Chepkwony v National Bank (K) Limited (Miscellaneous Civil Case E167 of 2024) [2025] KEHC 347 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 347 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL CASE E167 OF 2024

JRA WANANDA, J

JANUARY 24, 2025

BETWEEN

PATRICE KIPKEMEI CHEPKWONY ..... APPLICANT

AND

NATIONAL BANK (K) LIMITED ..... RESPONDENT

RULING

1. The Application before Court is the one dated 04/06/2024 filed by the Applicants through Messrs Ngigi Mbugua & Advocates LLP. The prayers sought are as follows:

    a. [.....] spent

    b. That a skeleton Court file be constructed in Eldoret HCC No. 71 of 1998, National Bank Limited vs Patrice Chepkwony and the same be placed in the strong room

    c. That the stay of sale of the suit land therein L.R. Soy/Kapsang Block 5 (Ziwa)/122 be scheduled for 14/06/2024.

    d. That the Court be pleased to find that the Order of Justice K. Kimondo made on 16/06/2016 concluded the rival claims between the parties.

    e. That the costs of the Application be provided for.

2. The Application is premised on the grounds set out on the face thereof and is supported by the Affidavit sworn by the Applicant, Patrice Kipkemei Chepkwony.

3. In the Affidavit, the Applicant deponed that he is the registered owner the parcel of land No. Soy/Kapsang Block 5 (Ziwa)/122, and that sometime in April 1995, he procured an overdraft of Kshs 50,000/- from the Respondent which was secured against his motor vehicle registration number KWU 253 Isuzu Lorry, that she partially repaid the loan in 1996 then upon his approaching and agreeing with

the Respondent, the overdraft was restructured whereof he provided his title for the said property in exchange for additional funds facility for Kshs 2,000,000/-. He deponed that immediately the security was perfected, the Respondent verbally informed him that no facility would be released to him, and that with this turn of events, he requested for his title to be discharged but the request was declined and that this marked the genesis of the case Eldoret HCC No. 71 of 1998 between the parties herein.

4. He urged that the said suit, including the Counterclaim filed therein, was dismissed for want of prosecution on 16/06/2016, that the Ruling has not been set aside, reviewed or appealed against and as such, it concluded the rival claims between the parties. He contended that the Respondent has on several occasions instructed Auctioneers to sell the suit land, the recent one being Keysian Auctioneers who sent him the Proclamation Notice, and that a sale by public auction had been scheduled for 14/06/2024 (now past). He added that his Advocates have made several attempts to trace the Court file in order to move the Court appropriately but the same has been in vain as the file is nowhere to be traced rendering it appropriate to make the instant Application and that he shall suffer prejudice should the intended sale be allowed to take place. In conclusion, he deponed that the intended sale exposes him to double jeopardy as the Respondents is seeking the remedy that the Court denied them.

Defendants' Response

5. In challenging the Application, the Respondent, through Messrs Omwenga & Co. Advocates, on 15/07/2024, filed the Replying Affidavit sworn by one Onesmus Mbuvi Kisaingu who described himself as a Remedial Analyst with the Credit Department of the Respondent Bank. In the Affidavit, according to the deponent, the Applicant is seeking substantive orders in a Miscellaneous Application against the provisions of Order 3 Rule 1 of the Civil Procedure Rules which is improper. He contended further that the Applicant has not demonstrated any basis for reconstruction of the Court file in Eldoret HCC No. 71 of 1998 as no evidence has been availed to confirm that the said file is missing. He then went back to the background of the litigation and narrated how the Applicant procured several overdraft loans from the year 1993, an amount which he paid in arrears until the year 1996 when he requested that the loan be converted to a term loan and that an additional loan was issued to him making a total of Kshs 2,000,000/-, that the parties then entered into a loan agreement for that amount whereby the Applicant offered his said parcel of land as security for the loan and a legal Charge for Kshs 1,700,000/- was registered against the property and the remaining amount was secured by a chattel over the motor vehicle registration number KWU 253.

