



**Ludah v Itemere & another (Environment and Land Appeal
E002 of 2024) [2025] KEELC 1418 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E002 OF 2024**

**A NYUKURI, J
MARCH 19, 2025**

BETWEEN

RONALD INGANGA LUDAH APPELLANT

AND

DAVID ABDALAH ITEMERE 1ST RESPONDENT

KENNEDY SHITUVI O MUTANYI 2ND RESPONDENT

JUDGMENT

Introduction

1. This appeal was filed by Ronald Inganga Ludah challenging the ruling of Hon. J.J. Masiga, Principal Magistrate, delivered on 24th January, 2024. In the impugned ruling, the learned trial Magistrate found as res judicata, the application dated 24th February, 2021 filed by the appellant, which sought the adoption of orders of the Business Premises Rent Tribunal made on 21st July, 2015; 31st December, 2015; 9th May, 2016 and 16th November 2016 in BPRT case Nos. 31 of 2015; 108 of 2015; 8 of 2016 and 105 of 2016, respectively.

Background

2. Vide application dated 24.2.2021 the appellant sought the following orders;
 - a. Spent
 - b. That the orders granted herein at the Business Premises Rent Tribunal Court on reference dated 21st July 2015 (BPRT Case No. 31/2015) and 31st December 2015 (BPRT Case No. 108 /2015) and 9th May 2016 (BPRT Case No. 8 /2016) and 16th November 2016 (BPRT Case No. 105 /2016) be adopted as court orders and the 1st and 2nd Respondents be directed to return the tenant's business and Properties forthwith.



- c. That the court to issue orders for the 1st and 2nd respondents to provide this court with legal documentation of ownership of the said parcel of plot Marama/Lunza/1960 since 1st and 2nd Respondents claim ownership leaving me confused/mixed up since the person I know as the legal owner is the 1st respondent.
 - d. That the court to issue orders for Butere Police Station to provide security during the opening of my business and return of my business properties and records
 - e. That costs of this application be paid by the respondents.
3. The application was supported by the affidavit sworn by the applicant dated 24th February, 2021. The applicant's case was that since 15th February, 2015, he had been struggling to save his business and properties from the possession of the respondents who had grubbed his business and business properties including records and documents. That he complained at the Business Premises Rent Tribunal and orders were issued but that the respondents failed to comply with them. He stated that he needed urgent orders to enable him continue with his business. He attached the Tribunal's orders dated 21st May, 2015 in Tribunal Case no. 31 of 2015, to the effect that the respondent opens the business premises; orders dated 3rd December, 2015 dismissing the landlords notice and allowing the tenants reference vide Tribunal Case No. 108 of 2015; and orders dated 9th May, 2016 to the effect that the landlord reopens the tenant's business premises.
 4. He also attached the order dated 16th November, 2016 from the Tribunal vide Tribunal case No. 105 of 2016 allowing the tenant to break into the business premises and resume his business; proceedings before the Business Premises Rent Tribunal in case 105 of 2016; 108 of 2015 and 8 of 2016; undated letter from the Assistant County Commissioner Marama West Ward; search certificate; and a letter from the landlord's advocates Daniel Orege & Co. Advocates communicating that the 1st respondent had sold the suit property to the 2nd respondent.
 5. The respondents filed grounds of opposition dated 18th July, 2023. They stated that the applicant was a litigious man having been unsuccessful in all his applications filed in Kakamega ELC MISC. Case No. 5 of 2020 and Kakamega HCC Misc. Application No. 51 of 2019. They argued that the application was res judicata and the court was functus officio. Further that the application was an abuse of the court process and that there does not exist landlord- tenant relationship between the parties as the tenant moved out of the suit business premises and that the application was an abuse of the court process.
 6. Having considered the applicants response and parties' rival submissions, the learned trial Magistrate held that having perused the entire record and the records of Kakamega Misc. Application case No. 51 of 2019 and Kakamega ELC 5 of 2022, the court concluded that the application herein is the same as the applications in the two cases and that in Misc. 51 of 2019, the High Court found that it had no jurisdiction to grant the same and struck out the suit. The court further held that it had no power to determine an application that had been determined by superior courts and proceeded to dismiss the application on the basis that it was res judicata.
 7. Being dissatisfied with the decision of the learned trial Magistrate made on 24th January, 2024, the appellant herein challenged the said decision vide a Memorandum of Appeal dated 19th February, 2024 citing the following nine grounds of appeal;
 - a. The learned judge erred in law and fact in reaching decisions and findings which were not supported by the weight of the Evidence tendered before the honourable court and making conclusions hurriedly which were inconsistent with the Evidence filed since the start of the dispute via Business Premises and Rent Tribunal Court to adoption of then issued orders at



Business Premises and Rent Tribunal Court, served warrant of arrest hence arriving at a wrong and erroneous ruling.

