



**Nduva & another v Mutiso & 3 others (Environment & Land Case
220 of 2010) [2022] KEELC 2691 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2691 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 220 OF 2010**

A NYUKURI, J

MAY 18, 2022

BETWEEN

RUTH KAMENE NDUVA 1ST APPLICANT

JOSEPH NDAVA NTHUKA 2ND APPLICANT

AND

RAPHAEL MUSILA MUTISO 1ST DEFENDANT

MATHEW MUTISO 2ND DEFENDANT

KALOKI MUSILA 3RD DEFENDANT

NZIOKA MUSILA 4TH DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiff's Preliminary Objection dated 22nd October 2021 and the Defendants' Notice of Motion Application dated 24th June 2021.
2. The background of this matter is that upon hearing the suit, on 22nd September 2017, this court dismissed the Defendant's counterclaim and entered judgment for the Plaintiff against the Defendant by granting eviction orders against the Defendant as well as a permanent injunction restraining the Defendant from interfering with Land Parcel Number Mavoko/Town Block 3/2729.
3. The Defendants were unwilling to vacate the suit property and upon application by the plaintiff, this court ordered the O.C.S Joska Police Station to enforce the decree.
4. Subsequently on 25th June 2021, the Defendants filed a Notice of Motion application dated 24th June 2021, in which they sought for the following orders;



- a. That the firm of Etole & Company Advocates be allowed to come on record after judgment.
 - b. Spent.
 - c. That the judgment delivered in this case on 22nd September 2017 be vacated as this suit is Res Judicata.
 - d. That the rulings and/or orders subsequent to this judgment be vacated.
 - e. Spent.
 - f. That costs of this application be provided for.
5. The application is premised on the supporting affidavit of Raphael Musila Mutiso, the 1st Defendant herein. The Defendants state that the Plaintiffs obtained judgment in this case without disclosing that they had filed Machakos SPMCC No. 586 of 2001 against the 1st Defendant which was dismissed in favour of the 1st Defendant; that the Plaintiffs filed an appeal thereto vide Machakos Civil Appeal No. 82 of 2004 which was also dismissed and that if eviction orders are executed they stand to suffer irreparable loss.
6. In response to the application, the Plaintiff filed a Preliminary Objection dated 22nd October 2021, raising the following grounds;
- a. Having pronounced its final judgment, this Honourable Court is functus official and it thus has no jurisdiction to entertain the Defendants' application.
 - b. The Defendants/Applicants are asking this court to reverse its own judgment which the court has no jurisdiction to do.
 - c. The alleged res judicata is based on dismissal for want of prosecution which in law cannot be the basis of res judicata.
 - d. The Defendants' application is an afterthought and an abuse of the court processed as it is brought after unsuccessful attempt to appeal out of time in the Court of Appeal.
 - e. That the said application ought to be dismissed on the outset.
7. In further response to the application, the 2nd Plaintiff filed a replying affidavit sworn on 29th November 2021. She deposed that the application is incompetent and that the Applicants have not proved the contention of res judicata as what is shown is dismissal of an appeal in respect of an interlocutory application; that what the applicant has alleged does not amount to res judicata and that the applicant participated in the said proceedings and did not raise the issue of res judicata in these proceedings.
8. On 27th October 2021, this court directed that both the Preliminary Objection and the application dated 24th June 2021 shall be determined together, and parties were directed to canvass the same by way of written submissions. On record are the Applicants' submissions filed on 11th November 2021 as well as the Respondents' submissions filed on 7th December 2021, both of which I have considered.

Analysis and determination

9. I have considered the application, supporting affidavit, the Preliminary Objection, the replying affidavit as well as the parties' submissions. The issues that arise for consideration are;
- a. Whether the firm of Etole should be granted leave to come on record for the Defendants.



- b. Whether this court should vacate the judgment made on 22nd September 2017 together with subsequent orders on the basis of the doctrine of res judicata.
10. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides that after delivery of judgment where a party intends to change their advocate or having previously engaged an advocate intends to act in person, such change or intention to act in person can only be effected by a court order either upon application or consent between the outgoing advocate and the new advocate or the party intending to act in person, as the case may be.
 11. The record shows that this matter was previously conducted by the firm of Maina Makomee & Company Advocates on behalf of the Defendants until after entry of judgment. It is therefore imperative that the firm of Etole & Company Advocates obtains leave of court to come on record in this matter. I have not seen any challenge to this prayer and since legal representation is a constitutional right of every party, I find that the prayer to allow the incoming counsel for the Defendant to come on record is merited.
 12. The Applicants have invoked sections 7 and 8 of the [Civil Procedure Act](#) in seeking the orders that judgment herein and subsequent orders be vacated.
 13. The doctrine of res judicata is addressed in section 7 of the [Civil Procedure Act](#), which provides that no court shall try any suit, where issues in that suit were conclusively determined with finality in a former suit, where the parties in the former suit are the same as those in the new suit. Section 8 of the [Civil Procedure Act](#) provides that where the rules bar a plaintiff from instituting a further suit for a particular cause of action, they will not be allowed to file suit in respect of such cause of action.
 14. I have perused and considered the Applicants' documents which are the basis of his allegations that a previous suit was heard involving the same parties and issues. I note that there is no evidence that there is a determination of the said suit conclusively, determining the rights of the parties with finality as envisaged under section 7 of the [Civil Procedure Act](#). Even the parties involved are only the 1st Plaintiff and the 1st Defendant herein and not the other parties in this suit. But most importantly, the Defendants' allegation that this suit is res judicata has no basis in law as there is no longer a suit in these proceedings, capable of being termed as res judicata, as the same was determined and judgment delivered on 22nd September 2017.
 15. In any event, the issue of res judicata was well within the Defendants' knowledge and ought to have been raised before the suit was heard and determined. Raising that issue over four years after the judgment was entered on grounds that if eviction is executed, the applicants will suffer irreparable loss, is not only an abuse of the court process, but also smacks of a desire to persist with contempt of court orders. That conduct will not be countenanced by this court. This court already determined the suit and therefore the question of res judicata is itself res judicata as the Defendants had opportunity to raise it and ought to have raised at the trial of this matter and not now. It is too late in the day to raise it now (See [John Florence Maritime Services Limited v Cabinet Secretary for Transport and Infrastructure & 3 Others](#) [2015] eKLR).
 16. This court having pronounced itself conclusively on the rights of the parties herein vide its judgment of 22nd September 2017, is functus officio and can no longer interfere with the said judgment as no justification has been presented for such interference. The Defendants ought to appreciate that they have come to the end of the road and the most viable option for them is to comply with the judgment of this court.
 17. In conclusion, I make the following orders;



- a. The firm of Etole & Company Advocates be and are hereby allowed to come on record for the Defendants herein.
- b. The prayer for vacating the judgment and subsequent orders is dismissed.
- c. Costs of the application are awarded to the Plaintiffs/Respondents.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Etole holding brief for Mr. Etole for the Applicant

Mr. Langalanga for the Respondent

Kevin Kimari – Court Assistant