6. He deponed further that the Applicant defaulted in repaying the loan which made the Respondent issue statutory notices and advertised the said securities for sale whereupon the Applicant ran to Court and filed Eldoret HCC No. 71 of 1998 in which the Applicant sought the restructuring of the loan on the ground of outbreak of East Cost Fever disease and the poor grain market and that in the Plaint, the Applicant admitted to defaulting in the loan repayment. He therefore denied that the purpose of filing Eldoret HCC No. 17 of 1998 was because allegedly the Respondent had declined to disburse the loan. He then submitted that the Applicant obtained orders of injunction in the said suit and enjoyed the same until the year 2015 when the suit was dismissed for want of prosecution. He contended further that dismissal of the said suit for want of prosecution did not translate to the loan arrears being written off as purported by the Applicant, and insisted that the Applicant has the obligation to fully pay the loan before the titles to the securities can be discharged, and that the Applicant owes a total sum of Kshs 5,949,460.95 (as at 12/07/2024), an amount which continues to attract interest and penalties.

7. According to Counsel, there is no basis for constructing a skeleton file in Eldoret HCC No. 71 of 1998 as the suit was dismissed for want of prosecution and the Applicant's efforts to reinstate the same proved futile as evidenced by the Ruling of Hon. Justice K. Kimondo delivered on 16/06/2016,

and that the Application for reinstatement was itself an afterthought, the Applicant's Counsel having expressly asked the Court to dismiss the suit. He added that the said Ruling did not make any determination of the issues raised in the suit neither did it grant any prayers sought in the Plaint and, in the Counterclaim, and therefore the same cannot be deemed to have resolved the dispute. He contended further that the Applicant has been served with the requisite statutory notices but intentionally ignored them only to file this Application and has not therefore approached the Court with clean hands, that the Respondent will suffer great loss and damage if the instant Application is allowed since they will not be able to recover the outstanding loan arrears, and that the Applicant has not satisfied the grounds for issuance of the orders of injunction.

Applicant's Further Affidavit

8. With the Court's leave, the Applicant filed a Further Affidavit on 2/08/2024 in which he basically reiterated the matters already deponed in his Supporting Affidavit. He added that Eldoret HCC No. 71 of 1998 having been dismissed for want of prosecution, bringing another suit as suggested by the Respondent would be Res Judicata. He also insisted that the Respondent failed to release the loan funds to him and deponed that Eldoret HCC No. 71 of 1998 was in respect of the parcel of land Soy/Kapsang Block 5 (Ziwa)/122, and not the motor vehicle registration number KWN 253. According to him, the advancement secured by the said motor vehicle was a separate facility.

Hearing of the Application

9. The Application be canvassed by way of written Submissions. Pursuant thereto, the Applicant filed two sets of Submissions, one dated 29/07/2024 and one dated 7/08/2024. However, on 24/09/2024, the Applicant's Counsel, Mr. Ngigi Mbugua, withdrew the set of Submissions dated 29/07/2024 and retained only the one dated 7/08/2024. On the part of the Respondents, its Submissions was filed on 21/08/2024.

Applicant's Submissions

10. Concerning Reconstruction of "missing" Court files, Counsel for the Applicant referred to the 2nd Edition of the High Court of Kenya Registry Manual at paragraph 46 and recited the procedures and steps required to be followed and complied with by the Court Registry under the Manual before a Court file is reconstructed. He submitted that the Applicant has exhibited a letter addressed to the Deputy Registrar on the issue, that the Respondent has opposed the Application but has not disclosed any reason why the file cannot be reconstructed and that the Application is in line with the guidelines set out above. He cited the case of Abdul Karim Omar versus Stephen Ngumbau Kithuka [2017] eKLR, Section 3A of the *Civil Procedure Act* and also the case of Re Estate of the Mbuitu Ndegwa (Deceased). He then submitted that without Reconstruction, the Court has no record upon which to determine the real issues in controversy between the parties, that only upon reconstruction of the Court file that the parties can be accorded a fair hearing as enshrined under Article 50(1) of *the Constitution*.

11. Regarding the Respondent's argument that the Applicant has not adhered with the correct procedures, Counsel submitted that Article 159 of *the Constitution* calls on the Courts to administer justice without undue regard to procedural technicalities and cited the case of Nicholas Kiptoo Korir Salat v IEBC & 6 Others [2013] eKLR. Regarding the prayer for injunction, he cited Order 40 Rule 1 of the Civil Procedure Rules, the case of Giella vs Cassman Brown & Company Limited (1973) EA 368, the case of Mrao Limited versus First American Bank of Kenya (2003) eKLR and the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai {2018] eKLR, and contended that the Applicant has established all the

requisites for grant of an injunction, namely, existence of a prima facie case, irreparable injury if the sale were to proceed, and tilting of the balance of convenience to his favour.