- b. The learned judge erred in law and fact in dismissing generally the plaintiff's suit against the weight of Evidence tendered by the Appellant from the day the 1st respondent initiated the suit in Business Premises and Rent Tribunal Court and never bothered to obey a single court order since 2015 and totally ignored the findings and conclusions made by the Business Premises And Rent Tribunal Court which gave clear court orders which were legally adopted then served to both Respondents/Landlords herein further the Respondents/Landlords never bothered to obey until such a time warrant of arrest were issued is when they showed up in court to defend the warrant of arrest and they were given audience in court despite earlier repeatedly disobeyed several court orders. My humble appeal is to this court to inform/advise/educate me if I made a mistake to come to this honourable court for adoption of the Business Premises and Rent Tribunal Court Orders or the Business Premises and Rent Tribunal court has no jurisdiction to hear and determine dispute matters and give direction or is it worth for me, the appellant herein lose my property to criminals without asking for justice? I am in this honourable court to seek justice and get my business property returned to me to enable me continue with my normal life and its with this finding that has subjected me to appeal on the Ruling delivered by Hon. J.J Masiga, who did not give the matter proper attention to the contrary thus arriving at a wrong Erroneous Decision and Ruling.
- c. The learned judge erred in law and fact in making findings and decisions against Appellant who did everything possible to get this matter resolved amicably but his efforts were thwarted by arrogance/neglect/disobeying court orders, not responding to earlier court proceedings including not responding to some of the court pleadings filed but only rely on misleading information filings made by the advocate on record that this matter was heard and determined yet the main purpose of Appellant herein was to file for adoption of the Premises and Rent Tribunal Orders to compel the Respondents obey the same. And on 6.5.2021 Orders of Business Premises and Rent Tribunal orders issued as earlier as 21.5.2015 were not obeyed. Can the advocate on record respond to that effect if you disobey earlier court order is it in order now for Appellant to obey current court order? I ask this Honourable court to educate me the other importance of establishing Business Premises and Rent Tribunal Court if its orders are taken for granted. Further I ask this Honourable court to educate me the importance of coming to court only if the advocates will come before this Honourable court to mislead the cause of Justice? And this demonstration alone in Appellant view is a total Contravention of the basic fundamental Principles of the Laws of Natural Justice by condemning Appellant without being satisfactorily heard and being given an opportunity to go through the entire process that led to this suit matter herein.
- d. The learned judge erred in law and fact in making Assumptions, presumptions and/or conclusions on the status of the Rulings cited and with evidence addressed in the Respondents written submissions dated 4.9. 2023 and filed on 6.9.2023 where the Respondents only cited Appellants application dated 24.2.2023 and deliberately/intentionally ignored to respond to the matter from the time both the respondents/landlord initiated this suit matter at Business Premises and Tribunal Court in 2015 and the same is well documented in court file Appellant filed hence arriving at wrong Decision and Ruling.
- e. The learned judge erred in law and fact in not making a determination on issues which were contested by Appellant in relation to the Appellant's business, business properties and the orders issued at the Business Premises and Rent Tribunal Court as the same were attached and



are in court records and which the respondents/landlords have not admitted or even bothered/ ignored to talk about since their valid opinion this matter is concluded and now its their valid right to acquire property through forceful and illegal means and by this reason therefore did not form part of the issues for determination by the learned judge.

