



Mwambu v Uriithi Housing Co-operative Society Ltd & another (Environment & Land Case E040 of 2021) [2022] KEELC 2551 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2551 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E040 OF 2021
LN GACHERU, J
JULY 21, 2022**

BETWEEN

NICHOLAS MUTUNGA MWAMBU PLAINTIFF

AND

URIITHI HOUSING CO-OPERATIVE SOCIETY LTD 1ST DEFENDANT

FAMILY BANK LIMITED 2ND DEFENDANT

RULING

1. By a Notice of Motion Application dated 17th November 2021, the Plaintiff/Applicant moved this Court for orders;
 1. That in the interim and pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction barring and /or restraining the Defendant/ Respondents either by themselves, their agents, or servants from selling, transferring, either by public auction or private treaty, and/or otherwise disposing Plot No. 257 (renumbered/ resurveyed to 58) situate on the suit property.
 2. That in the alternative to prayer 2 & 3 above, the Court be and is hereby please to order the parties to maintain status quo in regard to Thika LR No. 11486/6, pending the hearing and determination of this suit.
 3. That costs be provided.
2. The application is based on the grounds on its face and the Supporting Affidavit of Nicholas Mutunga Mwambu (the Applicant) sworn on 17th November 2021.
3. It is the Applicant's case that vide a sale agreement dated 23/7/2015, he purchased Plot Number 257, from the 1st Respondent which was later renamed to Plot Number 58. That he complied with all



- the terms of the said agreement and was issued with a certificate of ownership by the 1st Defendant/Respondent.
4. Further, that he purchased his plot free from any encumbrance and there was an agreement that subdivision would be undertaken after payment of the last instalment of purchase price. That a Charge was created without notice to him, and in total disregard of his interests over the suit land. That he is aware that on 13/10/21, the 2nd Defendant/Respondent issued a Statutory Notice over Thika LR No. 11486/6, and it intends to sell it off by Public Auction.
 5. That the Statutory Notice has been issued as a result of the failure of the 1st Defendant/Respondent to service its loan facility advanced by the 2nd Defendant/Respondent. That as a paid up purchaser before Charge, he has been unfairly subjected to the issue of discharge by the 2nd Defendant/Respondent, who was not a party to the sale agreement. That he was aware of the Judgement of the Court delivered by Hon. Kemei J. in Murang'a Environment and Land Court.
 6. The Application is opposed by the 2nd Defendant/Respondent vide a Replying Affidavit sworn by SYLVIA WAMBANI, on the 31st January, 2022. It is the 2nd Respondent's disposition that the Application is devoid of merit, and is brought in bad faith. That the 1st Defendant applied for and was granted a banking facility worth Kshs.500 Million, for purposes of purchasing the suit land. That the suit land was charged as security for the said facility. That the 1st Defendant has failed to service the loan as agreed prompting the 2nd Defendant/Respondent to exercise its statutory power of sale. That the 2nd Defendant/Respondent is not a party to the sale agreement alleged by the Plaintiff and it has only now come to know of him. That a certificate of title is proof of ownership and the Plaintiff/Applicant did not have it and therefore the 2nd Respondent's interests over the suit land ranked first.
 7. Further that the Plaintiff/Applicant ought to have conducted due diligence by conducting a search prior to purchase instead of believing the assertion of the 1st Defendant. That the Plaintiffs' interests over the suit land had not been registered and therefore notice could not be issued to him. That the 1st Defendants'/Respondent loan facility is still outstanding, non performing and accruing interest at default rated to the detriment of the 2nd Defendant.
 8. That there are other suits relating to the same subject matter before this Court. That Murang'a ELC Case No. 25 of 2019 – *Anthony Mbugua Njibia & 36 Others VS Urithii Housing Co-operative Society Limited & Another*, was determined in favor of the 2nd Defendant and the suit was dismissed. That Murang'a ELC Case No. 5 of 2020–*Joseph Kabunga Others vs Urithii Housing Co-operative Society Limited & Another*, seeking injunctive orders was dismissed vide a ruling dated 12th October 2021, and Murang'a ELC Case No. E042 of 2021, was pending before the Court. That the Plaintiff/Applicant having knowledge of the aforementioned suits ought to have applied for joinder instead of filing a fresh suit.
 9. Finally, that the Plaintiff/Applicant had failed to establish a case to warrant the grant of a temporary injunction. That the Court is bound to do justice to all parties and limiting the 2nd Defendant's/Respondent power of sale would be unjust. The 2nd Defendant therefore urged this Court to dismiss the instant application with costs.
 10. This Court gave directions that the instant application be dispensed by way of written submissions.
 11. The Applicant, filed his Written Submissions dated 21st February 2022, through the Law Firm of Nyambura Shani & Co. Advocates. The Applicant relied on a litany of cases inter alia the case of *Giella vs. Cassman brown* 1973 EA, which enunciates the principles for grant of an interlocutory injunction. The said principles are that the Applicant must show a prima facie case, that he will suffer irreparable