12. On the argument that the rival claims between the parties had been concluded by the order of Justice Kimondo, he submitted that it is improper for the Respondent to elect and utilize a legal option and after running the full course, to start an alternative which was available from the start. According to Counsel, this is contrary to Article 47(1) of *the Constitution*. Counsel urged that the Respondent's action is in total disregard to the principle of finality which is hinged on the public interest policy that litigation must come to an end. He cited the case of Jasbir Singh Rai & 3 Others vs Tarclocham Singh Rai & 4 Others [2007] eKLR.

13. In conclusion, Counsel submitted that reconstruction of the Court file is meant to show the Court that the parties pleaded their claims and that the Ruling by Kimondo J settled their claims, and that by resisting the reconstruction, the Respondent seeks to shield certain information from the Court contrary to Article 135(1)(b) of *the Constitution*.

Respondent's Submissions

14. After recounting the background and history of the dispute and the previous litigation between the parties, Counsel for the Respondent submitted that the Applicant must have thought that the dismissal of Eldoret HCC No. 17 of 1998 for want of prosecution had discharged him from the obligation to settle the loan and that the Applicant continued to be in default. Regarding the prayer for reconstruction of the Court file, Counsel submitted that there is no indication that the file is missing and/or cannot be traced. He submitted that the Ruling of Kimondo J declining the Applicant's prayer for reinstatement having been delivered almost 8 years ago and the file closed, attempting to reconstruct the file is an abuse of the Court process, a term whose definition he cited the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR.

15. He then submitted that where a matter is dismissed for want of prosecution, the action does not in any way determine the substantive issues in the matter, that it is only a move done to bring finality to matters which have not been acted upon in line with the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules with a view to reducing backlog. Regarding the principle of Res Judicata, he submitted that it bars parties from filing new suits over subject matter that has already been litigated and concluded either through a Judgment or for want of prosecution and that therefore, the Applicant could not present another suit over the same issues. He contended that if the Applicant intended to pursue the matter further, then he ought to have appealed against the Ruling or applied for review and that the instant Application is therefore Res Judicata. In respect to his argument that a suit dismissed or struck out for non-attendance or want of prosecution is not anonymous with a suit that has been heard and determined on merits, he cited the case of Mumira v Attorney General (Constitutional Petition No. E007 of 2020 [2022] KEHC 271 (KLR) (8th April 2022) Ruling.

16. To put the matter in context, Counsel submitted that dismissal of the suit for want of prosecution and the subsequent Ruling by Kimondo J dismissing the Application to reinstate the suit is that the parties were returned to the position they were in prior to filing of the suit and consequently, the interlocutory orders of injunction that were in place ceased being in force and the Respondent had nothing barring it from proceeding with the exercise of its statutory power of sale. He then termed as baseless the Applicant's insinuation that he is not bound to pay the said loan and submitted that there is no dispute that a Charge was registered.

17. On the Applicant's claim that the Respondent never disbursed the loan, he contended that the burden of proof on that allegation is upon the Applicant as the Respondent has produced a Statement for

the relevant period which shows a clear progression from the time the loan was advanced. He cited the case of Khan & Another v Habib Bank AG Zurich *& Another (Civil Case 069 of 2021*) [2022] KEHC 130 (KLR) (Commercial and Tax) 23 February 2022 (Ruling). He also pointed out that even in the exhibited copy of the Plaint filed in Eldoret HCC No. 17 of 1998, the Applicant never raised any issue alleging non-disbursement of the loan and that he, in fact, acknowledged the loan as having been disbursed and only sought permission to settle the same by instalments.

18. According to Counsel, the Respondent should not be denied the right to exercise its statutory power of sale and urged that the Respondent has long overdue loan arrears which he has adamantly refused to settle and cited the case of Nancy Wacigi v Kenya Women Micro Finance Bank Ltd [2017] eKLR. He submitted that the Respondent has served all the requisite notices listed under Section 90 to 98 of the *Land Act* 2012. He also cited the case of Tom Otwoma Omosa & Another v Bank of Africa Kenya Limited & Another [2021] eKLR.

