



**Mwamad & 6 others v Mombasa Teachers' Co-operatives and Credit Society Limited
(Environment & Land Case 230 of 2019) [2022] KEELC 2935 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 230 OF 2019
NA MATHEKA, J
JUNE 29, 2022**

BETWEEN

**HAMISI JUMA MWAMAD 1ST PLAINTIFF
ATHUMAN SULEIMAN 2ND PLAINTIFF
SHADRACK NDORO MWALIMU 3RD PLAINTIFF
CHIZI NGONDE TSUMA 4TH PLAINTIFF
MIMUKOWA HAMISI JUMA 5TH PLAINTIFF
HAMISI MOHAMED 6TH PLAINTIFF
ALPHONCE MWANGEMI 7TH PLAINTIFF**

AND

**MOMBASA TEACHERS' CO-OPERATIVES AND CREDIT SOCIETY
LIMITED DEFENDANT**

RULING

1. The application is dated 23rd March 2022 and is brought under Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya seeking the following orders;
 - a. That this suit be struck out for being res judicata to the decision delivered in ELC No.20 of 2012 consolidated with Originating Summons No.240 of 2012.
 - b. That Costs of this application be paid by the Plaintiffs.
2. It is based on the grounds that this Honourable Court has already dealt on with the subject land Plot No.3634/II/MN measuring 5.892 hectares which also involves the same parties in Civil Suit ELC No.20 of 2012 and Originating Summons No.240 of 2012 which were consolidated and heard



together. That this Honourable Court gave its judgment on 29th day of June, 2017 which decision was appealed against by the respondent vide Civil Appeal No.53 of 2017 and the court of appeal gave a decision to the said appeal on 14th June, 2018. That this Court is functus officio and ought not to hear this case/suit as it will amount into sitting on its own appeal. That the Plaintiffs herein have also preferred this matter before the Supreme Court and as such this court cannot render a decision on a matter before the Supreme Court and in any event on an already decided matter by a court of competent jurisdiction.

- 3 The Respondent opposed the application stating that ELC No. 20 of 2012 Robert Muhambi Katana & 15 Others (Suing on their behalf and on behalf of squatters/residents residing upon the suit property/plot No. 3634/MN/11) was between the Defendant and 16 different Plaintiff's distinct from the Plaintiffs in the instant suit. That the orders sought were simply an afterthought and an attempt to defeat justice.
4. This court has considered the application and submissions therein. It is based on the grounds that this Honourable Court has already dealt on with the subject land Plot No.3634/II/MN measuring 5.892 hectares which also involves the same parties in Civil Suit ELC No.20 of 2012 and Originating Summons No.240 of 2012 which were consolidated and heard together. That this Honourable Court gave its judgment on 29th day of June, 2017 which decision was appealed against by the respondent vide Civil Appeal No.53 of 2017 and the Court of Appeal gave a decision to the said appeal on 14th June, 2018. The doctrine of res judicata is set out in the Civil Procedure Act at Section 7 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 can 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. The Civil Procedure Act also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

Explanation 1. The expression “former suit” means a suit which has been decided before

- (1) the suit in question whether or not it was instituted before it.

Explanation 2. For the purposes of this section, the competence of a court shall be

- (2) determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation 3. The matter above referred to must in the former suit have been alleged by

- (3) one party and either denied or admitted, expressly or impliedly, by the other.”

6. Therefore, for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. In the case of *Henderson vs Henderson* (1843-60) ALL E.R.378, the court held that;

“...where a given matter becomes the subject of litigation in, and of 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 a 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 case, 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.”

7. It follows then that a Court will apply the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.

8. In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, (2017) eKLR, that:

“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.”

9 The Court went on to state on the role of the doctrine:

“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.”

10. I have perused the pleadings in Civil Suit ELC No.20 of 2012 and Originating Summons No.240 of 2012 which were consolidated and heard together. In that suit the court was informed that the Plaintiffs had brought the suit on their own behalf and on behalf of all the squatters living on the suit land. Indeed I find that the subject matter is the same and the parties are similar. The 14th Defendant Shadrack Nodoro Mwalimu in Originating Summons No.240 of 2012 is the 3rd Plaintiff in the instant suit. In applying the stated law to the facts before me, it is clear that the Plaintiffs seek to open issues that were raised in the earlier proceedings of adverse possession that were decided by the courts in those cases. The Plaintiff now the Defendant had sued for trespass against the Plaintiffs, and parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this suit, the Plaintiffs are trying to litigate a concluded matter.



12. In the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* (2020) eKLR the court held that;

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”

13. I find that this suit is res judicata and an abuse of the court process. The application has merit and hence upheld. I therefore strike out the Plaintiffs’ case with costs.

14. It is so ordered.

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

N.A. MATHEKA

JUDGE