- f. The learned judge erred in law and fact from the outset in his analysis of the History of the suit matter despite the same being filed in court for ease of reference, the reference matter ELC MISC. No.5 of 2020 which the learned judge refers to as Res Judicata was a matter for enforcement and not adoption. I wonder to my opinion if enforcement and adoption are meaning the same thing. Therefore our main purpose before the Honourable court was for adoption of orders which were adopted on 6.5.2021 upon the matter being referred to competent court via an order dated 7.2.2020 {ELC MISC. No.E018/2021} and respondents/ landlords as usual they intentionally ignored and the Appellant extracted warrants of arrest, its at this point both the respondents/landlords show up for Defence without obeying any of the previous court orders. I wonder why the Hon. Judge in his valid opinion decides to rule otherwise and without putting into consideration the history of the matter and any conditions or the alleged ruling and concluded by the learned judge.
 - g. In all the decisions cited by the Respondents/landlords and referred to by the learned judge in the Ruling the Respondents/landlords were a party and they had the Opportunity to Defend, justify or give evidence on their actions at the initial stage at the Business Premises and Rent Tribunal whereas in this case, both the respondents/landlords deliberately/willing/knowingly decided to ignore both court upon them instead they filed a Defence challenging various Res Judicata without making and taking adequate time to understand the matter cited in both Rulings which are totally different from their argument in the grounds of opposition dated 4.9.2023 (one matter talked of Enforcement and Another Adoption) hence the judge fell into Error in Law and fact in making findings against the appellant.
 - h. The learned judge erred in law and fact in considering and giving weight to totally extraneous matters which were outside the pleadings in this suit and perceptions and which were not legally binding hence arrived at a wrong and erroneous decision and ruling.
 - i. The final order on costs against the Appellant for the Main suit is ignored and the rulings were punitive in light of the orders granted and the same should be set aside.
8. Consequently, the appellant sought the following orders;
- a. The Ruling of the Environment and Land Court given on 24/1/2024 be set aside in its entirety.
 - b. The prayers sought in the Appellant's Notice of Motion dated 24/2/2021 and adopted orders dated 6/5/2021, and Warrant of Arrest issued on 18/1/2022 be allowed with such modifications as the court deem fit.
 - c. The prayers sought in the Respondents/landlords Notice of Motion dated 13/04/2022, Grounds of opposition dated 18/07/2023 be dismissed with costs.
 - d. In light of the period taken for determination of the suit in the Business Premises and Rent Tribunal Court from 21/02/2015 to the current matter in this Honourable to date its over 9 years and still counting, this Honourable Court do grant such orders, reliefs and declarations as may ultimately provide justice to both parties in a just and expedient manner.
9. The appeal was disposed by way of written submissions and on record the appellant's submissions dated 7th March, 2024 and the respondents' submissions dated 17th July, 2024.



Appellant's Submissions

10. The Appellant submitted that since the matters herein were dealt with in 2015, the respondents have never bothered to obey court orders. He further submitted that the respondents had used his property for unjust enrichment and were guilty of fraud, malice and deception. He also submitted that he was entitled to compensation for his properties with interest of 18% per annum. Reliance was placed in section 3 (3) of the *Law of Contract Act* and the case of *Sedena Agencies Ltd v Presbyterian Foundation* [2017] eKLR. The appellant concluded that he had proved his case on a balance of probabilities and argued that this court ought to enter judgment for him as prayed in the application plus interest at 18% or “current commercial court rate” plus costs of the suit.

Respondents' Submissions

11. Counsel for the respondent opposed the appeal and argued in support of the decision of the lower court. Counsel submitted that the same was well reasoned. Counsel argued that the decisions in *Kakamega HC Misc. Application No. 5 of 2020* involved the same parties and the same subject matter hence the application was res judicata and the court was functus officio.
12. It was also submitted for the respondents that there exists no landlord-tenant relationship between the appellant and the respondents and that the appeal was incompetent. Counsel argued that the appellant had introduced new issues that were never pleaded before the lower court and submitted that parties are bound by their pleadings. Counsel urged the court to dismiss the appeal.

Analysis and determination

13. The court has carefully considered the appeal, the parties' rival submissions and the entire record. The only issue that arise for the court's determination is whether the trial court was wrong in concluding that the application dated 24th February 2021 was res judicata in view of the decisions made in *Kakamega ELC Miscellaneous Application No. 5 of 2020* and *Kakamega High Court Miscellaneous Application 51 of 2019*.
14. The doctrine of res judicata bars a court from trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit, where a competent court has determined such suit or issue on merit with finality.
15. Res judicata is provided for in section 7 of the *Civil Procedure Act* 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.
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.

