



REPUBLIC OF KENYA



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Mwandori & 4 others (All Suing for themselves and other Residents/Owners of Land Used for Sugar Growing at Kwale/Majoreni and Kidimu Areas) v Kwale International Sugar Company Ltd & 6 others; Muslims for Human Rights (MUHURI) (Interested Party) (Environment & Land Petition 24 of 2021) [2023] KEELC 883 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 883 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 24 OF 2021

AE DENA, J

FEBRUARY 16, 2023

BETWEEN

KILLIAN MWAJANJI MWANDORI 1ST PETITIONER
MWATELA CHUPHI CHABOGO 2ND PETITIONER
MWARUMA DZEHA MWAMBIRE 3RD PETITIONER
JUMA BORA 4TH PETITIONER
MBEYU MWATENGA 5TH PETITIONER

**ALL SUING FOR THEMSELVES AND OTHER RESIDENTS/OWNERS OF
LAND USED FOR SUGAR GROWING AT KWALE/MAJORENI AND KIDIMU
AREAS**

AND

KWALE INTERNATIONAL SUGAR COMPANY LTD 1ST RESPONDENT
WHITESTONES FARMS LIMITED 2ND RESPONDENT
ABDALLA SAID KIZELE 3RD RESPONDENT
ZAINABU JUMA SALIMINI 4TH RESPONDENT
THE REGISTRAR OF LANDS, KWALE 5TH RESPONDENT
THE NATIONAL LAND COMMISSION 6TH RESPONDENT
THE HON ATTORNEY GENERAL 7TH RESPONDENT

AND

MUSLIMS FOR HUMAN RIGHTS (MUHURI) INTERESTED PARTY



RULING

Application

1. This ruling is subject of the 1st respondents (herein KISCOL) application dated 30/5/2022. The same has been filed pursuant to the provisions of sections 1A,1B and 3B of the Civil Procedure Act chapter 21 Laws of Kenya, order 2 rule 15, order 51 rule 1 of the Civil Procedure Rules 2010. The application seeks; -
 - a. That this petition be dismissed with costs
 - b. That in the alternative the petition as drawn and filed against the purported 3rd respondent be dismissed.
 - c. That costs of this application be provided for.
2. The application is premised on grounds listed on its face and the supporting affidavit of Amos Kipkemboi Suge KISCOL legal officer. It is averred that the petitioners through their authorized representatives including Mwanasiti Bakari Chombo filed a suit in Mombasa on 11/7/2012 seeking a declaration that they have obtained ownership of land reference no Kwale/Majoreni/1283, Kwale/Kidimu/15 and Kwale/Majoreni/1284. That the suit was heard by Justice Mukunya, Justice Omollo and subsequently dismissed by Justice Yano. It is contended that this honourable court does not have jurisdiction to reopen and determine issues that have already been determined by a court of competent jurisdiction.
3. It is deponed that litigation must come to an end and parties should be protected from suits that have already been determined. The 1st respondent seeks for protection against wastage of time and resource in endless litigation and multiplicity of suits. The court is asked to strike out the suit on account of being *res judicata*. Further that the petition cannot survive as it has been filed against some respondents who are deceased.

Response

4. In response to the application, the petitioners filed a replying affidavit sworn by the 1st petitioner Killian Mwanjani Mwandori. He avers that the application is marred by bad faith, is incompetent, misconceived and abuse of the court process therefore untenable. That the affidavit made in support of the application is by a natural person and with no authority legally to appear or plead on behalf of the 1st respondent. That the application is therefore incompetent and ought to be dismissed. It is stated that there has been no case relating to the suit properties which has been heard and determined. That HCC No 133 of 2012 (former suit) was filed before the High Court and not the Environment & Land Court and it was dismissed under the provisions of order 17 rule 2 of the Civil Procedure Rules. That the suit was filed way back in the year 2015 and it is therefore not a matter seeking to re-open any case.
5. It was further stated that Kiscol cannot purport to represent the interests of the 3rd respondent without explicit authority from the said 3rd respondent. That no proof has been tendered to show the 3rd respondent is deceased. According to the petitioners the application was meant to further delay the case as the 1st respondents continue to illegally occupy the suit premises. That court should therefore find the application incompetent and without merit and dismiss the same with costs.
6. The applicant filed a replying affidavit dated 24/6/2022. The same is sworn by Amos Kipkemboi Suge where he reiterates that he is employed by Kiscol as its legal officer and has been duly authorized to



