



**Akenga v Gekone & another (Environment & Land Case  
E007 of 2023) [2023] KEELC 19043 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19043 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E007 OF 2023**

**A OMBWAYO, J  
JULY 26, 2023**

**BETWEEN**

**BENJAMIN CHARLES AKENGA ..... PLAINTIFF**

**AND**

**VIDELIS MOMANYI GEKONE ..... 1<sup>ST</sup> DEFENDANT**

**SAMSON KEENGU NYAMWEYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff Benjamin Charles Akenga has come to court by way of a plaint against Videlis Momanyi Gekone Nyamweya praying for a declaration that the plaintiff is the legal owner of all that parcel of land known as land parcel No. Nakuru Municipality Block 16/102. He further prays for an order directing the defendants to immediately vacate parcel of land known as parcel No. Nakuru Municipality Block 16/102 and in default an order of eviction to issue forcefully evicting the defendants from parcel of land known as parcel No. Nakuru Municipality Block 16/102.
2. He further prays for a permanent injunction restraining the defendants whether by themselves, their servants, agents employees, proxies and/or anyone acting under their authority from dealing, entering, taking possession, evicting, transferring, charging and/or interfering whatsoever with all that parcel of land known as Nakuru Municipality Block 16/102. General damages for trespass plus mesne profits. Costs of the suit and interest. Any other order that this honorable court may deem fit and just to issue.
3. The defendants have raised a preliminary objection on the basis that the application dated February 13, 2023 is *res-judicata* as the issues raised herein are directly and substantially in issue in Nakuru HCC 265 of 2011 between the 1<sup>st</sup> defendant and the plaintiff where a court of competent jurisdiction adjudicated on the issue and rendered itself with finality through a judgment. That the application for injunction was dismissed on August 26, 2019. That the application is an abuse of the court process.



4. The defendant avers that the plaintiff's suit is against section 7 of the *Civil Procedure Act* cap 21 Laws of Kenya.
5. The 1<sup>st</sup> defendant herein submitted support of the preliminary objection that it is the 2<sup>nd</sup> defendant herein who sued the plaintiff herein in HCCC 265 of 2011 seeking a declaration that the purported transfer of the suit property from the 1<sup>st</sup> plaintiff in hccc 265 of 2011 (Olimpia Hospital Kenya ltd) to the defendant therein (Benjamin Charles Akenga who is the plaintiff herein) was ultra vires, illegal and or null and void.
6. The 1<sup>st</sup> defendant herein further submits that the 2<sup>nd</sup> defendant had prayed for an order directing the District Land registrar Nakuru to cancel the purported registration of the said transfer to the defendant from the register held in respect of the suit property.
7. Lastly, he prayed for a permanent injunction restraining the defendant therein (now plaintiff herein) by himself, or his servant, agents or assigns from transferring, leasing, charging mortgaging, disposing of or alienating or in any way dealing with the suit property.
8. An order restraining the defendant therein (now plaintiff herein) from acting in a manner ultra vires and or detrimental to the 1<sup>st</sup> plaintiff's interest to the suit property. Moreover, he prayed for costs of the suit and Interests on the costs of the suit. The suit was dismissed.
9. The plaintiff on his part submits that the prayers are different. Moreover, that the issue of res-judicata as raised by the defendant requires probing and therefore can't be dealt with by way of preliminary objection and submissions.
10. I have considered the preliminary objection and rival submissions and do find that the plaintiff's suit herein is between the plaintiff; Benjamin Charles Akenga, Videlis Momanyi Gekone and Samson Keengu Nyamweya. They are litigating in respect of property No. Nakuru/Municipality/block 16/102.
11. There is no dispute that there have been two previous suits between the parties and the same have been determined. The 1<sup>st</sup> case is Nakuru High court No. 265 of 2011 was filed by Olympia Hospital (k) limited and Samson Keengu Nyamweya against the plaintiff herein. The plaintiff is Nakuru High Court civil case No. 265 of 2011 sought a declaration that the purported transfer of property title Number Nakuru Municipality/block XVI/102 from the 1<sup>st</sup> plaintiff to the defendant is ultra vires, illegal, null and void; an order directing the District Land Registrar, Nakuru to cancel the purported registration of the said transfer from the Register of the said parcel of land. A permanent injunction restraining the defendant by himself, or through his servants, agents or assigns from transferring, leasing, charging, mortgaging, disposing of, alienating or in any dealing with the said parcel of land being title number Nakuru Municipality /Block XVI/102. An order that the defendant be restrained from acting in a manner ultra vires and/or detrimental to the 1<sup>st</sup> plaintiff
12. The defendant (the plaintiff herein) filed a defence and counter- claim seeking an order of eviction against the 2<sup>nd</sup> plaintiff from the suit property due to the fact that he had never made any contribution towards the building of the property.
13. The learned judge heard the suit and dismissed the plaintiff's suit but did not make any decision on the counter claim because the plaintiff did not pursue the same. The court made its decision on February 19, 2015 but the same was delivered on April 4, 2015 by Justice A .Mshila .
14. Dr. Benjamin Akenga (the plaintiff herein) filed another suit in the Chief Magistrates court at Nakuru against Samson Keengu Nyamweya (the defendant herein) on 15<sup>th</sup> August 2018, 3 years after the



decision by the ELC Nakuru in Nakuru H.C.C.C NO 265 OF 2011. The suit was transferred to the Environment and Land Court and became Nakuru ELC case No. 91 of 2019. In the case the plaintiff Dr. Benjamin Akenga was seeking the eviction of Samson Keengu Nyamweya . The defendant filed a counter claim seeking a sum of Kshs 40,000,000 plus interest from 1995 until payment in full.

15. This suit was struck out by the court for being res- judicata. The counter- claim was also found to be res- judicata.
16. I have considered rival submissions and do find that the plaintiff herein is claiming against the defendant the parcel of land known as Nakuru Municipality /Block XVI/102.
17. The plaintiff seeks eviction that he sought in the counter claim in 265 of 2011. He sought the same in 91 of 2019. The parties in those matters are the same, the reliefs sought are the same and that the court has determined the issued determined to finality.
18. The principle of res judicata is enshrined in section 7 of the Civil Procedure Act cap 21 Laws of Kenya that provides: -

7. Res judicata

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.

19. I do find that the claim by the plaintiff ought to have been determined in Nakuru HCCC No. 265 of 2011 as he had a counter claim and therefore the facts fit under explanation nos 4 and 5 because the plaintiff herein ought to have raised the issues herein in the previous suits where he was a party. It was an issue raised by the plaintiff in the said case by way of counter claim and therefore cannot be raised another suit because in legal terms it is res-judicata. I do find that the defendant preliminary objection is merited and the suit is found to be res-judicata as found by Justice Ohungo in ELC No. 91 of 2019. Moreover, the suit is an abuse of court process being the 3<sup>rd</sup> suit filed on the same issues. I do find that the whole suit is res- judicata and struck out. I do order that the plaintiff pays costs of the suit.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26<sup>TH</sup> DAY OF JULY 2023.**

**A O OMBWAYO**

**JUDGE**