16. Therefore, the elements of res judicata are as follows;
 - a. The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.
 - b. There is a judgment or order in a former suit which is final.
 - c. The judgment or order in the former suit was on merit.
 - d. The judgment or order was rendered by a competent court with jurisdiction.
17. In the case of *The Independent Electrical and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR the Court of Appeal stated the purpose of the doctrine of res judicata as follows;

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and for a, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of res judicata this rest in the public interest for swift, sure and certain justice.
18. In the above suit, the elements of res judicata were stated as follows;

For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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 the 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 issue in which the issue is raised.
19. A bar of res judicata is effective against a party who ought to have raised an issue but failed to do so in the former suit, so that such party is not allowed to file a fresh suit on an issue which he or she failed to raise in the former suit by mistake or negligence or otherwise. In the case of *John Florence Maritime Services Limited & Another v. Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 KLR (CIV) (6 August 2021) Judgment, the Supreme Court of Kenya cited with approval the case of *Hinderson v Henderson* [1843] 3 Hare 100 at page 115, where it was held as follows;



Where a given matter becomes the subject of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....

20. In the instant case, the learned trial magistrate held that the application dated 24th February 2021 was the same application presented before two superior courts. Further that there is a ruling dated 7th February 2020 in Kakamega High Court Misc application No. 51 of 2019 where the High court found that it had no jurisdiction to entertain the application and transferred the matter to the Environment and Land Court. That upon transfer in a ruling dated 21st February 2021, the Environment and land court found that the application lacked merit and dismissed it vide Kakamega ELC No. 5 of 2020. That therefore the trial court had no power to determine an application which was heard and determined by the superior courts. Further that the trial court held that the application was res judicata and subsequently dismissed it.
21. Therefore, the question that this court ought to determine is whether the elements of res judicata were met in view of the two decisions cited above.
22. Section 14 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 provides for adoption of a decision of the Business Premises Rent Tribunal as follows;
Filing of determination or order in court
 1. A duly certified copy of any determination or order of a Tribunal may be filed in a competent subordinate court of the first class by any party to the proceedings before such Tribunal or by the Tribunal, and on such copy being filed and notice thereof being served on the Tribunal by the party filing the same such determination or order may, subject to any right of appeal conferred by or under this Act, be enforced as a decree of the court.
 2. The Tribunal shall, upon being served with a notice under subsection (1) of this section, or upon its own filing of such copy in the court, transmit to the court its record of the proceedings before it, and the same shall be filed by the court along with the certified copy of the determination or order.
23. The court has considered the decision dated 7th February 2020 delivered in Kakamega High Court Misc. Application No. 51 of 2019. That decision is in regard to an application dated 30th April 2019, where the appellant herein sought for enforcement of the decisions of the tribunal stated herein; orders that the respondents provide ownership documents for parcel No. Marama/Lunza/1960 to clarify ownership and that Butere Police Station to supervise and enforce opening of the appellants business and return of his business property and records.
24. Upon hearing the application, the High court found that it had no jurisdiction to determine the matter and transferred it to the Environment and Land Court. Upon transfer to the ELC, the matter was assigned Number Kakamega ELC MISC. Application NO. 5 OF 2020. On the said application dated 30th April 2019, the ELC court held that as the applicant sought for enforcement of Tribunal findings before seeking adoption of the same, the application was premature and dismissed the same. Therefore, Kakamega High Court Misc. Application No. 51 of 2019 is the same suit as Kakamega ELC No. 5



of 2020. The parties therein are the appellant and respondents herein and therefore they are the same parties as those in Kakamega CMC Misc. Application No. 18 of 2021, the subject of this appeal.

