



**Mbogo & another v Zimman Settlement Scheme Society & 6 others (Environment & Land Case E068 of 2022) [2023] KEELC 17904 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17904 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E068 OF 2022**

**JA MOGENI, J  
JUNE 12, 2023**

**BETWEEN**

**RAPHAEL MBUGUA MBOGO ..... 1<sup>ST</sup> PLAINTIFF**

**ESTHER NYAGUTHII NDIRANGU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ZIMMAN SETTLEMENT SCHEME SOCIETY ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS KIRIMA ..... 2<sup>ND</sup> RESPONDENT**

**MARGARET NJERI WANYOIKE ..... 3<sup>RD</sup> RESPONDENT**

**CHARLES MWANGI NGUMI ..... 4<sup>TH</sup> RESPONDENT**

**CHARLES NYAMWENGE ..... 5<sup>TH</sup> RESPONDENT**

**PETER NDUNG’U MUTHIKA ..... 6<sup>TH</sup> RESPONDENT**

**BERNARD MUNYUIRA ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me for determination is the question of res judicata arising from a Notice of Preliminary Objection dated 3/02/2023 raised by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants/Respondents filed in opposition to the 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> Defendant’s Notice of Motion Application dated 25/01/2023.
2. The Preliminary Objection was raised on the following grounds:
  1. That the prayers sought in the application dated the 25<sup>th</sup> of January 2023 are res judicata and thus offends the mandatory provisions of sec 7 of the [Civil Procedure Act](#).
  2. That this Honorable Court pronounced itself on the issue of representation vide directions made on the 5<sup>th</sup> of December 2022.



3. That an application seeking the court to come to a different finding can only be made on review or appeal of this honorable court and offends the provisions of sec 7 of the [civil procedure Act](#).
3. The Preliminary Objection is not opposed.
4. The 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> Defendants/Applicants filed a Notice of Motion dated 25/01/2023 pursuant to Article 50 of [the Constitution](#) of Kenya 2010, Section 44(1) of the [Societies Act](#), Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 51 Rule 1 & Order 9 Rule 2 & 5 of Civil Procedure Rules 2010 and all other enabling provisions of the law. The Applicants are seeking for the following orders:
  1. Spent.
  2. That this Honourable Court be pleased to order, direct and or declare that the law firm of Adera & Kenyatta Advocates is the law firm that is properly on record for the 1<sup>st</sup> Defendant herein.
  3. That this Honourable Court be pleased to issue such further orders as it shall deem fit and just in the unique circumstances of this case.
  4. That the cost of this application be provided for.
5. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Michael Ngugi Karanja, the secretary of the 1<sup>st</sup> Defendant/Applicant herein.
6. The Application is opposed. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent filed a Replying Affidavit sworn by Francis Kirima M’Ikunyua on 3/02/2023 together with the notice of preliminary objection dated 3/02/2023 and lastly, the 1<sup>st</sup> Plaintiff/Respondent also filed a Replying Affidavit by Raphael Mbugua Mbogo sworn on 10/03/2023.
7. The Court on 8/03/2023 gave directions that both the Notice of Preliminary Objection and the Application be canvassed by way of written submissions. By the time of writing this Ruling, there were no submissions on record for the all the parties.

#### **Issues for determination**

8. Having carefully considered the Preliminary Objection dated 3/02/2023 and the 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> Defendants/Applicants’ application, it follows that the two main issues to be determined are whether this application is res judicata and if not, whether this Application is merited.

#### **Whether this Application is Res-Judicata.**

9. Before I delve into the Preliminary Objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Res judicata is a matter that goes to the jurisdiction of this Court and which I must consider at this earliest opportunity because without it, I must down my tools see Owners of the Motor Vessel ‘Lillian S’ -v- Caltex Oil Kenya Ltd 1989 KLR 1.
10. It is important that I establish if they meet the test laid down in the case of Mukisa Biscuit Manufacturing Co Ltd .V. West End Distributors Ltd 1969 E.A 696 where Sir Charles Newbold said: -

“ A Preliminary Objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. This decision has been affirmed and reiterated severally in our Courts including the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* Civil Application No. 36 of 2014 [2015] eKLR that a preliminary objection should be founded upon a settled and crisp point of law.
12. The preliminary objection is hinged on res judicata which is anchored Section 7 of the [Civil Procedure Act](#). It provides that; -

“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. From the above section, it is clear that for the doctrine of res judicata to be successfully invoked, the matter in question must have been heard and finally decided by the court. In *Mullas Code of Civil Procedure*, 16<sup>th</sup> Edition, Vol 1 at page 279, the learned authors have this to say of the last phrase on section 11 of the Indian Civil Procedure Code, which is in pari materia with our section 7 –

