



Njoroge (Suing as the administrator of the Estate of Wangui Njoroge (Deceased) v Ticha (Environment & Land Case E068 of 2021) [2023] KEELC 135 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E068 OF 2021
LA OMOLLO, J
JANUARY 19, 2023**

BETWEEN

JAMES WAWERU NJOROGE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF WANGUI NJOROGE (DECEASED)) PLAINTIFF

AND

STANLEY NDUNGI TICHA DEFENDANT

RULING

1. This ruling is in respect of the Defendant's Preliminary Objection as raised in his Defence and Counter claim dated October 27, 2021 at paragraph 33. It is pleaded as follows: -

'The Plaintiff (now defendant) avers that the suit herein is *Res Judicata* having been dismissed by the High Court on September 10, 2015 for want of prosecution and shall raise a preliminary objection notice of which is given that the suit is bad in law and should be dismissed with costs.'

Factual Background.

2. This suit was commenced by way of Plaint dated September 1, 2021 and filed on September 16, 2021. In the Plaint, the Plaintiff seeks, among other orders, a declaration that Wangui Njoroge (Deceased) is the sole owner and/or proprietor of all that parcel of land known as Plot No 180 Missouri Farm in Naivasha.
3. The Defendant filed his Defence and Counter claim dated October 27, 2021 wherein he denies that Wangui Njoroge (Deceased) is the sole owner of Plot No 180 Missouri Farm and prayed that the court grants him 9 ½ acres of the suit property.
4. He avers that the instant suit is res judicata having been dismissed by the high court on September 10, 2015 for want of prosecution.



5. The preliminary objection was canvassed by way of written submissions filed by both parties.

Issues For Determination.

6. The Plaintiff filed his submissions on August 19, 2022 while the Defendant filed his submissions on August 5, 2022.
7. The Plaintiff identified one issue for determination;
- a). Whether this suit is res judicata.
8. He relies on numerous judicial decisions including the case of *Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd [1969] 1 EA 696* and Section 7 of the [Civil Procedure Act](#). He submits that the said doctrine has been the subject of judicial pronouncement in a long line of decisions. He also cites the judicial decision in [John Florence Maritime Services Limited & Another Vs Cabinet Secretary Transport & Infrastructure & 3 Others \(Petition 17 of 2015\) \[2021\] KESC 39 \(KLR\) \(Civ\) \(6 August 2021\) \(Judgment\)](#).
9. The Plaintiff submits that whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question, the entire pleadings, record of the previous case and the instant case to ascertain whether the parties are the same or litigating under the same title and whether the previous case was determined by a court of competent jurisdiction. He cites the case of *ET Vs Attorney General & Another (2012) eKLR*.
10. The Plaintiff relied on the Court of Appeal case of *The Tee Gee Electrics and Plastics Company Ltd Vs Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK* where the court held that res judicata did not apply if the earlier suit had been dismissed for want of prosecution as the same had not been heard on merits. He relied on the Court of Appeal case of [Michael Bett Siror Vs Jackson Koech \[2019\] eKLR](#) and the Supreme Court case of [Independent Electoral & Boundaries Commission Maina Kiai & 5 Others \[2017\] eKLR](#) and submits that for a case to be res judicata, the issues must have been heard and finally determined in a previous suit.
11. The Plaintiff submits that in the instant case, even though the previous suit had been dismissed for want of prosecution and an application to revive the same dismissed, the court had not heard the case on merit. He submits that the suit cannot therefore be held to be res judicata as envisaged under Section 7 of the [Civil Procedure Act](#).
12. In conclusion, the Plaintiff submits that the preliminary objection is misconceived and ought to be dismissed with costs.
13. The Defendant on the other hand identified the following issues for determination:
- i. Whether the matter herein is sub judice
- ii. Whether the court has jurisdiction to entertain this matter
- iii. Whether the Plaintiff is entitled to the injunction as prayed
14. On the first issue, the Defendant relied on the Supreme Court case of [Kenya National Commission on Human Rights Vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others \(Interested Parties\) \[2020\] eKLR](#) and Section 6 of the [Civil Procedure Act](#). He submits that what is before this court is a matter directly and substantially in issue in a previously instituted suit being Nakuru CMC Succession Cause 19 of 2018 between the same parties over the same subject matter. He argues that the present suit is sub judice, an abuse of the court process and ought to be dismissed.



15. On the second issue, he relies on the case of *Owners of the Motor Vessel 'Lilian S' Vs Caltex Oil (Kenya) Ltd (1989)* and submits that the court lacks jurisdiction to entertain and determine the matter before it as the same is a matter directly and substantially in issue in Nakuru CMC Succession Cause No 19 of 2018. He further submits that in order to avoid multiplicity of suits, prevent conflicting decisions, guard against abuse of the court process and uphold substantive procedural justice, the court should exercise its discretion judiciously and decline jurisdiction by dismissing the present suit.
16. On the last issue for determination, he relies on the decision in *Kenya Power & Lighting Co Limited V Sheriff Molana Habib [2018] eKLR* and submits that the Plaintiff seeks an order of permanent injunction, a remedy granted after the matter has been heard on merit. He submits that the prayers sought are thus premature and the same cannot be issued in the circumstances.

