



**Nyangau v Ndatani Enterprises Limited & 2 others (Environment & Land
Case 51 of 2019) [2022] KEELC 2628 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 51 OF 2019**

**A NYUKURI, J
JULY 14, 2022**

BETWEEN

JOSEPH MARTIN NYANGAU PLAINTIFF

AND

NDATANI ENTERPRISES LIMITED 1ST DEFENDANT

RAILWAYS HOUSING CO-OPERATIVE SOCIETY LIMITED . 2ND DEFENDANT

DANIEL NDOLO MUSYIMI 3RD DEFENDANT

RULING

Introduction

1. What is before court for determination is the application dated 5th July 2021, brought by the 1st Defendant/Applicant seeking for the following orders;
 - a. That the Honourable court be pleased to declare and order that this suit is res judicata following the Judgment delivered on 31st October 2017 in Machakos ELC No. 224 of 2009 between Ndatani Enterprises Co. Limited & Another vs Railways Housing Co-operative Limited.
 - b. That further to prayer (a) above, the court do order dismissal of this suit with costs forthwith.
 - c. The Honourable court do order that costs of this application and that of the suit to be granted to the applicant.
2. The application is premised on grounds listed on its face, as well as the supporting affidavit sworn by Alexander Muema Muthengi, who is a director and shareholder of the 1st Defendant/Applicant. The Applicant's case is that the Judgment in Machakos ELC No. 224 of 2009 between Ndatani Enterprises Co. Limited & Another v Railways Housing Co-operative Limited (herein after referred to as the



former suit), sanctioned the relocation of the Plaintiff to another parcel of land, which judgment has never been vacated or set aside despite the Plaintiff being aware of the same. They also averred that the Plaintiff was one of the purchasers of parcel L.R No. 7340/90 in the schemes which were in dispute in the former suit, and which the court determined with finality. The Applicant also relied on the ruling of this court made on 29th January 2021, to the effect that the Plaintiff was aware of the former suit and that the issues herein are directly and substantially the same issues determined in the former suit and therefore that this matter is res judicata.

3. The application is opposed. The Plaintiff filed a replying affidavit on 12th November 2021 in opposition to the application. His case is that he was made aware of the decree in the former suit vide the Applicant's replying affidavit dated 13th May 2019. He complained that the decree in the former suit emanated from a consent between the 1st and 2nd Defendants, without regard to the purchasers including himself, and therefore it is only upon visiting his land L.R No. 7340/90/5 (the suit property) that he realized that it had been fenced off. He further emphasized that the consent only benefitted the 1st and 2nd Defendants and prejudiced all the purchasers. He maintained that in both its advertisements and the sale agreements, the 2nd Defendant had stated that it owned the suit property, and that he purchased the suit property based on its location and other factors for value, a matter that was not taken into account by the 1st and 2nd Defendant in their consent that relocated the Plaintiff. In regards to this court's ruling of 29th January 2021, the Plaintiff's position was that the same did not address the entire suit, but was limited to the application to stop further encroachment on the Plaintiff's land.
4. The 3rd Defendant filed a replying affidavit through one Daniel Ndolo Musyimi, who did not disclose his relationship with the 3rd Defendant, only stating that he was a resident of Nairobi County. He deposed that he was not opposed to the application as the issues raised in this suit were conclusively determined in the former suit and that the Plaintiff was among the persons affected by the Judgment in that suit, a fact that is within the Plaintiff's knowledge and that the judgment has not been appealed against or set aside.
5. The application was canvassed by written submission. On record are the 1st Defendant/Applicant's submissions filed on 30th November 2021. No submissions were filed by the Plaintiff, and the 2nd and 3rd Defendants.

Submissions

6. Counsel for the 1st Defendant/Applicant submitted that Section 7 of the *Civil Procedure Act* bars the court from determining a matter whose issues have been determined with finality in a former suit. Counsel argued that the purpose of section 7 is to ensure there is finality to litigation. Reliance was placed on the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, in restating the ingredients of res judicata, namely, that the issues in the former suit must be directly or substantially in dispute between the parties in the current suit, that the parties or parties under whom they claim ought to be the same as those in the former suit and that the court that determined the matter in the former suit was competent and determined the suit with finality.
7. Counsel contended that this court made a determination in the former suit and issued orders and directions on how to deal with all the affected suit properties, and the Plaintiff being one of the persons affected by the said judgment was allocated the Isinya Plot L.R KAJ/Kaputiei North/89695 which plot is available for possession by the Plaintiff, a fact the Plaintiff is aware of. Counsel relied on this court's ruling of 29th January 2021 to argue that as the transfer of the suit property was sanctioned by a decree of the court, the Plaintiff's recourse was to apply to set aside the decree and not file a fresh suit.



Counsel observed that the said ruling was not appealed against, set aside or reviewed and therefore the Plaintiff is bound by the said finding.

