



**Kombe v Kivuvani (Environment & Land Case 212 of 2020)
[2023] KEELC 21910 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21910 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 212 OF 2020
NA MATHEKA, J
NOVEMBER 29, 2023**

BETWEEN

DORIS POLA KOMBE PLAINTIFF

AND

NELSON MWANZIA KIVUVANI DEFENDANT

JUDGMENT

1. It is the Plaintiff's case that at all material times relevant to this suit, the Plaintiff herein has been the legal owner of all that Plot No. 197 Measuring 50ft by 100ft now CR 66705 subdivision MN/1/21338 situate at Kalima Upepo in Shanzu Location within Mombasa county. The Plaintiff avers that on or about the 23/9/2011, she entered into a sale agreement over the suit property herein at a consideration of Ksh 750,000 where the Plaintiff was to pay a deposit of sum of Ksh 600,000 and settle the remaining Ksh 150,000 in 2 months time. The Plaintiff states that she honoured her part of the said sale agreement and paid the agreed monies on the agreed time. As the legal owner of the suit property, the Plaintiff commenced some developments on the suit property to wit sinking a borehole and later assembled construction materials for further developments. The Plaintiff further states that, sometimes in the year 2018, it came to her attention that the suit property had been fraudulently been resold to the Defendant herein vide a sale agreement dated 14th February 2018. The Plaintiff avers that the Defendant has since been pursuing the suit property vide Mombasa Environment and land Case No. 29 of 2018- Nelson Mweanzia Kivuvani v Safari Karisa Jefwa and Abrari Mohammed (wrongly sued as Abrary Omar Marvell) and has so far obtained Warrant to give up vacant possession in his favour. The Plaintiff avers that she now fears unjustified eviction by the Defendants from the suit property which she rightfully and legally acquired from the 1st Defendant. The Plaintiff prays for Judgment against the Defendant for;



1. Declaration that the suit property, plot No. 197 measuring 50ft by 100ft now CR 66705 subdivision MN/ 1/21338 situate at Kalima Upepo Shanzu Location Mombasa belong to the Plaintiff herein.
 2. A permanent injunction restraining the Defendants, their agents and/or servants or any other persons acting under their authority from carrying out developments, trespassing upon, fencing, selling and/or in any other way dealing with the Plaintiffs portion of land.
 3. An order that the Plaintiffs be allowed to continue with the developments she had commenced on the suit property.
 4. Cost of the suit.
3. The Defendant states that there exist a previous suit Civil Case No.29 of 2018 Nelson Mwanzia Kivulani v Safari Karisa Jefwa and Abrary Mohammed Omar. The Defendant avers that the suit herein is Res-Judicata and offends the Provision of section 7 of the *civil procedure Act* Cap 21 laws of Kenya and Section 28 of the *Environment & Land Court Act* since the matters raised were fully litigated between the same parties and or parties litigating under the same title, touching on the same land in Civil Case No. CMCC NO 29 OF 2018 and raised a Preliminary objection to that effect. The Defendant has included the 2nd to 7th Defendants in his counter claim.
4. The Plaintiff (by way of counter claim) avers that on 29th November 2017, he purchased plot Number 197 at Kalima Upepo Scheme which was later registered as Plot Number MN/I/21338 from the 2nd Defendant and he duly paid for the same. The Plaintiff avers that he filed Civil Case No. 29 of 2018 against the 2nd Defendant and the 3rd Defendant which suit was fully heard, by a court of competent jurisdiction and the subject Plot Number 197 registered as MN/I/21338 was decreed to him on 22nd May 2020 and has duly executed the Judgement and evicted the 1st, 2nd and 3rd Defendants (in the counter-claim) and or their servants and or agents. The Plaintiff avers that the 3rd Defendant was litigating as a representative of the 1st Defendant (Plaintiff in the main suit) in CMCC 29 OF 2018. The Plaintiff avers that the 4th, 5th, 6th & 7th Defendant were aware of the decree in CMCC NO. 29 OF 2018 and their transfer of parcel of land MN/1/21338 is fraudulent and with collusion of the 1st, 2nd & 3rd Defendants. The Plaintiff avers that since the plot herein was decreed to him by the court he is seeking a declaration that the land herein belongs to him. The Plaintiff (by way of Counter claim) prays for the following orders;
1. A declaratory that he is the rightful owner of Parcel of land MN/1/21338 at Kalima Upepo Scheme.
 2. The Registrar of Land Mombasa do register the said land in the name of the Plaintiff in the counter-claim.
 3. That a perpetual order of injunction be granted against the 1st -7th Defendants in the g counter -claim from interfering in anyway with the suit premises herein.
5. This court has considered the evidence and the submissions therein. The plaintiff filed this suit on 18th November 2020 against the Defendant. The Defendant entered appearance filed their defence and counter claim and on the 10th July 2022 filed a preliminary objection. The objection was that this suit was res judicata SRMCC No. 29 of 2018 Nelson Mwanzia Kivuvani vs Safari Karisa Jefwa & Abrary Omar Marvel. By a ruling dated 27th September 2022 this court struck out the Plaintiff's case for being res judicata. The Defendant prosecuted his counter claim and now seeks judgement in his favour.