Analysis And Determination.

17. Upon perusal of the Pleadings, Annexures and Submissions filed in respect of the Preliminary Objection, my considered view is that the single issue for determination, apart from costs, is; Whether this suit is Res Judicata.
18. Before I delve into the Preliminary Objection raised by the Defendant, I shall first establish if it meets the test laid down in the decision in *Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696 Law JA* and *Newbold P* (both with whom Duffus V-P agreed), respectively at 700 and 701, on what constitutes a competent preliminary objection held as follows:

Law, JA.:

' So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'

Newbold, P.:

' A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.'

19. The Court of Appeal in the case of *Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR* further held as follows:

' A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'



20. The Supreme Court in the case of *Hassan Ali Jobo & another Vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR* stated that:

' A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit'

21. It is my view that the Defendant's Preliminary Objection meets the threshold as set out in the above cases. It raises a pure point of law which this court is inclined to determine first.

22. The legal doctrine of Res judicata is enunciated in Section 7 of the [Civil Procedure Act](#). It is as follows:

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) The expression 'former suit' means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

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) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

23. There are several judicial decisions that have been rendered in respect of this doctrine. In Independent Electoral and Boundaries Commission- Vs - Maina Kiai and 5 others, Nairobi CA No 105 OF 2017 the Honourable court set out the elements that must be satisfied conjunctively for Res judicata to be upheld:

- 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 issues was competent to try the subsequent suit or the suit in which the issue is raised.
24. The decision in *Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR* also offers useful guidance on the element of Res judicata. It rendered the elements as;
 - a. The former judgment or order must be final;
 - b. The judgment or order must be on merits;
 - c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identity of parties, of subject matter and cause of action.
25. Therefore, in order for a bar of Res judicata to be upheld, the Defendant must meet the criteria set out in section 7 of the *Civil Procedure Act* read together with numerous decisions that have been rendered by the Kenyan courts on this matter.
26. Upon perusal of the court record, I found that the suit property herein had been the subject of proceedings in Nakuru High Court Civil Case No 498 of 1993; Wangui Njoroge Vs Ndungi Ticha (formerly Naivasha Resident Magistrate's Court Land Dispute No 95 of 1986). The said suit was dismissed for want of prosecution vide an order dated September 10, 2015 issued on August 15, 2018. Dismissal of a suit for want of prosecutions is not akin to a dismissal after hearing a suit on merit. Therefore, a suit dismissed for want of prosecution does not fall within the ambit of section 7 of the *Civil Procedure Act*.
27. Subsequently, the defendant commenced Nakuru High Court Succession Cause No 19 of 2018 which, in my understanding is a citation and is intended to compel the Plaintiff to commence succession proceedings in respect of the estate of Wangui Njoroge (deceased) and have his share in the suit property distributed to him.
28. It is not disputed that the Succession Cause No 19 of 2018 is ongoing and is therefore not a former suit. I will, therefore, not interrogate the said suit for the reason that it has not been concluded and the doctrine of res judicata does not apply to an ongoing suit.
29. The court record also shows that this court delivered a ruling on March 17, 2022 which ruling dismissed the plaintiff's Notice of Motion application dated December 14, 2022. The said application sought, among others, an order for stay of proceedings in this suit pending the hearing and determination of Nakuru Chief Magistrate's Court Succession Cause No 19 of 2018.
30. I further note that the Defendant in his submissions shifts gear and raises and submits on the issue of sub judice yet in his Defence and Counterclaim he has pleaded res judicata.
31. In *Nairobi Civil Appeal No 240 of 2011 Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & another [2014] eKLR* the court held as follows:
 - ' Submissions are generally parties' 'marketing language', each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. Regarding the punitive damages sum of Kshs 50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st Respondent.



We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained'

32. The Supreme Court of Kenya in the case of [Raila Amolo Odinga & Another Vs IEBC & 2 others \(2017\) eKLR](#) held as follows:

' In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.'

33. It is this courts view that it is a well settled principle that parties are bound by their pleadings and therefore the Defendant raising in his submissions the issue of sub judice instead of res judicata is clearly misplaced and this court shall disregard the same.

B. Which party shall bear the cost of this preliminary objection?

34. On the question of costs of the preliminary objection, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

35. In the upshot, the Defendant's Preliminary Objection of Res Judicata as raised under paragraph 33 of his Defence and Counter claim dated October 27, 2021 is without merit and is hereby dismissed with costs to the plaintiff.

36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH DAY OF JANUARY, 2023.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Omae for the Plaintiff.

No appearance for the Defendant.

Court Assistant; Ms. Monica Wanjohi.

