



**Njoroge & 2 others v Mugo & 2 others (Environment & Land Case  
134 of 2019) [2023] KEELC 18206 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18206 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 134 OF 2019**

**BM EBOSO, J**

**JUNE 12, 2023**

**BETWEEN**

**GEOFFREY MUGO NJOROGE ..... 1<sup>ST</sup> PLAINTIFF**

**LEAH NJERI NJOROGE ..... 2<sup>ND</sup> PLAINTIFF**

**DAVID MBUGUA NJOROGE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PENINAH WANJIKU MUGO ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL SAMSON MBARATHI ..... 2<sup>ND</sup> DEFENDANT**

**JOAN WAIRIMU MBUTHIA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What falls for determination in this ruling is the 2nd and 3rd defendants' notice of motion dated 17/10/2022 through which the two defendants seek an order dismissing this suit on the ground that the suit is *res judicata*. The defendants contend that the suit is *res judicata* because it was preceded by Nairobi ELC Case No 264 of 2012; *Joan Wairimu Mbutia & Another v Peninah Wanjiku Mugo*, which was determined through a Judgment rendered on 26/12/2013 by this Court [Gitumbi J]. The single issue that falls for determination in the application is whether this suit is *res judicata*. Before I dispose the issue, I will briefly outline the gist of the plaintiffs' claim and the defence in this suit.
2. Through a plaint dated 7/8/2019, the plaintiffs contend that they are grandchildren of the 1st defendant, by virtue of being children of the late Lucy Wanjiku Njoroge who was a daughter of the 1st defendant. They further contend that their mother, the late Lucy Wanjiku Njoroge, was the beneficial owner of land parcel number Dagoretti/Thogoto/2132 by virtue of having inherited the land from her late father, Geoffrey Mugo Kariuki. They add that they are the administrators of the estate of Lucy Wanjiku Njoroge [hereinafter referred to as "the deceased"]. It is the case of the plaintiffs that upon



- the death of their mother, all documents relating to the suit property were left in the hands of the 1st defendant. They contend that the 1st defendant fraudulently subdivided the suit property into two parcels:
- (i) Dagoretti/ Thogoto/2869 and
  - (ii) Dagoretti/ Thogoto/2870 and fraudulently conveyed parcel number Dagoretti/ Thogoto/2869 to the 2nd and 3rd defendants.
3. The plaintiffs seek an order cancelling all the titles issued pursuant to the impugned subdivision. They also seek an order directing the defendants to vacate the suit property.
  4. The court record does not bear any defence filed by the 1st defendant. The 2nd and 3rd defendants filed a statement of defence dated 16/9/2019, in which they denied the plaintiffs' claim. They averred that pursuant to an offer extended to them by the 1st defendant, they purchased land parcel number Dagoretti/Thogoto/2869 through a sale agreement dated 23/7/2011 and paid the full purchase price to the 1st defendant. They added that the 1st defendant subsequently transferred the land to them in 2011 and a title deed was issued to them in October 2011. They further contended that they had enjoyed quiet possession of the suit property from 2011. They added that the issue of validity of their title was considered and determined in *Nairobi ELC Case No 264 of 2012*, hence the plaintiff's claim is *res judicata*.
  5. Against the above background, the defendants brought the application under consideration. The application was supported by an affidavit sworn on 17/10/2022 by Joan Wairimu Mbuthia. Annexed to the affidavit were two exhibits:
    - (i) a copy of the judgment delivered in Nairobi ELC Case No 264 of 2012; and
    - (ii) a copy of the decree extracted in the said suit.
  6. The application was canvassed through written submissions dated 26/1/2023, filed by M/s McKay & Company Advocates. Counsel for the applicants submitted that the single issue for determination in the application is whether the instant suit is *res judicata*.
  7. The plaintiff opposed the application through a replying affidavit sworn on 16/1/2023 by David Mbugua Njoroge and written submissions dated 24/2/2023 filed through M/s Muthuri & Co Advocates. The case of the plaintiffs/respondents is that they were not parties in *Nairobi ELC Case No 264 of 2012*. They contend that the said suit was filed by the 2nd and 3rd defendants against the 1st defendant solely for the purpose of obtaining a Judgment to legitimize a title that had been obtained through a flawed/fraudulent process. They add that the elements of *res judicata* are lacking in the present suit.
  8. I have considered the application; the response to the application; the parties' respective submissions; the relevant legal frameworks; and the prevailing jurisprudence on the subject of *res judicata*. As correctly pointed out by counsel for the applicants, the single issue to be determined in the application is whether this suit is *res judicata*.
  9. The common law doctrine of *res judicata* was codified by Kenya's Parliament through the enactment of Section 7 of the [Civil Procedure Act](#) which provides 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.”

10. Kenya’s Parliament went a step further to enact the following five explanatory notes that elaborate the tenor and import of the doctrine of *res judicata*:

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

11. The Court of Appeal gave the following rationale that underpins the doctrine of *res judicata* in [\*John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others\*](#) [2015] eKLR as:

“The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res-judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

12. Does the present suit have the essential elements of *res judicata* as outlined in Section 7 of the [\*Civil Procedure Act\*](#)? Having examined and considered the evidence that was placed before this court in support of the application, my answer to the above question is in the negative. Ideally, the applicants should have exhibited pleadings relating to Nairobi ELC Case No 264 of 2012. They did not. They only exhibited a copy of the Judgment and the Decree.

13. Nonetheless, it is clear from the said Judgment and Decree that the plaintiffs were not parties in Nairobi [\*Environment and Land Court ELC Case No 264 of 2012\*](#). The applicants [the 2nd and 3rd defendants] were the plaintiffs in the said suit while the 1st defendant in the present suit was the sole defendant in *Nairobi ELC Case No 264 of 2012*. The cause of action in Nairobi ELC Case No 264 of 2012 was the purported failure by the 1st defendant to give vacant possession of land parcel number Dagoretti/Thogoto/2369 to the 2nd and 3rd defendants. The 1st defendant did not defend the suit. Consequently, the 2nd and 3rd defendants obtained an *ex parte* Judgment and an *ex parte*



decree. If there is truth in the pleadings in the present suit, it does emerge that the said ex parte decree was subsequently used to evict the plaintiffs.

14. The cause of action in the present suit is the alleged fraudulent conveyance of the suit property by the 1st defendant to the 2nd and 3rd defendants. That is not the same issue as the issue that was considered in Nairobi ELC Case No 264 of 2012.
15. For the above reasons, this court finds that the essential elements of the doctrine of *res judicata* are missing in the present suit. The result is that the notice of motion dated 17/10/2022 is rejected for lack of merit. The applicants shall bear costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF JUNE 2023**

**B M EBOSO**

**JUDGE**

Mr Muthuri for the Plaintiffs

Ms Yala for the Defendants

Court Assistants: Hinga/Osodo