“...the expression ‘heard and finally decided’ in section 11 means a matter on which the court had exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided ...”
14. In the instant application, the 1<sup>st</sup> and 2<sup>nd</sup> respondents have pleaded that the 3<sup>rd</sup> – 7<sup>th</sup> Defendant’s application is res judicata and thus offends the mandatory provisions of Section 7 of the [Civil Procedure Act](#). A perusal of the 3<sup>rd</sup> to 7<sup>th</sup> Defendants’ application demonstrates that the Applicants’ claim is for the law firm of Adera & Kenyatta Advocates to be declared as the law firm that is properly on record for the 1<sup>st</sup> Defendant herein.
15. Looking at the proceedings of 5/12/2022, Mr. Mugo appeared for the Plaintiff whereas Mr. Kimathi appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and Mr. Kenyatta appeared for the 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> Defendant. He thereafter informed the Court that he came on record on 1/07/2022 for the 1<sup>st</sup> Defendant and for the other Defendants, he came on record in March 2022.
16. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that this Court pronounced itself on the issue of representation vide directions made on 5/12/2022. From the records, when the matter came up before this Court on 5/12/2022, coram was taken was indicated on paragraph 15 above and counsel for the Plaintiff thereafter informed the Court that the matter was coming up for Pretrial Conference while bringing his application for contempt dated 1/12/2022 to the attention of the Court.
17. The Court gave directions on disposal of the Plaintiff’s Application, a Ruling date was scheduled, and a further order was given for parties to appear before the Deputy Registrar for Pre-trial Conference on 26/01/2023.
18. From the foregoing, it is clear that the Court did not exercise its judicial mind on any alleged issue of representation on that particular day, 5/12/2022, as the same was never heard and finally decided as envisaged in section 7 of the [Civil Procedure Act](#). I find, therefore, that res judicata does not apply to this matter.



19. Ultimately, having considered the issues herein, it is my holding and finding that the Notice of Preliminary Objection dated 3/02/2023 is not merited.

**Whether this Application is merited.**

20. The Application is premised on grounds that the 1<sup>st</sup> Defendant is a registered Society under the provisions of the Societies Act and as such, as a registered Society, the 1<sup>st</sup> Defendant can only be represented in court through its registered officials or through an advocate appointed by the registered officials.
21. The 1<sup>st</sup>, 3<sup>rd</sup> – 7<sup>th</sup> Defendants/Applicants contend that the Registrar of Societies, as the independent custodian of the register of official leadership records of all the registered societies, has confirmed, via her letters dated the 4/09/2020 and 16/12/2022, that the 3<sup>rd</sup> to 6<sup>th</sup> Defendants herein are the duly elected and therefore registered officials of the 1<sup>st</sup> Defendant. That as such, the 1<sup>st</sup> Defendant can only be represented in these proceedings or any other court proceedings for that matter by the registered officials and or an advocate appointed by the said officials.
22. Further, it is their contention that there appears to be needless confusion on the representation of the 1<sup>st</sup> Defendant in this matter as there are two law firms that are currently on record for the said defendant. The law firm of Adera & Kenyatta Advocates came on record for the 1<sup>st</sup> Defendant by way of the Notice of Appointment dated 1/07/2022 pursuant to the instructions of the 2<sup>nd</sup> to 6<sup>th</sup> Defendants as the registered officials of the 1<sup>st</sup> Defendant while the law firm of S.G Kimathi Advocates purportedly came on record for the same 1<sup>st</sup> Defendant, allegedly on the instructions of the 2<sup>nd</sup> Defendant, on the 2/12/2022 by way of a Notice of Appointment that was mischievously backdated to the 2/12/2021.
23. It is the Applicants' case that the 2<sup>nd</sup> Defendant, by virtue of the two letters by the Registrar of Societies, is no longer the Chairman of the 1<sup>st</sup> Defendant and cannot, therefore, instruct advocates for the 1<sup>st</sup> Defendant. They aver that the Registrar confirmed to them that there had been no change in the leadership of the 1<sup>st</sup> Defendant and that, as per its records, the 2<sup>nd</sup> Defendant was not the Chairman or an official of the 1<sup>st</sup> Defendant, having been voted out by the members on the 27/08/2020.
24. Conversely, the 2<sup>nd</sup> Defendant deponed that he is the bona fide chairman of the 1<sup>st</sup> defendant having been duly elected to the office. He contends that the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> Defendants and one Michael Ngugi Karanja are not legitimate officials of the 1<sup>st</sup> Defendant since they belong to their rival society Githu Zimman. He further informed the Court that he has filed Petition No. 160 of 2020 seeking clarification on the bona fide officials which case is still pending before the Constitutional Court Division. That without an official search and extract confirming them to be officials of the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant avers that he remains the bona fide and duly elected chairman of the 1<sup>st</sup> Defendant.
25. The 2<sup>nd</sup> Defendant clarified that there was a typographical error on the Notice of Appointment wherein it read 2/12/2021 instead of 2/12/2022 which was the date it was filed. That the same was not mischievous as his advocates orally amended it in court to read 2/12/2022.
26. Lastly, he denies producing evidence in Court in collusion with the Plaintiff as alleged. He averred that the evidence he has adduced is the correct version of events and aimed at assisting the court.
27. The 1<sup>st</sup> Plaintiff also opposed the instant application. He contends that before the firm of SG Kimathi appeared for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the 1<sup>st</sup> defendant always appeared in person through the 2<sup>nd</sup> defendant and that they were never served with any notice of appointment by the advocates for the 3<sup>rd</sup> – 7<sup>th</sup> defendants on his appointment to act for the 1<sup>st</sup> defendant. It was his contention that this application was only filed to delay the hearing and determination of the suit.



