



REPUBLIC OF KENYA



KENYA LAW
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**Mate v Gitonga (Environment and Land Appeal 1 of 2023)
[2023] KEELC 21756 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21756 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

CK NZILI, J

NOVEMBER 22, 2023

BETWEEN

JAMLICK MUTUGI MATE APPELLANT

AND

PETER GITONGA RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. E.M Ayuka
delivered on 15th December 2022 in Nkubu CM ELC No. E032 of 2021)*

JUDGMENT

1. Before the court is a memorandum of appeal dated 12.1.2023 in which the appellant faults the lower court for:-
 - i. Finding the suit *res judicata*
 - ii. holding, there were no written submissions, yet they had been filed on time.
 - iii. Failing to consider the written submissions.
2. As a first appellate court, the mandate is to consider the lower court record and come up with independent findings on facts and the law, mindful that the trial court had an opportunity to see and hear parties firsthand. See *Abok James Odera t/a A.J Odera & Association v John Patrick Machira t/a Machira & Co Advocates* (2013) eKLR.
3. The appellant filed a plaint dated 2.8.2021 at the lower court against the respondents as the defendants and the third parties herein. The appellant had averred that he was the registered owner of L.R. No. Nkuene/Mitunguu/1116, which he had acquired on 1.9.2012 from Amin Bilal, took vacant possession and embarked on livestock keeping and commercial chicken rearing but obtained the title deed in 2021.



4. The appellant averred that on 2.1.2021, the respondents trespassed into the land in the company of goons and the area chief, demolished his cattle, chicken, and pig structures, took or released his animals to the wild, and retained or took away some of his construction and fencing materials which action he reported at Mitunguu police station.
5. Further, the appellant averred that on 12.5.2021, the respondent once more trespassed into his property, destroyed his banana stems, cut them off, and went to plant maize on his land, eliciting another report to the police.
6. In an attempt to reclaim his land, the appellant averred that the respondents refused him entry, claiming they had a court order to which he was not party or privy. Due to the forceful entry and malicious destruction of his property, the appellant averred he had suffered loss and damage valued at Kshs.567,201/= special damages to the property, an alternative rental place to rear his livestock and chicken, loss of use and quiet enjoyment of the suit premises.
7. The appellant sought a declaration that he was entitled to exclusive and quiet occupation of the suit land, permanent injunction, and mandatory injunctions for a monthly rent of Kshs.16,000/= (*mesne* profits) with effect from 2.1.2021 till handing over of vacant possession, mandatory injunction to hand over vacant possession and special damages at Kshs.659,421/=:, and lastly, an order directing the 2nd respondent to survey the suit land and its neighboring plots, to establish the correct boundaries. The plaint was accompanied by witness statements and documents dated 2.8.2021 and a supplementary list dated 2.3.2022.
8. The 1st respondent opposed the claim by a defense dated 16.11.2021. He admitted the appellant was the owner of L.R. No. Nkuene/Mitunguu/1116 and not L.R. No. Nkuene/Mitunguu 1659. He denied all allegations of trespass, wrongdoing, demolition, or being in occupation of L.R. No. Nkuene/Mitunguu/1659.
9. On the contrary, the 1st respondent averred he was lawfully occupying L.R. No. Nkuene/Mitunguu/1116 as of right and shall continue doing so. The 1st respondent averred the suit was res judicata given PMCC No. 5 of 2015, already determined where the 1st interested party was the defendant while the 1st respondent was the plaintiff and the appellant herein being a son of the 1st interested party claiming under the same title, with the two subject parcels of land featuring prominently in the former suit. The 1st respondent termed the suit an appeal in disguise over a valid judgment that had not been appealed against.
10. The 1st respondent averred that the appellant and the 1st interested party had colluded to bring the suit as a fresh claim and were guilty of non-material disclosure of the previous suit in the same court at the execution stage. He termed the suit irredeemably defective under Sections 7 & 34 of the [Civil Procedure Act](#) for the appellant was a mere agent of the 1st interested party bound by the previous decree.
11. Additionally, the 1st respondents averred the suit touched on an existing boundary dispute whose jurisdiction was before the land registrar; hence, the court lacked jurisdiction to entertain it. The 1st respondent averred that the appellant was not entitled to any mesne profits, loss of user, or general damages since his suit was bad in law, defective, a fraud, and brought by the interested party and his son after losing in the former suit. The defense was accompanied by a witness statement and documents dated 25.5.2022, among a copy of the title for L.R. No. Nkuene/Mitunguu/1116 copy of plaint and defense in ELC No. 5 of 2015, judgment therein, copy of an order, land registrar and surveyors report and decree thereto. Further, the 1st respondent filed a notice of preliminary objection dated 25.10.2015 seeking to find the suit res judicata bad in law and offending Section 18 of the [Land Registration Act](#).