Determination

19. Evidently, the issues that arise for determination herein can be summarized as follows:

    i. Whether the present action can be sustained when a previous suit between the same parties, namely, Eldoret HCCC No. 179 of 1998 over the same issues was dismissed for want of prosecution.

    ii. Whether a skeleton file should be reconstructed in Eldoret HCC No. 71 of 1998 previously dismissed for want of prosecution.

    iii. Whether the Ruling of Kimondo J dismissing the Application seeking to set aside dismissal of Eldoret HCC No. 71 of 1998 in which the Respondent also had a Counterclaim, amounted to a bar to the Respondent against exercising its Statutory power of sale as a Chargee.

20. Determination of the 1st issue may inevitably also determine this entire action. Regarding the issue, apart from addressing my mind on the same, I have also looked at various cases in which a similar issue was addressed and picked out a few that I will highlight herein.

21. The first case that I wish to cite is the decision of P. J. Otieno, J in the case of Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another [2018] eKLR. In that case, the Judge stated as follows:

> "
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> "7. That there was a prior suit, No. 6 of 2015, Malindi, between the same parties and seeking to stop the exercise of statutory power of sale is not in dispute. That the suit was dismissed for want of prosecution is also not contested. The point of contestation is whether a suit dismissed for want of prosecution is deemed heard and finally determined in terms of section 7, *civil Procedure Act*, and the issues therein cannot be litigated afresh.
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> .....
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> 9. In urging the point Mr. Kongere, advocate for the Defendant, cited to court the decision of the Court of Appeal in Njue Ngai vs Ephantus Njiru Ngai &

Another [2016] eKLR decided on 03/01/2016. In which the gist and ratio decidendi was expressed in the following terms:

> "It is clear to us, as it was to the trial court, that the declaratory suit raised the same or substantially the same issues decided before the Appeals Committee and confirmed by the High Court in dismissing the appeal. The filing of it was in breach of Section 7 of the *Civil Procedure Act* and a matter that satisfies the tests for a defense of res judicata as stated above. We find no fault with the reasoning of the trial court and hereby affirm its decision. There must be an end to litigation".

10. Earlier on in the decision, the court said:-

> "Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR stating:-
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> Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff". It uses the word "dismissed". The *Civil Procedure Act* does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:
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> Judgement is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."
>
> Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order," "Judgment – in England, the word judgment is generally used in the same sense as decree in this code".
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> In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes 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) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a

plaintiff from applying for the dismissal to be set aside under Rule 8". [Emphasis added]

.....

17. Upon such arguments and papers filed, the only issue for determination is whether this suit, as filed, is res judicata – the matter has been heard and finally adjudicated upon before.

18. That issue is not difficult to decide as there are pleadings in the previous suit exhibited here. The two sets of pleadings by the plaintiff reveal that in both suits, the plaintiff's goal was and remains an order for injunction to stop sale of the property charged to the defendant by the plaintiff on the basis that the power to sell has not accrued. In fact in both suits the prayers are word-for-word save for prayer 3 in the current suit which is the only addition. That however does not change the character of the dispute or the cause of action. The truth and indisputable reality is that the two suits challenge the right of the Defendant to exercise its statutory power of sale. It matters not that the sums demanded has changed for that is inevitable in every contract where a debt attracts interests. It also does not matter that the plaintiff has by some ingenuity introduced a new prayer essentially challenging notices issued Pursuant to section 96, which as of necessity follow those under Section 90, of the *Land Act*. Whichever angle one looks at the matter the dispute in both suits is about exercise of chargee's power of sale by the Defendant.

19. The current suit is therefore a dispute between the same parties on a matter on the same dispute which was litigated upon in the previous suit which stands dismissed for want of prosecution and has not been sought to be reinstated. To this court it falls in all fours with what the court set as the ingredients of res judicata in Uhuru Highway Developers vs Central Bank of Kenya [1996] eKLR.

20. However, there ought to be appreciated that in Uhuru Highway Developers vs Central Bank of Kenya (supra), the court was dealing with decision made on interlocutory applications and not a final and terminal verdict like it is alleged in this matter. In that decision the question was whether a decision made on an interlocutory application, duly argued and determined, invited the application of the re judicata rule against a subsequent application seeking same orders of injunction.

21. In this matter it is argued for the defendant that a suit dismissed for want of prosecution is hard and finally decided and thus a total bar to subsequent litigation on the same course of action. I do not agree that a suit dismissed for want of prosecution or non-attendance can be deemed heard and finally determined. My disagreement arises from my understanding of the expression as used by the statute, Section 7 *Civil Procedure Act*, that the matter has been heard and finally decided.