28. I have considered the application and the rival affidavits on record. According to the Applicants, they received confirmation from the Registrar that there had been no change in the leadership of the 1<sup>st</sup> Defendant and that, as per its records and that the 2<sup>nd</sup> Defendant was not the Chairman or an official of the 1<sup>st</sup> Defendant, having been voted out by the members on the 27/08/2020. The Applicants adduced the following documents in support of this application: -
- i. A Certificate of Registration No. 23044 dated 15/12/2008 (marked as MNK1).
  - ii. A letter from the Registrar of Societies Ref: SOC/44868 dated 4/09/2020 (marked as MNK2).
  - iii. Notice of Appointment of Adera & Kenyatta Advocates for the 3<sup>rd</sup> – 6<sup>th</sup> Defendants dated 1/03/2022.
  - iv. Notice of Appointment of Adera & Kenyatta Advocates for the 1<sup>st</sup> Defendant dated 1/07/2022.
  - v. Notice of Appointment of S.G Kimathi & Co. Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants dated 2/12/2021.
  - vi. A letter from the Assistant Registrar of Societies Ref: SOC/44868 dated 16/12/2022 (marked as MNK6).
29. The Applicants contended that the 1<sup>st</sup> Defendant can only be represented in court through its registered officials or through an advocate appointed by the registered officials. The Applicants further allege that the 2<sup>nd</sup> Defendant, by virtue of the two letters by the Registrar of Societies and Assistant Registrar of Societies, is no longer the Chairman of the 1<sup>st</sup> Defendant and cannot, therefore, instruct advocates for the 1<sup>st</sup> Defendant. Even though that is the case, I am of the view that this is not sufficient evidence.
30. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the [Evidence Act](#) provide as follows:
- 107
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
31. I also refer to the Halsbury’s Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:
- “The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case.”
32. I am of the view that this Application should have been accompanied by a certified copy of the minutes of the meeting at which the resolution to vote out the 2<sup>nd</sup> Defendant was passed. See section 29 of the [Societies Act](#).



33. Furthermore, I opine that the Applicants could have also produced before the Court, a copy of the Register of members to demonstrate that the 2<sup>nd</sup> Defendant is no longer a chairman/member as alleged and therefore not authorized to appoint an advocate to act for the 1<sup>st</sup> Defendant. Section 25 of the Societies Act provides that:

“Every registered society shall keep a register of its members in such form as the Registrar may specify or as may be prescribed and shall cause to be entered therein the name and address of each member, the date of his admission to membership and the date on which he ceases to be a member.”

34. A reading of the above section indicates that each Registered Society is required to keep a register of its members and it is my understanding that this information/evidence should be within the reach of the Applicants herein. They could have proffered this evidence together with a copy of the minutes from the meeting held on 27/08/2020 as alleged, in support of the present application. But they did not do so.

35. Therefore, from the forgoing, having regard to all the evidence and material placed before the court, I am persuaded that the Application dated 25/01/2023 is devoid of merit and I dismiss the same.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**MOGENI J**

**JUDGE**

**In the Virtual Presence of :-**

Mr Kimanthi for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents

Mr Mugo for 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

No appearance for 3<sup>rd</sup> – 7<sup>th</sup> Defendant/Respondent

Ms. C. Sagina : Court Assistant

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**MOGENI J**

**JUDGE**