12. Following directions issued on 22.9.2022, parties canvassed the preliminary objection through written submissions, which were to be filed by 3.11.2022. The 1st respondent filed his submissions on 5.10.2022. When the matter was mentioned on 3.11.2022, counsel holding brief for Mrs. Karwitha, advocate on record for the appellant, who told the court that written submissions had been filed. A ruling date was given for 15.12.2022, which is now appealed before this court.
13. Parties herein agreed to canvass the appeal by written submissions dated 23.10.2023 and 24.10.2023. The appellant submitted that the trial court directed the 1st respondent to file and serve written submissions within 14 days from 22.9.2022, after which he would have 14 days upon service to comply. He was forced to file via email on 31.11.2022 and physically on 5.12.2022. The appellant submitted that on 15.12.2022, they appeared in court but could not prove compliance through a court-stamped copy.
14. Concerning whether the suit was res judicata, the appellant submitted it was erroneous for the trial court to uphold the preliminary objection, for there was no sameness or identity of the parties, title or claim, or issues in the two suits. Reliance was placed on [*Nancy Mwangi t/a Worthlin Marketers v Airtel Networks \(K\) Ltd*](#) (2014) eKLR, [*Michael Gachoki Gacheru v Joseph Karobia Gicheru*](#) Kerugoya ELC No. 783 of 2013 and [*Bernard Mugo Ndegwa v James Nderitu Githe and others*](#) (2010) eKLR.
15. Regarding written submissions, the appellant submitted by 3.11.2022 the 1st respondent had not served his written submissions and could not access the copy from the court chambers. However, he was able to file the submissions two weeks before the ruling, on 29.11.2022 at 4.58 pm and physically on 5.12.2022, yet the trial court said it had not seen them, which was an error of law and fact bordering on the right to a fair hearing and to be heard. The appellant submitted that this court should consider them since he was condemned unheard.
16. The 1st respondent, on the other hand, submitted the suit was res-judicata, and the trial court was correct to uphold the preliminary objection under Section 7 of the [*Civil Procedure Act*](#). Reliance was placed on [*Kenyariri t/a Kenyariri & Associates advocates v Salama Beach Hotel Ltd and 3 others*](#) (2017) eKLR, [*C.K Bett Traders Ltd and others v Kennedy Mwangi & another*](#) Kajiado HCA No. 7 of 2020 and [*Ganatra v Ganatra*](#) (2007) 1 E.A pg 76.
17. In trite law, parties are bound by their pleadings, and issues for the court's determination flow from them. In this appeal, the 1st respondent had, in his defense, pleaded res-judicata that the previous decree was at the execution stage, and lastly, the issue was about boundaries, whose jurisdiction fell under the land registrar and not at the trial court. The 1st respondent had invoked Sections 7 and 34 of the [*Civil Procedure Act*](#) and Section 18 of the [*Land Registration Act*](#).
18. There was no reply to the defense from the appellant to discount the averments described above. The purpose of pleadings is to set out facts out of which issues are framed by the parties for court's determination. The 1st respondent's defense was accompanied by a list of documents dated 2.3.2022, where he attached the pleadings in the former suit, its judgment, decree, and a report by the land registrar and the land surveyor on the two properties. While aware of all these facts, the appellant filed a list of issues dated 2.3.2022 one of which was whether the boundaries of the two properties should be re-established.
19. A preliminary objection is a point of law that has been pleaded or arises by clear implication out of the pleadings and may dispose of a suit. It is a pure point of law that is argued on the assumption that all the facts pleaded by the other side are correct. See [*Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*](#) (1969) E.A 696. In [*IEBC v Maina Kiai*](#) (2017) eKLR, the court said that for a plea of res judicata to be raised, there must be the identity of the matter in the sameness of title, the



concurrency of jurisdiction, and finality of the previous decision. The court said the purpose of res-judicata is to ensure there was finality in litigation and protection of the respondent from multiple proceedings on the same issues.