loss and that he had proved its case on a balance of probability. It was the Applicant's submissions that he had made a case for grant of a temporary injunction and his application should be allowed entirely with costs.

12. The 2nd Respondent on the other hand filed their submissions dated 20th May 2022, through the Law Firm of Maina & Onsare Partners Advocates LLP. The 2nd Defendant/Respondent submitted that an injunction is an equitable remedy granted to protect the Subject Matter of a suit, pending determination of rights and interests of parties. That the orders sought by the Plaintiff/Applicant are untenable as this Court by determining the instant application will be sitting on an appeal and/or review of its own decisions in Murang'a ELC Case No. 25 of 2019 – *Anthony Mbugua Njibia & 36 Others vs Urithii Housing Co-operative Society Limited & Another* and in Murang'a ELC Case No. 5 of 2020–*Joseph Kahunga Others vs Urithii Housing Co-operative Society Limited & Another*.
13. That the Plaintiff/Applicant was trying to circumvent the doctrine of res judicata by inviting this Court to sit on an Appeal via the instant application. The 2nd Defendant/Respondent relied on the case of *Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR where it was stated that;

In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. ... Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice”
14. Based on the foregoing, the 2nd Defendant/Respondent urged this Court to dismiss the instant application with costs.
15. The 1st Defendant/Respondent neither filed a response to the Application nor submissions in support or opposition of the same.
16. The Court has now carefully read and considered the instant Notice of Motion, the written submissions and the Pleadings in general and finds that the issues for determination are;
 1. Whether the Instant suit is res judicata
 2. Whether the Notice of Motion dated 17th November 2021 is merited.

(1) Whether the suit herein is res judicata

17. The principle of res judicata is embedded under Section 7 of the *Civil Procedure Act*. The same 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.”



18. In the case of *John Florence Maritime Services Limited & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, 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.”

19. 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.”

20. 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.”

21. 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 judicial precious 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.
22. Having stated the above, this court will now investigate whether the 2nd Defendant/Respondent in the instant suit have established a case for the application of the doctrine of res judicata.
23. The first issue is whether the suit or issue in the instant suit was directly and substantially in issue in Murang’a ELC Case No. 25 of 2019 – *Anthony Mbugua Njibia & 36 Others vs Urithii Housing*



Co-operative Society Limited & Another and in Murang'a ELC Case No. 5 of 2020–Joseph Kahunga Others vs Urithii Housing Co-operative Society Limited & Another .

