Ng'ang'a v Kang'ethe & 5 others; Kangethe & 11 others (Objector) (Environment & Land Case 253 of 2012) [2023] KEELC 22086 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22086 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 253 OF 2012

A OMBWAYO, J

DECEMBER 11, 2023

BETWEEN

MUHIA MUCHIRI NG'ANG'A ..... PLAINTIFF

AND

JULIUS WAHINYA KANG'ETHE ..... 1ST DEFENDANT

JULIANA WARIGI KANG'ETHE ..... 2ND DEFENDANT

CATHERINE GATHONI KOGI ..... 3RD DEFENDANT

MONICAH WAMBUI KANG'ETHE ..... 4TH DEFENDANT

NG'ANG'A KANG'ETHE ..... 5TH DEFENDANT

KINYANJUI KANG'ETHE ..... 6TH DEFENDANT

AND

WAHINYA KANGETHE & 11 OTHERS ..... OBJECTOR

RULING

1. The two applications before me are dated 28th September 2023 and 16th October 2023. The first application seeks orders that the honorable court be pleased to certify the present application as urgent and service of the same upon the respondent be dispensed with in the first instance due to reasons of urgency.

2. This honorable court be pleased to allow the firm of Maingi Kamau & Associates Advocates to come on record for the defendants/applicants in this matter *in lieu* of the judgment entered herein on 17th February, 2016.

3. This honorable court be pleased to set aside any/or vary the terms of the judgment entered against the defendants/applicants on February,2016 the subsequent decree/order be stayed pending the hearing and determination of this application inter-parties.

4. This honorable court be pleased to issue an order of injunction restraining J.K Wanderi Auctioneers from proceeding to auction the Defendant's LR no Nyandarua/Nandarasi/214 by public Auction by dint of Notice dated 15th August, 2023 and the Notification of Sale dated the same day pending hearing of this application

5. This honorable court be pleased to issue mandatory order of injunction restraining the Auctioneers herein J.K Wanderi Auctioneers or any other auctioneers from exercising their mandatory power of sale over land parcel no Nyandarua/Nyandarasi/214 pending hearing and determination of this application inter-parties.

6. That the court herein be pleased to re-open this case and the defendants herein be granted leave to adduce their evidence in chief to enable the case to be decided on merit.

7. This honorable court be pleased to visit the site and establish the boundaries visa-a-vis the report of Nyahururu Land Registrar with a view to establish the truth of the report filed before this court. Last but not least, that costs of this application be provided for.

8. The grounds of the application are that their advocates never informed them of the hearing and judgment and therefore the mistakes of their advocates should never be visited on the applicants.

9. The applicants' states that all along they have been waiting for communication from their advocate on the hearing date only to learn that the matter proceeded *exparte* and that judgement was entered. That the judgment was adverse against the defendant and is threatened with execution through the auctioneers. The applicants are likely to suffer irreparable loss and damage if the said notice of redemption is implemented. The applicants reiterate that they have a genuine defence to be considered on merit. The application is supported by the affidavit of Julius Wahinga Kangethe. He reiterated the grounds of the application by blaming their advocate.

10. The plaintiff respondent in reply states that the applicants are not the registered owner of the parcel of land no Nyandarua/Nandarasi/214. He obtained judgment on 17th February 2016. The defendant were ordered to pay a sum of ksh 2,352,000 with interest and costs of filing the suit from the date of filing till settlement in full but they have failed to pay. That some of the applicants have been parties to the suit.

11. The 2nd application is dated 16th October 2023 when basically seeks interim orders pending the hearing of the application dated 28th September 2023 and therefore the determination of the application dated 28th September 2023 will determine the application dated 16th October 2023.

12. I have considered both applications and responses and do find that the judgment in this case was made more than 6 years ago. I have gone through the record of proceedings in this matter and do find that allowing the application dated 28th September 2023 will be rewarding an indolent and lethargic party who skived court on many occasions including the hearing date despite being served by the plaintiff. They went to sleep like the fox in the Iceland during winter which kept on hibernating even after winter had ended. This court cannot reward a party that conducts proceedings leisurely and lazily and only when there is danger of execution.

13. The firm of Waiganjo and Company religiously served hearing notices to the defendants but they never turned up for hearing.

14. On 17th February 2016 the judgment was delivered after the honorable court was fully satisfied that notice was issued. The defendants were aware of the judgment on 3rd March 2016 when they made an exparge application for stay dated 3rd March 2016 and were granted a stay on condition that they deposited the half of the decretal sum which apparently did not materialise.

15. It is clear from the record that the applicants were aware of the judgment by the month of March 2016 and applied for stay of execution.

16. In fact the applicants have previously applied for review of the judgment on record but the application was rejected by the court on 16th July 2017. Therefore the application dated 28th September 2023 is *res-judicata* because a matter that has been adjudicated by a competent court and therefore cannot be pursued further by the same parties.

17. The principles of *res judicata* are discerned in section 7 of the *Civil Procedure Act* that provides 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"

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..."

Kuloba J., in the case of *Njangu v 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*....."

i. what issues were really determined in the previous Application;

ii. whether they are the same in the subsequent Application and were covered by the Decision.

iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

18. In the Court of Appeal case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that: -

> " The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...
>
> The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open

that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

19. Hon. Justice G.V. Odunga in *Republic v Attorney General and another Exparte James Alfred Koroso*, expressed himself thus on the issue of access to justice: -

> " Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others."

20. In *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was *res judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined "thrice by the High Court and twice by the Court of Appeal", it could not be resuscitated by another Application.

The Court of Appeal further stated that:

> " That is to say, there must be an end to Applications of similar nature, that is to further, under principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

21. *Res judicata* also known as claim preclusion, is the Latin term for matter decided and refers to either of two concepts in both civil law and common law legal systems: a case in which there has been a final judgment and that is no longer subject to appeal; and the legal doctrine meant to bar (or preclude) re-litigation of a claim between the same parties. In the case of *res judicata*, the matter cannot be raised again, either in the same court or in a different court. A court will use *res judicata* to deny reconsideration of a matter. The doctrine of *res judicata* is a method of preventing injustice to the parties of a case supposedly finished but perhaps also or mostly a way of avoiding unnecessary waste of

judicial resources. *Res judicata* does not merely prevent future judgments from contradicting earlier ones, but also prevents litigants from multiplying judgments, and confusion.

22. I do find that the application dated 28th September 2023 is an affront to Articles 159 of *the constitution* of Kenya 2010. In *Raila Odinga v I.E.B.C & others* (2013) eKLR, the Supreme Court of Kenya observed further:

> " Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

23. The applicant relies on Article 159 of *the constitution* of Kenya by misconception because it is not meant to oust the procedural requirements to litigants. Moreover, the issue of *res-judicata* is not a mere procedure because it is meant to avoid re-litigation.

24. The upshot of the above is that the application lacks merit and is an abuse of court process and the same is dismissed with costs and likewise the application dated 16th October 2023 is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 11TH DAY OF DECEMBER 2023.

A O OMBWAYO

JUDGE