22. Much as I am bound by the decision in Njue Ngai (supra), it is of note that in that matter, the suit found to have been res-judicata was one challenging a determination the Provincial Land Disputes Appeal Committee on the merits.

It was not that the Appeal to the High Court was dismissed for want of prosecution.

.....

26. Based on the foregoing reason, it not being denied that Malindi HCCC No. 6 of 2015 was dismissed for want of prosecution; I am not able to find this suit to be bad for being res judicata. For that reason alone, I find no merit in the Notice of Preliminary objection and I hereby dismiss same with costs.

22. The second case that I find relevant is the decision of Mativo J (as he then was) in the case of Mumira *v Attorney General (Constitutional Petition E007 of 2020)* [2022] KEHC 271 (KLR) (8 April 2022) (Ruling). In that case, the Judge stated as follows:

> " 3. The Respondent's counsel submitted that prior to the Petition, the Petitioner had filed a Plaint dated 1st November 1999 being Mombasa High Court Civil Suit No. 496 of 1999 ..... Counsel submitted that the said suit was dismissed for want of Prosecution. As a consequence, the Respondent submitted that this Petition is res judicata by dint of section 7 of the *Civil Procedure Act*[1]and cited Njue Ngai v Ephantus Njiru & another[2] and Kenya Commercial Bank Ltd v Nenjoh Amalgamated Ltd[3] which decisions defined the ingredients of res judicata .....
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> .....
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> 13. The Respondent's counsel relied on Njue Ngai v Ephantus Njiru Ngai & Another[11] in which the court addressing the question whether a dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution, amounts to a judgment reviewed previous decisions and referred to Jowitt's Dictionary of English Law[12] which defines a judgement as a :- the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several." The court also referred to Mulla's Indian Civil Procedure Code,[13] which reads:-:"Judgment" means the statement given by the judge on the grounds of a decree or order," "Judgment – in England, the word judgment is generally used in the same sense as decree in this code" and concluded that a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law which is not a bar to the Plaintiff to apply for the dismissal to be set aside.
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> 14. From the jurisprudence discussed earlier, it is clear that the previous suit must have been determined conclusively and a final Judgment rendered on the merits. Even in Njue Ngai v Ephantus Njiru Ngai & Another, the court in the above underlined sentence, the court cited authorities/decisions stating that there must be a determination on the main questions. Turning to this case, the question is whether a dismissal for want of prosecution can be termed as a final determination on merits. In Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & another[14] the High Court dismissed a similar objection as raised in this Petition declining to buy the arguments raised in this Petition. Also, in Moses Mbatia v Joseph Wamburu Kihara[15] the

court held that dismissal of a suit for non attendance or want of prosecution is not synonymous with a suit that has been heard and determined. On this ground alone, the Respondent's argument that dismissal of a suit for want of prosecution constitutes res judicata collapses

.....

21. ..... 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 Limited & 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.

22. 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 apply for review the order or prefer an appeal against the dismissal. It is not open for the Petitioner to instate 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. On this ground alone, I find and uphold the Notice of Preliminary Objection and dismiss the Petitioner's Petition dated 21st September 2020 with no orders as to costs."

23. Another decision that I find relevant is the one by L.W. Gitari, J in the case of In re Estate of Mungiria M'Runguchi (Deceased) [2022] eKLR. In that case, the Judge held as follows:

" 17. The question that begs an answer is whether dismissal of a matter for want of prosecution can be relied on to conclude that the matter is res judicata. The court of appeal has addressed this issue in the case cited by the petition, that is Njue Ngai-v- Ephantus Njiru & Another C.A, 29/2015 [2016] eKLR.

.....

What the court is saying is that an order dismissing a matter for want of prosecution and the party fails to apply for the suit to be reinstated, forms the judgment in that suit. It becomes the final determination of the issues between the disputing parties. There is no dispute that on 11/2/2019 Justice Limo dismissed similar application by the applicants. They filed this application when the order dismissing the application is still in force and is a valid order. The Rule under which the application was dismissed requires that a party moves the court to set aside the order dismissing the application but not to file a fresh application in the same suit. This is meant to discourage multiplicity of suit and abuse of court process.

I find that the application is res judicata ....."