sign relevant pleadings and appear on their behalf in these proceedings. That there is also a supporting affidavit filed on 30/5/2022 that confirms the suit against the 3rd and 4th respondents is premised on nothing as both are deceased and urges that this application is allowed as prayed.

Submissions

1st respondent's submissions

7. Reiterating the grounds earlier mentioned it is submitted on behalf of the applicants that the issues in the previous suit were directly and substantially in issue between the same parties herein and have been determined by a court of competent jurisdiction. That counsel for the petitioners ought to have advised them properly that the previous suit was handled by judges of the Environment & Land Court pursuant to section 30 of the ELC Act No 19 of 2011. That the proceedings were referred to the Environment & Land Court as per the directives of the Chief Justice after establishment of the court. That the pleadings in the previous suit bear the stamp of the Mombasa Environment and Land Division and an admission on the part of the petitioners.
8. The court was invited to invoke the provisions of order 13 rule 2 and grant the prayers sought herein since the averment that the suit was dismissed under order 17 rule 2 of the Civil Procedure Rules is not sustainable. That the said provisions guarantee remedy to the petitioners to file application upon dismissal of their suit and having failed to do so the order dismissing the suit must be accepted as correct. That when the previous suit came before the three judges herein the petitioners through their witnesses had already testified under oath. Relying on the case of Kennedy Mokuia Ongiri Versus John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR it was urged the court cannot re-open the proceedings.
9. On whether the petition against the 3rd and 4th respondents can be sustained it is submitted a suit cannot be filed against a dead person as was stated in Viktar Maina Ngunjiri & 4 Others Versus AG & 6 others Nairobi HC Civil suit no 21 of 2016 neither can judgement be sustained against a person that is already dead. That the suit against the 4th respondent stands abated in line with the provisions of order 24 rule 4[4] of the Civil Procedure Rules, more than two years have lapsed since her demise on 16/4/2020.
10. Ms Mukoye for the petitioners informed the court on 13/10/22 that the petitioners would rely entirely on the replying affidavit. Mr Muinde for the 6th respondent supported the application.

Analysis And Determination

11. Having considered the application, the pleadings, the response and submissions of the parties two issues stand out for determination. Whether the present suit is *res judicata*. Whether the suit against the 3rd respondent should be struck out however this will be dependent upon a finding that this suit does not meet the threshold of *res judicata*.
12. The guiding law on *res judicata* is set out under section 7 of the Civil Procedure Act which states 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.”



13. The Supreme Court further expounded the above, in *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR 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 all 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.”

I will therefore proceed to express myself on each of the elements above.