20. In *E.T. v A.G. & others* (2012) eKLR, the court said parties could not evade the doctrine of res-judicata by merely adding other parties or causes of action referred to as cosmetic changes in a subsequent suit. It is not open for a party whose matter has been determined to finality to relitigate or re-agitate the issue before the same or another forum hoping to get a different or improved result. The doctrine is pragmatic and is designed to stop vexatious litigants from pestering those with whom they have had previous disputes with the same matter. See *James Njuguna Chui v John Kimani* (2017) eKLR.
21. In *Siri Ram Kaura v M.J.E Morgan* (1961) E.A 462, the court said that the general principle is that the party cannot in subsequent proceedings raise a ground on a claim or defense which has been decided on which upon the pleadings or the forms of the issue was open to him in former proceedings between the same parties and that the mere discovery of fresh evidence on fresh circumstances on a matter which has been open for controversy in the earlier matters is no answer to a defense of res-judicata. The court said the doctrine is that a party who has been unsuccessful in litigation cannot be allowed to re-open that litigation by merely saying that since the former litigation, there is another fact going precisely in the same direction as the facts stated before leading up the same relief which he had asked for before. The court said it was not permissible for parties to evade the application of res-judicata by simply conjuring up parties or issues to give the case a different complexion from the one given in the former suit.
22. In *John Florence Maritime Services Ltd 7 others v Cabinet Secretary for Transport and Infrastructure and 3 others* (2015) eKLR, the court said res-judicata is based on public interest that there should be an end to litigation and the protection of a party from facing repetitive litigation, over the same matter as the economic use of courts limited resources of timely termination of cases. The court further said the doctrine promotes confidence in the court's predictability, respect for justice, and the rule of law; otherwise, there would be a danger of unraveling the rule of law uncontrollably.
23. In this appeal, the appellant submits that the subject matter, title, and parties were not identical in the two matters. He submitted that the former suit was on trespass to L.R. No. Nkuene/Nkumari/1116, while the current suit was on trespass and malicious destruction over L.R. No. Nkuene/Nkumari/1659.
24. Further, the appellant submits that he was not a party to the former suit even though the 1st respondent was a party in the previous suit. Additionally, the appellant submits that the two causes of action arose with a difference of several years.
25. On the other hand, the respondent-submits res-judicata refers to the thing that has been decided. The respondent urged the court to look at his list of documents filed on 26.5.2022 and served upon the parties and find the issues in the former suit were similar, the parties were the same, and the litigation was under the same title. Reliance was placed on *Kenyariri and Associates v Salama Beach Hotel & others* (*supra*) and *C.K Bett Traders Ltd v Kennedy Mwangi* (*supra*).
26. A preliminary objection must be a pure point of law that must not be based on disputed facts, requiring a court to delve into evidence to establish the facts or one based on the exercise of court's discretion.
27. Before the trial court and in this court, the respondent, in his written submissions dated 5.10.2022 at clause B, urged the court to rely on his list of documents to find the suit res-judicata. It is the same position the respondent has taken in this appeal, urging the court to find the suit res-judicata, primarily based on evidence and contested facts.



28. Given this, was the trial court entitled to entertain the plea of res-judicata in the manner it was raised, and was it justified in upholding it? The answer, in my view, is no. In the first instance, the plea as raised required the trial court to delve into evidence on contested facts. The appellant's claim in the suit was about trespass and malicious property damage. Trespass, as held in *Kenya Power & Lighting Company v Ringera & 2 others* (2022) KECA 104 (KLR) (4th February 2021) (Judgment), may be continuous.
29. The issue of trespass onto L.R. No. 1659 on 2.1.2021 and 12.5.2021, had not been litigated in the previous suit. The encroachment issue onto L.R. No. 1659 and its overlap with L.R. No. 1116 had not been previously litigated, especially on the events of 2.1.2021 and 12.5.2021. As to who among the parties had encroached on the land of the other and with what rights as of 2.1.2021 and 12.5.2021, these were new issues that the trial court had not litigated over in the previous suit.
30. Regarding how a preliminary objection based on res judicata should be raised and determined in *Margaret Njeri Gitau v Julius Mburu Gitau & 2 others* (2022) eKLR, the court cited with approval *Oraro v Mbaja* (2005) 1 KLR 141 that anything that purports to be a preliminary objection must not deal with disputed facts and must not derive its foundation from factual information which stands to be tested by rules of evidence.
31. In *Henry Khaemba v Standard Chartered Bank and another* (2014) eKLR, the court observed that a preliminary objection on res judicata may require probing through evidence. In *George Kamau Kimani & others v County Government of Transzoia & others* (2014) eKLR, the court observed the best way to raise a ground of res judicata is through a notice of motion where pleading are annexed to enable the court to determine whether the current suit was res-judicata.
32. Therefore, the trial court should have awaited to consider the preliminary objection alongside the case's merits or in the alternative directed the respondent to file a formal notice of motion.
33. The record shows the appellant was not condemned unheard. In contrast, written submissions had not been emailed to the court. No order was made for the appellant to only file the written submissions upon service by the respondent. When the ruling was listed for delivery, the appellant insisted he had complied, yet nothing was presented to the trial court through a stamped document duly paid for. This court has been unable to find written submissions filed as directed by the trial court. The filing on 5.12.2022 came after the deadline of 3.12.2022. Parties must ensure pleadings are received and filed at the court's registry on time. It is not enough to send emails without a follow-up to ensure that they are received, stamped, and transmitted to the court file.
34. Timelines must be adhered to as the court is obligated under Article 159 of *the Constitution* to dispense justice expeditiously. It is also not a must that the court has to look at the written submissions as held in *Daniel Toroitich Arap Moi v Mwangi Stephen Murithi and another* (2014) eKLR and *Imperial Bank Ltd v Bakari Juma Bech Pende* (2016) eKLR.
35. The upshot is that I find the appeal with merits. The same is allowed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 22ND DAY OF NOVEMBER 2023.

In presence of

C.A Kananu/Mukami

Karwitha for appellant

Ondari for respondent



HON. CK NZILI
ELC JUDGE

