



REPUBLIC OF KENYA



**Rionlima v Paul (Environment and Land Appeal 10 of 2022)
[2023] KEELC 15697 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 10 OF 2022
FO NYAGAKA, J
FEBRUARY 23, 2023**

BETWEEN

JAMES LOKORR RIONLIMA APPELLANT

AND

LORIONGO KAMZEE PAUL RESPONDENT

(Being an Appeal arising out of the Ruling and order of Hon. M. M. Nafula (Principal Magistrate) in Kapenguria Chief Magistrate's Court ELC Case No. E006 of 2022 delivered on 27th April 2022)

JUDGMENT

Introduction

1. After filing his Memorandum of Appearance on 02/03/2022, the Respondent, who was the Defendant in Kapenguria CMC ELC No. E006 of 2022, filed a Preliminary Objection on the same day seeking to strike out the suit for being res judicata. In support, it was grounded and contended that the present dispute was strikingly similar to SPM ELC No. E007 of 2021 that had been determined.
2. In its Ruling, the trial Court concurred with the Respondent and dismissed the Appellant's suit with costs.

The Appeal

3. The Appellant is dissatisfied with the findings of the trial Court. He filed his Memorandum of Appeal on 25/05/2022 impugning the trial court's findings as follows:
 1. The Learned Principal Magistrate erred in law and fact by disregarding Section 7 of the [Civil Procedure Act](#) which captures the doctrine of *Res Judicata*;



2. The Learned Principal Magistrate erred in law and fact by holding that the issues raised in this suit were the same ones raised in SPM ELC No. E007 of 2021 and that the same were heard and finally determined in the former suit;
3. The learned trial magistrate erred in law and fact in relying on extraneous matters in dismissing the Plaintiff's suit with costs.
4. The Appellant prayed that by allowing the Appeal, this Court be pleased to set aside the Ruling and he be given an opportunity to prosecute his case. He further prayed for costs of the Appeal and those at trial.

Hearing Of The Appeal

5. The Appeal was heard on the basis of the parties' rival written submissions. The Appellant filed his submissions dated 17/11/2022 on the same day. He argued that the four (4) constituent elements set out in Section 7 of the *Civil Procedure Act* did not qualify the present suit as res judicata. He submitted that while the issues and parties herein were similar, the suit had not been previously heard and determined on its merits. His understanding was that striking out a suit was not contemporaneous to hearing and determination of a suit. He cited several decisions arguing this ground. In the interest of Article 50 (1) of *the Constitution*, the Appellant prayed that the Appeal be allowed.
6. The Respondent submissions dated 05/12/2022 and filed on 06/12/2022 gave a chronology of the dispute in SPM ELC No. E007 of 2021. The Court dismissed the suit therein for offending the mandatory provisions of Section 30 of the *Land Adjudication Act*. Excepting that the Appellant filed consent in the suit giving rise to the instant Appeal, the Respondent propounded that the two (2) matters in question were similar in all ways. He argued that although the Appellant obtained consent to proceed with the dispute, the proceedings before the Minister were still pending. As such, he was bound by the outcome of that adjudication process. Finally, he submitted that the Appellant was intent on defeating the res judicata doctrine by sanitizing the present dispute with the filing of a consent. He ultimately prayed that the Appeal be dismissed with costs.

Analysis And Determination

7. I have considered the Appeal, the parties' rival written submissions, the relevant law, the proceedings at trial and the impugned decision. The Appeal seeks to overturn a decision terminating the suit in limine. It was a decision of the trial magistrate, made based on analysis of the law only.
8. This being the first appellate court, its duty is to re-evaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. For this, see the cases of Sumaria & Another vs. Allied Industrial Ltd (2007) 2KLR and Selle & Another vs. Associated Motor Boat Co. Ltd. & Others [1968] EA, 123.
9. In allowing the Preliminary Objection, the trial court reasoned that although the Appellant obtained consent to file suit by virtue of Section 30 (1) of the *Land Adjudication Act*, the court lacked jurisdiction since there was a pending Appeal before the Minister. Additionally, the Court observed that the issues in the former case were similar in this suit giving rise to the res judicata dogma. It recalled that the former was struck out for violating Section 30 (1) of the said Act.
10. Both parties conceded that the Preliminary Objection was raised on pure points of law. That was not disputed even on appeal. The Appellant pleads that the doctrine did not apply because the former suit



was dismissed on technical grounds. The Respondent on his part, while observing that the suit before the Minster had not been withdrawn, cited the Appellant for engaging in a fishy expedition. Secondly, he lauded the trial Court's reasoning that held that the doctrine fell within the four (4) corners.