14. I will first dispense with the element of the competency of the court that is said to have determined the former suit which appears straight forward to me. It has been stated that HCC No 133 of 2012 was filed in the High Court of Kenya as opposed to the Environment and Land Court. The issue of jurisdiction of the specialized courts was resolved by both the Court of Appeal and Supreme Court of Kenya in the case of *Karisa Chengo & 2 Others Vs Republic* (2015) eKLR where it was held that judges appointed to the High Court and those of Employment & Labour Relations Court are barred from hearing matters relating to Land. And indeed, the *Constitution* of Kenya expressly prohibits the High Court from hearing matters to do with land and employment. However, this finding did not render the land related cases filed in the High Court void then. They were pursuant to powers conferred on the Chief Justice administratively transferred to the Environment & Land Courts. Indeed, I have seen an order by Justice A Emukule which duly transferred the file to the ELC Court for action and determination as the same had been initially filed at the human rights division.
15. Back to the other elements, it is stated by KISCOL that the prayers sought in the present petition are similar to the ones raised in OS No 133 of 2012 *Chari Chimambo Nyawa & 4 Others Versus Kwale International Sugar Co Ltd* filed in Mombasa on 11/7/2012. My perusal of the OS reveals that the court was called to determine on the following; -
- a. Whether the plaintiffs/applicants have acquired the said property by reason of adverse possession against the defendant/respondent herein.
 - b. Whether the plaintiffs/applicants should be registered as proprietors of the land known as Kwale/Majoreni/1284, Kwale/Majoreni/1283 and Kwale/Kidimu/15 on the grounds that on diverse dates since 1976 the plaintiffs/applicants have been openly and peacefully enjoying occupation for over twelve [12] years preceding the presentation of summons
 - c. Whether the defendant/respondents should execute a transfer and all acts necessary to convey the said title to the plaintiffs/applicants as the rightful proprietors and enable it to be registered as such and in default the deputy registrar be authorised to sign the relevant documents on behalf of the defendants.
 - d. Whether the plaintiffs/applicants are entitled to costs of the suit.



16. I have also examined the pleadings in the present suit which was filed on 9/12/2015. The prayers sought are listed as hereunder;
- a. A declaration that the petitioners constitutional right under article 40 of the Kenyan constitution 2010 which protects acquisition and ownership of land, freedom from arbitrary deprivation and freedom from discrimination has been infringed and was not been conducted in line with part V111 of the Land Act guiding constitutional principles on land policy in Kenya.
 - b. An order directed to National Land Commission to issue a policy document on government Kwale land policy addressing the issue of how the government intends to displace, resettle and compensate people who will be affected by the sugar cane growing project in their county and how the National Land Commission intends to cure the historical injustices caused to the petitioners.
 - c. Compensation for damages suffered for trespass, invasion and intrusion of privacy, loss of security and arbitrary deprivation of property and the violation of other constitutional rights and values cited in this petition to be paid by the 1st respondent.
 - d. An order for costs to be provided for.
17. A quick glance at the prayers to me show that the issues are different. The applicants in the former suit were laying claim against the suit property by way of adverse possession. In the present case the petitioners are alleging infringement of their right to property claiming arbitrary deprivation of their property under article 40 of the Constitution and compensation by way of damages thereof. I also see the issue of resettlement of the people affected by the sugar project and claims for historical injustices and a cure thereof. Quite a mixed grill. This answers to whether the suit or issue was directly and substantially in issue in the former suit. Clearly therefore the issues are different.
18. On whether the former suit was between the same parties or parties under whom they or any of them claim. The pleadings are very clear in the Land Suit No 133 of 2012 (OS) that the applicants therein Chari Chimambo Nyawa, Emmanuel Mwayonga, Dorothy Kadzo, Mwanasiti Bakari Chombo and Mawazo Abdalla Moyo were suing on their own behalf and on behalf of all the residents of Pongwe Kidimu area who are exclusively occupying portions of Parcels known as Kwale/ Majoreni/1284, Kwale/ Majoreni/1283 and Kwale/Kidimu/15. I will therefore not belabour the point since all residents were being represented. I have noted that in the present suit the Registrar of Lands Kwale, the National Land Commission and the hon Attorney General have been joined as parties to the petition when they are not in the originating summons.
19. I will then proceed to render myself on the respondents objection that former suit was dismissed under the provisions of order 17 rule 12 of the Civil Procedure Rules. This appears to be in response to the last element requiring that the issue must have been heard and finally determined in the former suit. I think the correct rule is rule 2. Order 17 rule 2(2) provides for dismissal of a suit for want of prosecution and a look at the pleadings it is true that some of the witnesses had already testified in the matter but the parties were not keen to prosecute the case and Justice Yano rightly so dismissed the former suit on 18/5/2017. Indeed, order 17(2) (6) provides a remedy to a party whose suit is dismissed under the provisions of order 17 to apply to court after dismissal of a suit as contended by KISCOL. The respondents contend that the present suit was filed in 2015 and is therefore not a matter seeking to reopen any other case. This I note is based on the date of the dismissal which happened after the filing of the present petition. To me for purposes of the doctrine of *res judicata* and elements stated by the