6. The preliminary issue for determination in this matter is whether the court can now entertain the counter claim having dismissed the Plaintiff's suit for being *res judicata*. The substantive law on *Res Judicata* is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which 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”

The [Black's law Dictionary](#) 10th Edition defines “*res judicata*” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

Kuloba J., in the case of *Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991* (unreported), held that:

“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 some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”

7. In the case of [Christopher Kenyariri v Salama Beach \[2017\]](#) eKLR, the court clearly stated the ingredients to be satisfied when determining *res judicata* thus;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit
- b) Former suit between same parties or parties under whom they or any of them claim
- c) Those parties are litigating under the same title
- d) The issue was heard and finally determined.
- e) The court was competent to try the subsequent suit in which the suit is raised.”

8. In *E.T v Attorney General & Another [2012]* eKLR where it was held that:

“The courts must always be vigilant to guard litigants 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 a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and 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., in the case of *Njangu vs*



Wambugu and another Nairobi HCCC 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 some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

9. Having considered the pleadings and rival submissions by counsel Defendant I find that it is not in dispute, that there exists a Judgment in Civil Case No. CMCC NO 29 OF 2018. The Defendant has added other Defendants in his counter claim who are not parties to this suit and now seeks orders against them. My ruling in this matter dated 27th September 2022 applies mutatis mutanda to the counterclaim. In striking out the Plaintiff’s case the court held that;

“I have perused the pleadings in Civil Case No.29 of 2018 Nelson Mwanzia Kivulani vs Safari Karisa Jefwa and Abrary Mohammed Omar. The 2nd Defendant appeared in court and stated that this Plaintiff in the instant suit was his mother and was sickly. The subject matter was plot No. 197 at Kalima Upepo Shanzu which is the same in the instant case. 1st Defendant was the alleged seller in that case and is the same one in the Plaintiff’s pleadings. Indeed, I find that the subject matter is the same and the parties are similar. In applying the stated law to the facts before me, it is clear that the plaintiffs seek to open issues that were raised in the earlier proceedings on ownership and the sale agreements. The Plaintiff now appears after she was well aware of the previous suit and hence cannot evade the doctrine of res judicata. In my view, by filing this suit, the Plaintiff is trying to litigate a concluded matter. Nothing stopped her from joining the previous suit and producing the requisite documentary evidence and or appealing the said decision.”

10. I find that the same situation obtains as concerns the counterclaim. The subject matter still remains the same and the parties are similar. This court cannot issue orders to parties irregularly enjoined in the pleadings in this suit. I find that the counter claim is res judicata Civil Case No.29 of 2018 Nelson Mwanzia Kivulani vs Safari Karisa Jefwa and Abrary Mohammed Omar and I strike it out with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