11. Looking at the totality of the evidence and arguments furthered, I postulate that two (2) issues will determine the Appeal; firstly, to ascertain whether res judicata is applicable herein and lastly, the effect of the consent obtained by the Plaintiff.

Did the present suit offend the Res judicata principle? __/**

12. It was acknowledged by the Appellant that although the parties and issues were the same, the doctrine of res judicata did not arise as the former suit was struck off and not dismissed on its merits. My interrogation of this issue firstly lies with an understanding of Section 7 of the [Civil Procedure Act](#) which provides:

“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.”

13. Its purpose was discussed by the Supreme Court in [Kenya Commercial Bank Limited vs. Muiri Cofee Estate Limited & Another \[2016\]](#) eKLR as follows:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights.”

14. The doctrine of *res judicata* is premised on the principle of public policy. It is intended to discourage unending litigation especially whether a dispute has been resolved substantively. The court is called upon to zealously guard the time and resources donated to it in the administration of justice. It will then, at the earliest opportune moment, not hesitate to strike a suit bearing similar attributes to another determined by a competent court.

15. A party alleging the subsistence of the said doctrine must demonstrate that the suit qualifies within the four (4) parameters as set out in Section 7 of the [Civil Procedure Act](#). I will restate again to say that in the present suit both parties are amenable to the fact that the parties and dispute are similar. They also agree that the parties litigated under the same title. This was also the trial court's holding. However, the Appellant departed from the fourth (4th) element; the suit was previously heard and finally decided.

16. Had the former suit been heard and finally decided by a competent court? Faced with a similar issue, the Court of Appeal in [Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited \[2005\]](#) KLR 97 demystified the meaning of the phrase “heard and finally decided” as follows:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore



do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits.”

17. I fully associate myself with the sentiments of the superior court. It is not gainsaid that the former suit was not determined on its merits. As such, it was not finally heard and decided by the said court. To this extent, I find that the trial court was in error in finding that the suit was res judicata.

Whether the suit offended Section 30 (1) of the *Land Adjudication Act* and thus ought to be struck out?

18. The Plaintiff in filing the subject suit sought and obtained the consent from the Land Adjudication and Settlement Office at Kapenguria. This was not disputed. However, it appears that the dispute may still be pending before the Minister as an Appeal had been preferred by the Appellant and appears to be pending.

19. Section 30 (1) of the *Land Adjudication Act* provides:

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act”.

20. My reading and interpretation of the above provisions bars litigation of a suit before an Adjudication Section until it has become final in all respects. When is the adjudication register final? By final in all respects, the statute contemplated a scenario where, if any, an Appeal had been filed before the Minister. As such, until the matter is finally concluded through the utilization of all available avenues as provided, no litigious proceedings can be instituted. It means that the Minister ought to have rendered himself or herself on the appeal and communicated as such to the relevant parties or offices. However, there is an exception: a party can institute a suit in Court irrespective of the fact that the matter is yet to be concluded by the Minister if he observes one condition. He/she must mandatorily obtain written consent from the Land Adjudication Officer. It is thus immaterial whether there are pending proceedings running side by side.

21. From the pleadings, it is evident that the Plaintiff obtained consent from the relevant office to file the suit. He was perfectly entitled to do so. Consequently, I fault the trial court for holding otherwise.

22. In view of my above analysis, I find that the Appeal is merited. I therefore make the following orders thereon:

1. The Appeal is allowed.
2. The Ruling of the trial Court delivered on 27/04/2022 is hereby set aside and substituted with an order dismissing the Preliminary Objection dated 02/03/2022 with costs to the Appellant.
3. The matter shall be mentioned on 22/03/2023 for reallocation to another trial Court.
4. The original Court file of the trial Court shall be transmitted forthwith, together with a copy of this decision or an order thereof, to the Law Courts, Kapenguria for final determination as directed in 3 above.



5. The Appellant shall have costs of this Appeal.
23. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 23RD DAY OF FEBRUARY 2023.

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HON. DR. IUR FRED NYAGAKA
JUDGE, ELC KITALE.