- Supreme court, the question this court should ponder on is whether the suit was finally heard and determined.
20. Does a dismissal for want of prosecution meet the test for finality or let me say judgement as envisaged under section 7 of the Civil Procedure Act. This court was referred to Black's Law Dictionary 10th Edition, definition of *res judicata* as hereunder; -
- An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue (2) a final judgement on the merits and (3) the involvement of same parties or parties in privity with the original parties.'
21. The suit was dismissed for want of prosecution. Even though some parties had already given their evidence the court never applied itself on the evidence to render its judgement on the merits of the evidence. To me this is what would bring finality which is the key rationale for *res judicata*. The suit was dismissed on a technical knockout since there was no judgement. The Court Appeal faced with a similar submission that a suit dismissed for want of prosecution was *res judicata* in the case of Michael Bett Siror Vs Jackson Koech (2019) eKLR aptly 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.'
22. Based on foregoing discussions and on the material placed before me in these proceedings, it is this courts finding that this suit is not *res judicata*.
23. The court must now deal with the second limb of the application where it is being invited to dismiss the petition as drawn against the purported 3rd respondent. The alleged 3rd respondent is said to have been deceased at the time this petition was filed. KISCOL has in its supporting affidavit herein exhibited the death certificate of Abdalla Said Abdalla which shows he died on 2/6/2000. This evidence has not been controverted by the respondents. If he was alive an affidavit sworn by him confirming he was alive then would have sufficed.
24. Faced with a similar issue in Japhet Nzila Muangi Vs Hamisi Juma Malee in Mombasa ELC No 71 of 2016 (OS) Justice Sila Munyao referred to the decision of Mbogholi Msagha J (as he then was) in the case of Viktar Maina Ngunjiri & 4 Others Vs Attorney General & 6 Others, High Court at Nairobi Civil Suit No 21 of 2016 (2018) eKLR and which reviewed various authorities on the same issue and where Justice Mbogholi found that a suit as against the 7th defendant who was dead when the case was filed was null and void *ab initio*. In the his ruling Justice Munyao goes further to cite the court of Appeal decision on a similar issue in Geeta Bharat Shab & 4 Others Vs Omar Said Mwatayari & Another, Court of Appeal at Mombasa, Civil Appeal No 46 of 2008 (2009) EKLr where the court held that 'the judgement could not be sustained as it was entered against a person who was already dead.
25. I'm bound by the above and I make the same finding that the suit against the 3rd respondent is a nullity and must be struck out.



26. I have been invited through the submissions of counsel for the 1st respondent to make a finding that the suit against the 4th respondent stands abated in line with the provisions of order 24 rule 4[4] of the *Civil Procedure Rules*, since more than two years have lapsed since her demise on 16/4/2020. In the supplementary affidavit was exhibited the death certificate in respect of Zainabu Juma Salimini wherein the date of death is given as 16/4/2020. Again this evidence was not controverted. It is now over two years since the death and substitution has not been effected. Consequently, I make a finding the suit as against the 4th respondent has abated by operation of the law see *Titus Kiragu Vs Jackson Mugo Mathai* (2015) eKLR.
27. The upshot of the foregoing is that the application fails on prayer (a) seeking the dismissal of this petition and succeeds on prayer (b) seeking the petition as drawn and filed against the purported 3rd respondent be dismissed. I also make an order that the suit against the 4th respondent has abated by operation of the law. Costs shall be in the cause.

DELIVERED AND DATED AT KWALE THIS 16TH DAY OF FEBRUARY, 2023

A.E. DENA

JUDGE

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

No appearance for petitioners

Mr. Kulecho for the 1st Defendant/respondent

Mr. Makuto for the 5& 7 respondent

No appearance for NLC

Ms. Namulele holding brief for Mr. Apolo Muinde

Mr. Daniel Disiii- Court Assistant.

