



REPUBLIC OF KENYA



**PMG v MWM (Matrimonial Cause 2 of 2020)  
[2022] KEHC 10919 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10919 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
MATRIMONIAL CAUSE 2 OF 2020  
RB NGETICH, J  
JUNE 23, 2022**

**BETWEEN**

**PMG ..... PLAINTIFF**

**AND**

**MWM ..... DEFENDANT**

**RULING**

1. The respondent filed originating summons dated 29<sup>th</sup> day of January, 2020 seeking the following orders:-
  - (a) That this Honourable Court do issue an order declaring that the property known as Lari/Kambaa/683 is matrimonial property.
  - (b) That this Honourable Court do issue an order declaring that the Plaintiff has a beneficial interest in the property Lari/Kambaa/683 and that the defendant holds the same in trust for her.
  - (c) That this Honourable Court do issue an order restraining the Defendant from selling/ alienating/leasing and or transferring the said Lari/Kambaa/ 683 without the consent of the plaintiff.
  - (d) That the costs of this application be in the cause.
2. The defendant opposed the originating summons by filing Notice of Preliminary Objection dated 9<sup>th</sup> February, 2021 on 17<sup>th</sup> February 2021 in opposition to the plaintiff's originating summons on the following grounds:-
  - (a) The suit is res judicata. It is filed contrary to Section 7 of the Civil Procedure Act 2010.



- (b) There existed Nairobi ELC Case No. 369 of 2012 between the same parties herein concerning the same subject matter which has been determined
  - (c) This Honourable Court lacks jurisdiction to entertain the same.
3. On 29<sup>th</sup> February 2022 directions were taken to have the Preliminary objection canvassed by way of written submissions. Only the Defendant filed written submissions on 24<sup>th</sup> May, 2022. The Plaintiff did not file written submissions.

### **Defendant's Submissions**

4. Counsel for the defendant submitted that a litigant who seeks redress of the court must be clear on the question of jurisdiction as the court will down its tools if it lacks jurisdiction to hear the dispute and cited the case of Owners of the *Motor Vessel "Lillian S. v Caltex Oil (Kenya) Ltd* (1989) KLR 1 where the court held as follows:-
- “jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basal for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”
5. Counsel submitted that the suit filed by the Plaintiff offends the doctrine of Res Judicata as stipulated under Section 7 of the *Civil Procedure Act*. The matter has been finally determined by a court of competent jurisdiction in Nairobi ELC Case No. 369 of 2012 involving the same parties and the same subject matter property known as Lari/Kambaa/683; that the issues raised in the current suit relate to the same issues raised in Nairobi ELC No. 369 of 2012.
6. The defendant submitted that the former suit determined that the Defendant is the registered owner of the property after the property was lawfully gifted by Plaintiff and the Plaintiff has therefore approached the court with unclean hands.
7. The Defendant's contention is that the Plaintiff is attempting to try his luck by alleging the property is matrimonial property, claiming beneficial interest.

### **Analysis And Determination**

8. I have perused and considered the Originating Summons filed by the Plaintiff and the Preliminary objection and the submissions filed by the Defendant. The issue for determination is whether the Originating Summons dated 29<sup>th</sup> January 2020 is res judicata.
9. Section 7 of the *Civil Procedure Act* provides for res judicata state 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 can 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.”
10. From the above, a matter to be res judicata if the dispute was litigated under the same title and the dispute has been determined by a court of competent jurisdiction.



11. The current application involves the property known as Lari/Kambaa/683 where the plaintiff Peter Munyua is claiming the property is matrimonial property and he claims some beneficial interest. He has sued the Defendant Mary Wambui.
12. In the previous suit Nairobi ELC No. 369 of 2012, the plaintiff Lari/Kambaa/683. The trial court in its judgment delivered on 22<sup>nd</sup> September, 2017 dismissed the Plaint and upheld the counterclaim. The court found the property having been registered in the name of Mary Wambui Munyua, she is the beneficial owner of the property. The court also went ahead to state that the Plaintiff failed to prove he was not in a capacity to transfer the property to the Defendant.  
  
Peter Munyua filed a suit against the Defendant Mary Wambui seeking a judgment that the Defendant does re-transfer the parcel known as
13. Thus the gist of the current application revolves around the ownership of Lari/Kambaa 683. By the judgment of Nairobi ELC No. 369 of 2012 the court addressed the issue of ownership. I further note the previous suit relates to the same parties as to the current suit the Plaintiff Peter Munyua has sued Mary Wambui in both suits.
14. The principle of res judicata is meant to bar a party who has litigated the matter in a court of competent jurisdiction from re-litigating the same issues against the same party.
15. From the pleadings and submissions, it is not in dispute that the subject matter in the previous suit and the current suit is the same, between the same parties and the same, and was litigated before a court of competent jurisdiction.
16. I do hold the same view as J. Manjanja In the case of *E.T.V -v- Attorney General & Another* (2012) eKLR where he stated:

“The courts must 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.”

17. In the circumstances, I find the Preliminary objection dated 9<sup>th</sup> February 2021 is merited, the suit is res judicata and therefore an abuse of the court process.
18. Final Orders
  1. Preliminary objection dated 9<sup>th</sup> February, 2021 is upheld.
  2. The originating summons dated 29<sup>th</sup> January, 2020 is dismissed.
  3. Costs of the Defendant.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU**

**THIS 23RD DAY OF JUNE, 2022**

.....  
**RACHEL NGETICH**  
**JUDGE**

**In the Presence of:**



**Kinyua – Court Assistant**

**Ms. Tikoko holding brief for Nguu for defendant**

**C.W Kinyua for plaintiff -absent**