24. It is not in doubt that the Defendants/Respondents herein are the same Defendants in Muranga ELC No. 25 of 2019; *Anthony Mbugua Njibia & 36 Others vs. Urithi Housing Co-operative Society Ltd & Another* and in Murang'a ELC Case No. 5 of 2020–Joseph Kahunga Others vs Urithii Housing Co-operative Society Limited & Another (the former suits.)
25. It is also not in doubt that Muranga ELC No. 25 of 2019; *Anthony Mbugua Njibia & 36 Others VS Urithi Housing Co-operative Society Ltd & Another* was substantively heard, and determined and a Judgment for the same was delivered on 12th October 2021. In relation to Murang'a ELC Case No. 5 of 2020–Joseph Kahunga Others vs Urithii Housing Co-operative Society Limited & Another, the court considered an application for temporary injunction against the Respondents herein and dismissed the same.
26. With regards to the Plaintiff/Applicant herein and the former suits, the Court notes that they are different. In Murang'a ELC Case No. 5 of 2020–Joseph Kahunga Others VS Urithii Housing Co-operative Society Limited & Another, the Applicants were suing on behalf of Panorama Residents' Association, while a perusal of the Judgment delivered in Muranga ELC No. 25 of 2019; *Anthony Mbugua Njibia & 36 Others VS. Urithi Housing Co-operative Society Ltd & Another*, that there were 37 Plaintiffs and this Court is unable to tell from the submissions who the exact Plaintiffs were.
27. The Applicant herein has confirmed that he is aware of the former suits, but contends that he was not a party therein. It is however safe to assume; in the absence of any evidence to the contrary; that since suit land more specifically being LR. No. 11486/6(Panorama Estate) is the same in the three suits, the Applicant's interest, though, he was not a party to the suit, were represented as he was claiming a portion of the suit land. Further, it appears that the Plaintiff/Applicant was ignorant and/or willingly neglected to seek to be enjoined in the former suits, yet he has alleged that he was aware of the said suits. The work of this Court is to do justice and parties seeking equity must at all times come with clean hands.
28. What remains to be determined is whether the issues for determination in the instant suit are substantially similar to the issues raised and determined in the former suit. In the instant suit, the subject land is LR. No. 11486/6(Panorama Estate) while a perusal of the pleadings and decisions of the former suits indicates that the Plaintiffs therein sought orders against the Defendants therein for specific parcels of land to be hived off from LR. No. 11486/6(Panorama Estate). It appears that the subject matter is similar.
29. With regards to the prayers sought, the prayers in the instant suit point to an order of specific performance among other orders against the 1st Defendant, in favor of the Plaintiff/Applicant, an injunction against the 2nd Defendant/Respondent who sought to exercise its Power of sale against the 1st Defendant. In the former suits, the Plaintiffs therein also sought for specific performance among other orders against the Defendants. Based on the foregoing, this Court finds and hold that the issues for determination in the instant suit are substantially similar to the issues raised and determined in Anthony Mbugua Njibia & 36 Others vs. Urithi Housing Co-operative Society Ltd & Another 2021 Eklr and in Murang'a ELC Case No. 5 of 2020–Joseph Kahunga Others vs Urithii Housing Co-operative Society Limited & Another
30. In the premises, this Court finds and holds that the 2nd Defendant/Respondent has substantively satisfied the conditions for the application of the doctrine of *res judicata* and therefore the instant suit is ripe for striking out by this Court.



2. Whether the Notice of Motion dated 17th November 2021 is merited.

31. Having found that the instant suit is res judicata, it follows that this Court though properly clothed with jurisdiction to determine the instant application on merit, should down its tools. As stated above, litigation has to come to an end and parties have an unlimited right to appeal to the Court of Appeal.
32. The upshot of the foregoing is that this Court cannot entertain the instant application and thus it will resist itself from determining the instant application and the suit on merit and proceeds to strike it out. This Court in finding that the suit is ripe for striking out is guided by the case of *Diocese of Eldoret Trustees (Registered) VS Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR where the Courts in striking out a suit for being rejudicata held as follows;
- “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.”
33. Consequently, the Court holds and finds that this suit is res judicata, null and void abinitio and is an abuse of the Court process and proceeds to strike it out entirely.
34. Although it is trite that costs shall follow the events, this Court notes the circumstances surrounding the instant suit and orders that each party shall bear its own costs.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21ST DAY OF JULY, 2022.

L. GACHERU

JUDGE

21/7/2022

Delivered virtually in the presence of; -

Joel Njonjo – Court Assistant

N/A for the Plaintiff/Applicant

N/A for the 1st Defendant/Respondent

M/s Ngui for 2nd Defendant/Respondent

L. GACHERU

JUDGE

