was the bona fide proprietor of North Gem/Siriwo/806 and the encroachment by the plaintiff herein was illegal, he sought permanent injunctive orders and eviction of the plaintiff herein.
10. In a defence and counterclaim, the plaintiff herein averred North Gem/Siriwo/806 was in the name of Samuel Opiyo; the plaintiff’s step uncle and was sold to the 1st defendant’s father; Nelson Ogalo Otieno. However, Samuel Opiyo died before transferring the suit property to Nelson Ogalo



Otieno. Knowing the suit property would be transferred to him, Nelson Ogalo Otieno entered into an agreement of exchange with the plaintiff's grandfather; Dishon Warom who was the registered proprietor of North Gem/Siriwo/338. Dishon Warom was to possess North Gem/Siriwo/806 whereas Nelson Ogalo Otieno was to possess North Gem/Siriwo/338.

11. The reliefs the plaintiff herein sought were as follows, a declaration that by virtue of the agreement of exchange between Nelson Ogalo Otieno and Dishon Warom, North Gem/Siriwo/806 belonged to him; a cancellation of the title to North Gem/Siriwo/806 and for it to revert back to its status quo ante and damages.
12. After hearing the parties on merit, the trial court in its judgment and decree dismissed the 1st defendant's suit and that of the plaintiff herein and ordered them to vacate North Gem/Siriwo/806. It appointed John Oyoko as the administrator of the estate of Samuel Opiyo Oyoko and ordered him to facilitate the transfer of the suit property to the family of Nahashon Ogalo. Nahashon Ogalo was the father of the 1st defendant herein. The lower court gave the 1st defendant and the plaintiff herein liberty to decide whether they could interchange their occupation of North Gem/Siriwo/806 and North Gem/Siriwo/338.
13. An application for Judicial review by the plaintiff herein against the trial court magistrate and the 1st defendant in Siaya ELC Judicial Review No. 2 of 2021 was struck out by this court on 18/11/2021.
14. In Siaya Miscellaneous Application Ad Litem Number E002 of 2022, the plaintiff herein was granted letters of administration ad litem, limited for the purposes of filing and prosecuting or challenging any suit pending in respect of North Gem/Siriwo/806. Shortly thereafter, the plaintiff filed the instant suit.
15. In the instant suit that is subject of this ruling, the plaintiff has sought an order compelling the 1st defendant to exhume his kin from North Gem/Siriwo/1506 and an order restraining the defendants from evicting him from North Gem/Siriwo/806 until the exhumation was completed. No cause of action has been disclosed against the 2nd defendant.
16. From the lower court record, it is evident the plaintiff has filed applications and affidavits in resistance to his eminent eviction. Similarly, too, the 1st defendant has sought to evict the defendant from the suit property. What emerged from those proceedings was that North Gem/Siriwo/338 was subdivided and North Gem/Siriwo/1506 emanated from it.
17. Having set down the background of the suit, is the instant suit res judicata?
18. In *Independent and Electoral Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR, the Court of Appeal delineated the criteria of determining if a suit was *res judicata* as follows;

“Thus 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) The 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.”
19. All that I am now called upon to do is to apply the principles set out in section 7 of the *Civil Procedure Act* that was further elaborated in the case of *Independent and Electoral Boundaries Commission v Maina Kiai & 5 others* (*supra*).



20. On the first principle, this court has to establish whether the issues which have been brought up in the instant case were dealt with in the former suit. As elaborated earlier in this ruling, the issues in the lower court suit was to establish who the bona fide proprietor of North Gem/Siriwo/806 was and how the suit property was to be used in terms of possession and control.
21. In the instant suit, the plaintiff prayed for an order restraining the defendants from evicting him from North Gem/Siriwo/806 until the exhumation was complete. The issue of ownership, control and possession was already determined by the lower court when it stated both parties were to vacate North Gem/Siriwo/806. That decision has not been overturned. The lower court also rendered itself on North Gem/Siriwo/338 which North Gem/Siriwo/1506 is a subdivision of.
22. The second requirement was to test whether the former suit was between the same parties or parties under whom any of the parties claim. The parties in the instant case are the same as the parties in the lower court case. The plaintiff added a 2nd defendant herein but it is apparent that no cause of action has been laid against him.
23. The third requirement was for the court to establish if the parties were litigating under the same title. In both the lower court and the instant case, the parties approached the court as owners or occupiers of the North Gem/Siriwo/806 and or North Gem/Siriwo/338 of which North Gem/Siriwo/1506 is a subdivision of. It is therefore clear the parties are litigating under the same title.
24. The issues were heard and finally determined by the lower court in its judgment which was rendered on 18/04/2019. The lower court was competent to hear the matter.
25. Parties are required to litigate their case all at once and not by installments or by conjuring up new parties to the claim. By due diligence, the plaintiff herein was required to lay his entire claim before the lower court so that the court could pronounce itself with finality on all the issues that were before it. The plaintiff herein filed a counterclaim and sought for the lower court to render itself on North Gem/Siriwo/338. Having introduced this particular property to the proceedings, it behoved upon him to raise all issues that appertained to this property including its subdivisions and exhumation of any bodies from it; which he did not. In *E T v Attorney General & another* [2012] eKLR, Majanja J stated that:

“The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”
26. It is my humble opinion the instant suit was filed with the sole intent of defeating the execution of the lower court suit. I say so because the plaintiff has sought the following relief in the pleadings before this court an order restraining the defendants from evicting the plaintiff from North Gem/Siriwo/806 until exhumation is completed and further in Siaya Miscellaneous Application Ad Litem Number E002 of 2022 he sought to be appointed as administrator ad litem for purposes of challenging North Gem/Siriwo/806.
27. Courts frown upon the use of litigation to abuse the court processes and they cannot shy away from pronouncing itself on such an abuse. I find no difficulty in arriving at the conclusion this suit and Siaya PM ELC No 35 of 2015 *Joab Odeny Ogalo v Joab Onyango Warom* were similar, arose from the same set of facts and circumstances, involved the same parties and the instant suit is a gross abuse of court



process and on this ground I am inclined as I hereby do, to strike out this suit for being *res judicata* and abuse of court process. I award costs to the 1st defendant.

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 Platform in the Presence of:

In the Presence of:

N/A for the plaintiff

1st defendant present – acting in person

Court assistant: Ishmael Orwa