25. On whether the issues in the former suit were the same as those in the current suit, it is clear that the appellant in the former suit sought to enforce the tribunal decisions, which decisions had not been filed for adoption as required under section 14 (1) of Cap 301 Laws of Kenya. On the other hand, in Kakamega CMCC Misc. 18 of 2021 which is subject of this appeal, the appellant herein sought for adoption of the tribunal decisions plus other orders. In the former suit, the ELC held that the appellant cannot seek to enforce an order of the tribunal before adoption of the same and dismissed the application. The ELC also pointed out that the Tribunal Orders should have first been filed in the Magistrates Court for adoption and decree extracted, before the applicant could seek for enforcement of the same.
26. It is therefore clear that the issue before the ELC was whether or not the tribunal decisions could be enforced by the ELC while the issue in Kakamega CMC ELC MISC. APPL. NO. 18 of 2021, was whether the court could adopt the tribunal decisions. Therefore, the issue in Kakamega ELC NO. 5 OF 2020 was not the same as the issue that in Kakamega CMCC ELC MISC. APPL. 18 OF 2021, as the former sought for enforcement of decisions that had not been adopted as a decree of the court, while the latter sought for adoption of the tribunal orders.
27. It is therefore clear from the provisions of section 14 of Cap 301 that upon determination of a landlord-tenant dispute by the Business Premises Rent Tribunal, the Tribunal or the parties may file the decision of the Tribunal in Magistrates Court so that the same is adopted by the lower court as a decree of the court. It is upon adoption of the Tribunal decision that a decree is issued, extracted and enforced in the usual manner of execution of decrees and orders as provided for under Order 22 of the Civil Procedure Rules. It therefore follows that enforcement of an order of the Tribunal, is only possible after adoption of such order as the decree of the court. The decisions in Kakamega HCC Misc. 51 of 2019 and Misc. Appl. No. 5 of 2020 show that the decisions of the Tribunal have never been filed in court for adoption. The court with the jurisdiction to hear and determine an application under section 14 of Cap 301 is the Magistrates court and not the High Court or the ELC, and therefore the said superior courts lack jurisdiction to determine an application under section 14 of Cap 301. Hence, the rejection for the application for enforcement of the Tribunal decisions does not render the subsequent filing thereof for adoption under section 14 of Cap 301 res judicata as no such application has been made or sought before the lower court, being a court of competent jurisdiction. Besides, there is no final determination on the question of adoption of the tribunal decisions by the Magistrates court. In the premises, for the reasons that the issue in the former suit is is different from the issue in the current suit; the ELC and the High Court have no jurisdiction to determine an application under section 14 of Cap 301, which jurisdiction is vested in the magistrates court of the first class; and there being no final determination on merit on the question of adoption of the cited decisions of the Tribunal, I find and hold that the application dated 24th January 2021 was not res judicata and hence the learned trial magistrate erred in concluding that the same was res judicata.
28. The provisions of section 14 of Cap 301 are for filing and adoption of the tribunal decision. The same does not grant the subordinate court power to grant other independent orders apart from adopting orders that the tribunal made. Therefore, prayers by the appellant for returning his properties; the respondent providing legal documents for the ownership of parcel No. Marama/Lunza/1960 as well as the prayer for Butere police station to provide security cannot be granted under section 14 (1) of Cap 301. The applicant must first get a decree, extract it, serve it for compliance and if there is non-compliance, that is when he can seek to execute or enforce the tribunal orders as provided for by the law. In short, there is no extracted, served and defaulted decree upon which the appellant can seek for



orders for instance that Butere Police Station to provide security for enforcement or any other order apart from adoption of tribunal decisions sought in the application dated 24th February 2021.

29. In the result, the appeal partially succeeds and the court sets aside the ruling of the trial court dated 24th January 2024. Consequently, the trial court's order dismissing the application dated 24th February 2021 is hereby set aside and substituted with an order that the orders granted by the Business Premises Rent Tribunal dated 21st July 2015 (BPRT Case No. 31/2015); 31st December 2015 (BPRT Case No. 108 /2015); 9th May 2016 (BPRT Case No. 8 /2016) and 16th November 2016 (BPRT Case No. 105 /2016) are hereby adopted as court orders and a decree shall issue in terms of the aforesaid orders. I make no order as to costs in regard to the proceedings before the trial court as the application is partially allowed.

30. As the appeal herein is partially successful, I order that each party shall bear its own costs of the appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 19TH DAY OF MARCH, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ronald Inganga Ludah the appellant in person

No appearance for the respondent

Court Assistant: M. Nguyai

