



REPUBLIC OF KENYA



**Gathuri & another v Mohamed & another (Environment & Land Case
239 of 2018) [2022] KEELC 2829 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 239 OF 2018**

NA MATHEKA, J

JUNE 29, 2022

BETWEEN

PETER THUO GATHURI 1ST PLAINTIFF

NELLY NGONYO KAMAU 2ND PLAINTIFF

AND

MWANAISHA KIRIALE MOHAMED 1ST DEFENDANT

MBARAK HAMISI MBARAK 2ND DEFENDANT

RULING

1. The application is dated November 23, 2018 and is brought under Section 6 and 7 of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya Order 2 Rule 15 (1) (d) and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders;
 - a. That this application be heard *ex parte* in the first instance, service of the same be dispensed with and it be certified as urgent.
 - b. That at this *ex parte* stage the court do issue an order staying any further proceedings in this suit pending the hearing and determination of this application.
 - c. That the suit herein be stayed as the issues therein are substantially the same issues as in *Mwanaisha Kiriale Mohamed & Another vs Alfred Wafula Okuku and 2 others*, ELC No. 129 of 2010 Mombasa and the appeal arising therefrom that is still pending and also in *Peter Thuo vs Mbarak Hamisi Mbarak*, RMCC No. 3049 of 2009 which gave rise to High Court Civil Appeal No. 101 of 2010 Mombasa hence the *subjudice* proceedings and *Res Judicata* rules apply.
 - d. That in the alternative the *Plaint* dated October 15, 2018 be struck out with costs for being otherwise abuse of the court process and the suit herein be dismissed with costs.



e. Costs

2. It is based on the grounds that this matter raises the same issue as the case of Mwanaisha Kiriale Mohamed & another vs Alfred Okuku & 2 others, ELC Case No. 129 of 2010 Mombasa and the Appeals arising therein. The issues in this case are substantially the same as in the case of Peter Thuo vs Mbarak Hamisi Mbarak, SRMCC No. 3049 of 2009 Mombasa and High Court Civil Appeal No. 101 of 2010. The Defendant has sought an injunction pending appeal in Mwanaisha Kiriale Mohamed & Another vs Alfred Okuku & 2 Others, ELC No. 129 of 2010 which are the same orders sought in this new case. The Plaintiffs have also instituted a case against Diamond Trust Bank (K) Ltd and the land subject matter herein. This suit is on the face of it an abuse of the court process and ventilates issues that are substantially the same in other matters or that should have been raised in the other matters with exercise of due diligence by the Plaintiff. The Plaintiff ought to have filed a counter claim in Mwanaisha Kiriale Mohamed St Another vs Alfred Okuku & 2 others, ELC No. 129 of 2010 asking for Vacant possession or prosecuted Peter Thuo vs Mbarak Hamisi Mbarak, RMCCNo. 3049 OF 2009 Mombasa which asks for vacant possession. Section 6 and 7 of the Civil Procedure Act respectively provides that cases that are subjudice or Res Judicata be stayed and preference be given to the case that is first in time. The Civil Procedure Rules at Order 2 Rule 15 (1) (d) provides that suits that are otherwise an abuse of the court process should be stayed or dismissed. That on 22nd November 2018 the judge issued an order in Mwanaisha Kiriale Mohamed & Another vs Alfred Okuku & 2 others, ELC No. 129 of 2010 that the status quo be maintained. Those orders render the current suit superfluous and actually confirm this case is subjudice.
3. The Plaintiffs /Respondents submitted that the issues raised in the various suits referred to by the Defendants do not find any alignment with the instant case since they are fundamentally different. That the Defendant has since vacated and the Plaintiff is pursuing a claim for general damages which are neither res judicata or sub judice.
4. This court has considered the application and the submissions therein. The issue for determination is whether or not this suit is res judicata and or sub judice. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

5. I have perused the pleadings on record and find that the title and ownership of the subject matter properties has been and still is the subject matter of the proceedings in the Magistrate’s Court, High Court and the Court of Appeal. I find that the Plaintiffs have also instituted Peter Thuo & Another vs Diamond Trust Bank & 2 others being High Court Commercial Case No. 113 of 2016 against the



Defendants herein over the same parcel of land. The Plaintiffs have also filed the case of Peter Thuo vs Mbarak Hamisi Mbarak RMCC No. 3049 of 2009 Mombasa which gave rise to High Court Civil Appeal No. 101 of 2010 wherein he seeks vacant possession of the plot from the Defendants. The decision in Mwanaisha Kiriale Mohamed & Another vs Alfred Okuku & 2 others, ELC No. 129 of 2010 Mombasa is the subject of a Notice of Appeal. The parties are the same and or similar and the subject matter is the same.

6. In the case of *E.T. v Attorney General & another* (2012) eKLR Majanja J stated that;

“The courts must 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.”

7. In *Gurbachau vs Yowani Ekori* (1958) EA 450, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the Vice Chancellor in *Henderson vs Henderson* (1) 67 ER 313 at page 319 wherein it was stated that;

“In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time”

8. In applying the stated law to the facts before me, I find that the Plaintiffs are trying to introduce a new cause of action of general damages. The Plaintiffs ought to have pursued the said claim in the previous suits and cannot reopen the matter afresh. Consequently, I find that this court lacks the jurisdiction to deal with this matter pursuant to Section 6 and 7 of the *Civil Procedure Act*. I find this suit is res judicata and or sub judice and I strike it out with costs to the Defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

