



Ndubai v M'Ikunyua & 4 others (Environment and Land Appeal E019 of 2022) [2023] KEELC 18097 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18097 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E019 OF 2022**

**CK YANO, J
JUNE 14, 2023**

BETWEEN

LEON MURIITHI NDUBAI APPELLANT

AND

CHARLES NTIRITU M'IKUNYUA 1ST RESPONDENT

MOSES MURIUKI M'IKUNYUA 2ND RESPONDENT

STEPHEN MUTHEE M'IKUNYUA 3RD RESPONDENT

HARRIET GACHIJENJA M'IKUNYUA 4TH RESPONDENT

LUKE MURIUNGI MAKATHIMO 5TH RESPONDENT

RULING

1. Before me for determination is the notice of motion dated 16th December, 2022 by the appellant mainly seeking for orders that the firm of Carlpeters Mbaabu & Co. Advocates be granted leave to come on record and henceforth represent the appellant in place of M/s Donex Juma Advocates and an order of inhibition over LR NO. Kiirua/naari/1178 and or any subdivisions arising therefrom pending hearing and determination of this appeal or until further orders of the court. The application is brought pursuant to the provisions of Section 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Order 9 Rule 9 and Order 51 Rules 1, 3 and 4 of the *Civil Procedure Rules* and Section 68 of the *Land Registration Act*.
2. The application is supported by the affidavit sworn by Leon Muriithi Ndubai, the appellant and is predicated on the grounds that the appellant bought the subject land through an agreement executed on 29th October, 2015 and that the 5th respondent has engaged several land brokers in Meru town who are aggressively looking for potential and ready to buy purchasers and that the 5th respondent will easily sell and transfer the said land because it is in his name. The appellant has annexed copies of an



agreement dated 29th October, 2015 and certificate of official search. It is the appellant's contention that the respondents will not be prejudiced by the preservative relief sought.

3. In opposing the application, the respondents filed a replying affidavit sworn by Luke Muriungi Makathimo, the 5th respondent in which he avers that the appellant's assertion that he is scouting for buyers to sell off the suit land is baseless. He further avers that the appellant is a very litigious person as his earlier application for stay of execution was dismissed with costs and that by filing this application the appellant is trying to obtain orders of stay which have already been denied by this court. The 5th respondent urged the court to dismiss the application with costs.
4. I have considered the application and the response. The issues for determination are whether the firm of Carlpeters Mbaabu & Co. Advocates should be granted leave to come on record for the appellant in place of M/s Donex Juma Advocates and whether the order of inhibition should be granted as sought.
5. Order 9 rule 9 of *Civil Procedure Rules* provides as follows-;
 - “9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-;
 - a) Upon an application with notice to all the parties.
 - b) Upon a consent filed between the ongoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
6. Order 9 Rule 10 provides as follows-;
 - “10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
7. Order 9 Rule 9 is clear that no new advocate can take over the conduct of a suit which was finally determined without leave of the court through a formal application or by consent of the outgoing and incoming advocate. In the present case, the firm of Carlpeters Mbaabu & Co. Advocates has filed an application for leave to come on record for the appellant in place of the firm of Donex Juma Advocates. I note that the application was served upon the firm of Donex Juma Advocates and there is no opposition filed. I therefore grant leave to the firm of Carlpeters Mbaabu & co. advocates, to come on record for the appellant in place of M/s Donex Juma Advocates.
8. I now turn to the issue as to whether an order of inhibition should be issued as sought. In his application dated 21st June 2022, the appellant sought for an order of temporary injunction restraining the respondents from selling, transferring leasing or in any other way interfering with the appellant's peaceful possession and occupation of the suit property known as Parcel No. Kiirua/Naari/1178. By a ruling delivered by this court on 5th October, 2022, the court found that the said application had no merit and dismissed the same with costs to the respondent.
9. I have perused the present application. Besides an order to have the firm of Carlpeters Mbaabu & Co. Advocates to come on record, the application is seeking an order of inhibition against the suit property pending hearing and determination of this appeal. It is clear that besides the issue of representation the current application is seeking preservative relief pending the hearing and determination of the appeal.



10. The law pertaining to the doctrine of res-judicata is in Section 7 of the Civil Procedure Act which provides as follows-;

“7. 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.”

11. There is no doubt that the principle applies to applications with the same force whether the application be final or interlocutory. There is no dispute that the parties are the same in all these proceedings. In both the earlier application and the present one, the appellant is mainly seeking preservative orders pending the determination of the appeal. These issues are similar in all forms and this court has already determined them in the earlier decision. The statutory provision under Section 7 of the Civil Procedure Act is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit or application between the same parties, if the issue was determined in the former application after a hearing. By virtue of Section 7 of the Civil Procedure Act, it is clear to me that orders of inhibition sought in this application is barred by the doctrine of res-judicata.

12. In the case of *Attorney General & another Vs ET* [2012] eKLR it was held as follows-;

“The courts must always be vigilant to guard litigants against 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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In this case of *Omondi Vs NBK & Others* (2001) EA 177 the court held that “parties cannot evade the doctrine of res-judicata by merely adding other parties or causes of action in a subsequent suit” In that case, the court quoted Kuloba J (as he then was) in the case of *Njanju Vs Wambugu & another* Nairobi HCC NO. 2340 OF 1991 (unreported) where he stated; “If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case cosmetic lift in every occasion he comes to court, then I do not see the use of the doctrine of res-judicata”

13. By reason of the forgoing, I find that the application herein seeking orders of inhibition is an abuse of the court process as it raises issues which had been substantially litigated and adjudicated upon by this court or which ought to have been raised in the earlier application and the same is rejected. However the firm of Carlpeters Mbaabu & Co. Advocates is granted leave to come on record for the appellant in place of M/s Donex Juma Advocates.

14. In the result, I make the following orders-;

- a) Prayer 2 of the application is allowed.
- b) Prayer 4 is disallowed
- c) Costs of the application are awarded to the respondents.

15. Orders accordingly

DATED SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE 2023



In the presence of

Court Assistant – V. Kiragu

Carl Peters for appellant

Mrs. Mutegi for respondents

C.K YANO

JUDGE