24. The last authority that I wish to cite is the decision of A. Nyukuri, J in the case of Mutinda (Suing as the Legal Representative of the Estate of Syokau Kinama alias Beth Syokau Kinama) & another v Agutu & 2 others (Environment & Land Petition E009 of 2022) [2023] KEELC 20843 (KLR) (18 October 2023) (Ruling). In that case, the Judge pronounced herself as follows:

> " 31. Having found that this is a matter for the determination by the ELC, I then must answer the question as to whether this court can proceed to hear this matter in view of the fact that Machakos ELC 313 of 2011 was dismissed for want of prosecution by this court on 23rd February 2018.
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> 32. As Machakos ELC 313 of 2011 was dismissed for want of prosecution, then it is clear that that suit was not heard on merit and it follows that that determination cannot render this suit as res judicata under Section 7 of the *Civil Procedure Act*.
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> 33. How does Machakos ELC 313 of 2011 (former suit) relate to this suit? ..... It is clear therefore that the claim in the former suit and in this suit is whether Mutuku Kinama had capacity to enter into a contract for sale of the suit property. I have considered the petition herein and what is in contention is the capacity of Mutuku Kinama to purport to sell the suit property to the 1st and 2nd Respondents. In my view therefore this suit, like the former suit concern the same parties and the same course of action. The former suit was dismissed for want of prosecution on 23rd February 2018. That order has neither been reviewed, set aside nor appealed against and therefore still stands.
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> 34. Order 17 Rule 2 (6) of the Civil Procedure Rules provides in regard to matters dismissed for want of prosecution as follows;
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> "A party may apply to court after dismissal of a suit under this order."
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> 35. Therefore, where a suit is dismissed for want of prosecution a party is allowed to make an application they deem fit if they are still interested in having the dispute determined on merit. For that reason therefore, a party whose suit is dismissed for want of prosecution ought not file a fresh suit but should apply to reinstate their suit. Filing a fresh suit would make a mockery of the order of dismissal for want of prosecution and in my view would amount to abuse of the court process.
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> 36. I associate with the decision in Mumira v Attorney General (Constitutional Petition E007 of 2020 [2022] KEHC 271 (KLR) (8 April 2022) (Ruling) where the court held as follows;
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> .....
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> 37. In the instant matter, it is immaterial that the former suit was commenced by plaint, while this suit was commenced by a constitutional petition, as the facts and circumstances relied upon and the question that the court has been invited to address is the same. Even the fact that there is a different administrator of the estate of Syokau Kinama in the former suit and the current suit, cannot be a justification for filing a fresh suit when the former suit was dismissed for

want of prosecution. The attempt by the Petitioners to convert their claim into a constitutional petition when plainly it is the same claim filed earlier and subsequently dismissed by this court, is an abuse of the court process which this court will not countenance. For the above reasons, this petition is found to be an abuse of the court process and is hereby dismissed with costs to the 1st and 2nd Respondents."

25. Having carefully considered the material placed before me and also the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules and having also appreciated the authorities cited above, my view and findings are as follows:

    i. As Eldoret HCC No. 17 of 1998 was dismissed for want of prosecution, that suit was not heard or determined on merits and as a result, such dismissal did not render the present action as Res Judicata within the meaning ascribed under Section 7 of the *Civil Procedure Act*. The Applicant's claims that the dismissal of the suit for want of prosecution concluded the rival claims between the parties is also therefore misconceived.

    ii. It is not open for the Applicant to bring a fresh action based on the same facts and circumstances as Eldoret HCC No. 17 of 1998 which was dismissed for want of prosecution. The proper cause of action for the Applicant was to either apply to set aside the order dismissing the suit for want of prosecution (which the Applicant in fact did but was unsuccessful) or apply for review of the order of dismissal or prefer an appeal against thereto.

    iii. To allow the Applicant to bring a fresh action replicating the same issues would create endless litigation and would be contrary to, and/or fly in the face of the principle of finality which is hinged on the public interest policy that litigation must come to an end.

26. Having reached the above findings, there would be no need to delve into the other issues that arose as doing so would only amount to an academic exercise and therefore futile.

Final Orders

27. In the end, I rule and order as follows:

    i. This instant action cannot be sustained for the reason that a previous suit filed by the same Applicant herein against the same Respondent herein, namely, Eldoret HCCC No. 179 of 1998 , over the same issues was dismissed for want of prosecution. Allowing the Applicant to institute a fresh action would make a mockery of the order of dismissal for want of prosecution and would clearly amount to an abuse of the Court process.

    ii Consequently, the Applicant's Notice of Motion dated 4/06/2024 filed herein is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24 TH DAY OF JANUARY 2025

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of: