



**Kanyari v Mwangi & another (Sued as The Administrator of The Estate of Mwangi Kanyari)
(Environment & Land Case E028 of 2021) [2022] KEELC 2817 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2817 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E028 OF 2021
LN GACHERU, J
JUNE 30, 2022**

BETWEEN

GITHII KANYARI PLAINTIFF

AND

BEATRICE WANJERI MWANGI 1ST DEFENDANT

JOYCE WANJIRU MWANGI 2ND DEFENDANT

SUED AS THE ADMINISTRATOR OF THE ESTATE OF MWANGI KANYARI

RULING

1. By a Notice of Motion Application dated 25th November 2021, the Defendants/Applicants sought the following orders; -
 - a) That this Honorable Court be pleased to strike out and/ or dismiss the Plaintiff/ Respondent's suit filed herein for being res judicata
 - b) That the Honorable Court be pleased to strike out the Plaintiff's Complaint dated 24th June 2021, and as filed on 21st September 2021, for contravening the mandatory provisions of Order 4 Rule 1(1)(f) & 2 of the *Civil Procedure Rules*.
 - c) That the costs of this application and the entire suit be borne by the Plaintiff/ Respondent.

2. The application is premised on the Grounds stated on the face of it and the Supporting Affidavit of the 1st Defendant/Applicant Beatrice Wanjari Mwangi, sworn on the 25th November, 2021. It is the Applicants contention that the instant suit is res judicata. They further contended that the Suit is fatally defective for want of compliance with the provisions of Order 4 Rule 1(1) (f) & Rule 2 of the *Civil Procedure Rules*.



3. The Application is opposed by the Plaintiff/Respondent vide a Replying Affidavit sworn on 7th November, 2021. It is the Plaintiff/Respondent's averments that the instant suit is not res judicata as the claim herein is about determination of a trust. That the claim as drawn does not offend the provisions of Order 4 Rule 1(1) (f) & Rule 2 of the Civil Procedure Rules. Further that the Court in Muranga PM Civil Case No. 5 of 1986, never made a finding on the issue of trust and hence the instant suit cannot be said to be res judicata. She further averred that similarly the issue of trust, had not been arbitrated in Nairobi HCC Appeal No. 250 of 1991, Nairobi HCC Court Civil Case No. 1576 of 1992 and Nairobi Court of Appeal No. 155 of 2008.
4. The said Application was canvassed by way of written submissions.
5. The Defendants/Applicants filed their submissions dated 31st March 2022, and reiterated the contents of their application and the history of the various suits.
6. On whether the instant suit is res judicata, the Applicants submitted on the facts and issues giving rise to the pronouncements of various Courts in Muranga PM Civil Case No. 5 of 1986, HCC Appeal No. 250 of 1991, Nairobi High Court Civil Case No. 1576 of 1992 and Nairobi Court of Appeal No. 155 of 2008. It is their submissions that as per Section 7 of the Civil Procedure Act, the issues before this Court in the instant suit are the same and have already been determined by other Courts of competent jurisdiction. Reliance was placed on a litany of cases inter alia the case of E.T v Attorney General & Another [2012]eKLR, where it was held:

“57. The courts must always be vigilant to guard against 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 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 v 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 face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata”
7. Further, it is the Defendants/Applicants' submissions that since the suit is res judicata, it essentially offends the provisions of Order 4 Rule 1(1) (f) & Rule 2 of the Civil Procedure Rules. The Applicants urged this Court to allow the application as prayed.
8. The Plaintiff/Respondent filed his submissions dated 5th April, 2022, where in she reiterated the facts of his response and maintained that the instant suit is not res judicata. He relied on the case of Okuya Omtata Vs Communications Authority of Kenya & 14 Others, Petition No. 59 of 2015, where the Court observed that a matter is res judicata if it seeks to canvass a subject which was also canvassed in another suit. It is the Plaintiff/Respondent's further submissions that though the issue of customary trust was raised in Muranga PM Civil Case No. 5 of 1986, through a Counter claim, the Court did not deliberate on it. Reliance was placed in the case of Kerugoya ELC No. 135 of 2015:- Jecinta Wambura M. Ciero and Another v Benson Warui Njanja [2018], where the Court in dismissing a similar application stated that a claim for trust should be determined by a Court of competent jurisdiction to finality. The Plaintiff/Respondent urged this Court to find that the instant application lacked merits and should be dismissed with cost.



9. Before delving into the issues for determination by this Court, it is important to point out the number of cases cited by parties.

1. I. Muranga PM Civil Case No. 5 of 1986: the deceased Mwangi Kinyari was the Plaintiff, while the Plaintiff/Respondent herein was the Defendant. The Plaintiff therein sought orders for eviction against the Defendant from L.R. No. Loc. 19/ Rwathia- Kiriti/ 283. The Defendant filed a counter-claim against the Plaintiff for customary trust over the suit property therein claiming ½ of L.R. No. Loc. 19/ Rwathia/ 283, measuring 0.7 acres. On the issue of trust, the Court stated as follows “if his intention was that the Plaintiff holds it in trust for himself and the defendants, the Plaintiff’s bid to evict the Defendant would have been brought to his attention. The person who would have brought it to his attention was the Defendant but he kept away. ... I have carefully followed the evidence in this case, I believe the Plaintiff and I find he has shown that parcel 283 was given to him and him alone and that what was given to the Defendant was parcel 1579.” The trial Court delivered its judgment allowing the Plaintiff’s claim and dismissing the counter –claim.
2. II. Nairobi Civil Appeal No. 250 of 1991: the Appellant who is the Plaintiff/Respondent herein appealed against the judgment of the Court in Muranga PM Civil Case No. 5 of 1986. The High Court in agreeing with the trial magistrate delivered its judgment dismissing grounds 1 -4 & 6 of the Memorandum of Appeal and allowed ground 5 which was on jurisdiction of the trial Court to determine an issue of adverse possession.
3. III. Nairobi Civil Suit No. 1576 of 1997 OS: The Plaintiff/Respondent herein filed a suit against the late Mwangi Kanyari for adverse possession over L.R. No. Loc. 19/ Rwathia-Kiriti/ 283 claiming ½ of L.R. No. Loc. 19/ Rwathia-Kiriti/ 283 measuring 0.7 acres. In its judgment delivered on 16th May 2008, the Court allowed the Plaintiff’s claim and declared that the Plaintiff had acquired title over the suit land and was entitled to 0.7 acres to be excised from L.R. No. Loc. 19/ Rwathia- Kiriti/ 283.
4. IV. Nairobi Civil Appeal No. 155 of 2008: the Defendant/Applicant herein was the Appellant while the Plaintiff herein was the Respondent. Being aggrieved by the decision of the Court in Nairobi Civil Suit No. 1576 of 1997 OS preferred an Appeal against the judgment of the trial Court. The Court of Appeal in allowing the appeal stated “in conclusion, our finding is that although the Respondent proved long occupation of the suit property, he failed to establish that the said occupation was without the Appellant’s permission. On our part we are convinced that the Respondent stayed on the Appellant’s suit property with permission. His claim for adverse possession cannot therefore lie. We find this Appeal meritorious.”

10. This Court notes and appreciates that the suit property has been the subject of numerous litigation in various Courts of competent jurisdiction as outlined above. This Court also notes that the parties in the instant suit are the same parties in the previous litigation save for Joyce Wanjiru Mwangi, the 2nd Defendant/ Applicant herein. The said Joyce Wanjiru is the registered proprietor of the suit land, while the 1st Applicant has a life interest over the suit land as per the Certificate of Confirmation of Grant marked “BWM2”.

This Court has looked at the Application, the response, the attachments thereto and the rival submissions by parties and the issues for determination are

- i. Whether the issue of customary trust has been heard and determined
- ii. Whether the Plaintiff’s suit should be struck out for being Res judicata



iii. Who should bear the cons of this application?

i. Whether the issue of customary trust has been heard and determined

It is the Applicants' contention that the issue of customary trust was heard and determined in the aforementioned cases. This Court has perused some pleadings and judgments attached to the Applicants' application. It notes that the issue of customary trust arose in Muranga PM Civil Case No. 5 of 1986, via a Counter claim filed by the Plaintiff/Respondent herein. The judgment of the Court in Muranga PM Civil Case No. 5 of 1986, was the subject of the Appeal in Nairobi Civil Appeal No. 250 of 1991. On the other hand in Nairobi Civil Suit No. 1576 of 1997 OS and Nairobi Civil Appeal No. 155 of 2008, the Courts deliberated on the issue of adverse possession over the suit land.

It is evident that the issue of customary trust was not canvassed in Nairobi Civil Suit No. 1576 of 1997 OS and Nairobi Civil Appeal No. 155 of 2008 and therefore these suits, though touching on the same subject matters and the same parties as in the instant suit, cannot be said to be *res judicata* to the instant suit.

In Murang'a PM Civil Case No. 5 of 1986, the trial Court while dealing with the issue of customary trust as pleaded in the Counter claim by the Respondent dismissed the Counter-claim and stated follows:

“if his intention was that the Plaintiff holds it in trust for himself and the defendants, the Plaintiff's bid to evict the Defendant would have been brought to his attention. The person who would have brought it to his attention was the Defendant but he kept away. ... I have carefully followed the evidence in this case I believe the Plaintiff and I find he has shown that parcel 283 was given to him and him alone and that what was given to the Defendant was parcel 1579.”

11. The High Court sitting on Appeal in Nairobi Civil Appeal No. 250 of 1991 agreed with the decision of the trial Magistrate in Murang'a PM Civil Case No. 5 of 1986 and stated:

“I have on my own independent and fresh perusal and evaluation have come to the same conclusion arrived at by the Learned Trial Magistrate. I would have rejected the conclusions arrived at by the Learned Trial Magistrate if I would find that his assessment of evidence was faulty or that he did not take the evidence adduced before him in account of its totality while arriving at his decision.”

This Court does not have to investigate further to conclude that the issue of customary trust was an issue for determination in both Murang'a PM Civil Case No. 5 of 1986 and Nairobi Civil Appeal No. 250 of 1991. As a matter of fact, the issue of customary trust therein was raised by the Plaintiff/Respondent herein. It is trite that a Counter claim is an independent suit from a Plaint. Therefore it follows that the foregoing trial Courts could not have ignored entirely the issue of customary trust and even if they did, which this Court finds they did not, the Plaintiff/Respondent herein had an avenue of appeal.

The upshot of the above is that the issue of customary trust was conclusively dealt with in Murang'a PM Civil Case No. 5 of 1986 and Nairobi Civil Appeal No. 250 of 1991.

ii. Whether the Plaintiff's suit should be struck out for being *Res judicata*

The elements of *Res Judicata* are laid out in section 7 of the [Civil Procedure Act](#) which provides

“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.”

In the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] e KLR the Court of Appeal set out the ingredients of res judicata as follows:

“From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83.”

12. Further in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

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

13. The Court went on to set out the rationale for res judicata as:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

14. In a nutshell, res judicata is intended to bring litigation to a halt; it is intended to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating his case afresh. In essence, it saves precious judicial time and protects the sanctity of the court to do just what it should do. In sum, it prevents the abuse of the Court process.
15. Having stated the above, this court will now investigate whether the Defendants/Applicants in the instant suit have met the threshold for the application of the doctrine of res judicata.



16. A cursory look at the annexures annexed to the Applicants' Application informs this Court that Mwangi Kanyiri and Githi Kanyiri had litigated against each other over the suit property. That the suit property was registered in the name of Mwangi Kanyiri and which property Githi Kanyiri, the Plaintiff/Respondent herein laid claim against. The said Mwangi Kanyiri instituted a suit against the Plaintiff/Respondent herein for eviction orders in Muranga PM Civil Case No. 5 of 1986, and wherein the issue of customary trust arose. After the death of Mwangi Kanyiri, he was substituted by his wife Beatrice Wanjeri Mwangi. The suit land was transferred to the 2nd Applicant via a confirmation of grant dated 20th November, 2014.
17. This Court determined herein above that the issue of customary trust was raised and determined in Muranga PM Civil Case No. 5 of 1986, and Nairobi Civil Appeal No. 250 of 1991. Further, this Court notes that the parties and the subject matter therein being, L.R. No. Loc. 19/ Rwathia-Kiriti/ 283, are the same as the parties and the subject matter in the present suit. Therefore, the Court finds and holds that the instant suit is res judicata Muranga PM Civil Case No. 5 of 1986 and Nairobi Civil Appeal No. 250 of 1991.
18. The upshot of the foregoing is that the Court finds that the instant suit should be struck out as it offends the provisions of Section 7 of the Civil Procedure Act.

iii. Who should bear the cons of this application?

19. Section 27 of the Civil Procedure Act gives this Court the discretion to award costs. Also costs follow the events. The Applicants herein being the successful parties shall therefore have the costs of the suit.
20. Having now carefully considered the Notice of Motion Application dated 25th November 2021, the Court finds it merited and the same is allowed entirely in terms of prayers No. (a) (b) and (c).
21. Consequently, the Plaintiff's suit herein is struck out for being res judicata.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 30TH DAY OF JUNE, 2022.

L.GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

No Appearance for the Plaintiff/Respondent

Mr Kirubi for the Defendants /Applicants

L.GACHERU

JUDGE

30/6/2022