8. The cases of *Peterson G. Mburati v Joseph K. Mwangi* [2021] eKLR and *E.T.V v Attorney General & Another* [2012] eKLR, were cited for the proposition that if a former suit was compromised by consent and the Plaintiff is aggrieved with such consent, he ought to challenge the consent and not file a fresh suit, as that would be evading the doctrine of res judicata, which the court ought to guard against.
9. On the question as to whether the parties to the suit in the former suit were the same as the parties in this suit, counsel submitted that the defendants were parties in the former suit and the Plaintiff as a purchaser was aware of the said suit. This was buttressed by the finding in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others* [2018] eKLR, for the proposition that addition or omission of parties in the new suit does not render the doctrine of res judicata inapplicable. Counsel was of the view that if indeed the Plaintiff in the instant suit was interested in protecting his interests, he ought to have applied to be joined to the former suit and not wait until the matter is finalised for him to file a fresh suit.
10. As regards the competence of the court that determined the former suit, counsel contended that the court that tried that suit was competent to determine the matter and the determination was final. In that regard, counsel relied on the cases of *Rono Limited v Caltex Oil (Kenya) Limited* [2014] eKLR, *Uburu Highway Development Ltd v Central Bank of Kenya & 2 Others* Civil Appeal No. 36 of 1996, *John Florence Maritime Services Ltd (supra)*, *Elizabeth Osewe (Suing on behalf of the Estate of Mishack Engweso Omolo) v Andronico Otieno Anindo & Another* [2015] eKLR and *Abdi- Mohammed Noor v County Government of Turkana & Another* [2020] eKLR, which this court has considered.

Analysis and Determination

11. Having considered the application, the replying affidavits, submissions and authorities cited, the sole issue that arise for determination is whether this suit is res judicata.
12. Section 7 of the [Civil Procedure Act](#) provides for ingredients of res judicata 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.
13. The provisions of section 7 of the [Civil Procedure Act](#), bars a court from trying a suit whose issues have already been determined with finality by a competent court in another suit between the same parties or parties under whom those parties claim.
14. The Black's Law Dictionary 11th Edition defines res judicata as follows;

[Latin "a thing adjudicated"] 1. An issue that has been definitively settled by judicial decision.
2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been- but was not- raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and the involvement of the same parties, or parties in privity with the original parties.



15. As the doctrine of res judicata does not allow a party to litigate on issues already determined between the same parties or parties privy to the original parties, a party cannot evade the doctrine by introducing fresh issues if those issues ought to have been raised in the former suit, but were not raised.

16. The purpose of the doctrine of res judicata was upheld in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR as follows;

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 common-sensical 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

17. Essentially, as the structure of our court system is vertical, the doctrine of res judicata frowns upon and shuts the door on any horizontal action, where a party to a previous suit or privy to a party in a previous suit, files a fresh suit, over issues already determined in such previous suit by a competent court. If such party is unhappy with a determination in a previous suit, their remedy does not lie in filing a fresh suit, as that will simply be adding another litigation at the same level with the former decision, which is a horizontal action, and which cannot be countenanced in law. Their remedy is to either seek to review the decision in the former suit or file an appeal if the law so permits. To allow a party to litigate over issues previously determined by a competent court, will create an indefinite process, making nonsense of the purpose of litigation which is to access justice expeditiously. On the contrary, the vertical structure, by its design, has a limit, making litigation and the quest for justice, prompt, predictable and certain. In short, it is unlawful to escalate litigation horizontally. The law expects a vertical and upward move, if there has to be any move at all.

18. In the case of *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd* [2017] eKLR, the court enumerated the elements of res judicata in the following terms;

The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- 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 suit is raised.

19. In the instant suit, the Plaintiff pleads in the Plaintiff that he purchased the suit property from the 2nd Defendant who was selling as an agent of the 1st Defendant. He contends that the agency agreement between the 1st and 2nd Defendant ran into a storm which led to the filing of the former suit, wherein an order was issued restraining the parties from selling, transferring, wasting or fencing the suit property



- apart from transferring it to the Plaintiff. The Plaintiff's main complaint is that the suit property was transferred to the 3rd Defendant by fraud and contrary to the order aforesaid. He has sought for orders to declare that the suit property belongs to him, that the sale of the same to the 3rd Defendant is a nullity, a permanent injunction and an eviction order against all the Defendants, mesne profits, general damages and costs of the suit.
20. The 1st Defendant/Applicant has argued that the Plaintiff's claim is res judicata as the former suit was determined with finality whereof orders and directions were issued on how to deal with all the affected properties including the suit property. That by virtue of that determination, the Plaintiff was among the affected persons who was allocated Isinya Plot L.R. No. KAJ/Kaputiei North/89695. The 1st Defendant's position being that, as the transfer of the suit property was sanctioned by a decree in the former suit, the Plaintiff's recourse would be to apply to set aside the decree and not to file a fresh suit.
 21. In a rejoinder to the defence of res judicata, the Plaintiff argued that the decree in the former suit emanated from a consent between the 1st and 2nd Defendants and without the Plaintiff's input, and which decree did not consider relevant factors including the properties' location and personal preference of the Plaintiff, but was only beneficial to the 1st and 2nd Defendants. The Plaintiff also complained that he was not aware of the decree in the former suit, but was only made aware of it when the 1st Defendant filed response to his Notice of Motion dated 13th May 2019.
 22. It is therefore clear from the above analysis that the Plaintiff is aggrieved with the consent judgment in Machakos ELC No.224 of 2009. According to him, that consent judgment had resulted in violation of his proprietary rights. From the orders sought in the Plaintiff herein, it is clear that the Plaintiff's intention is to reverse the effect of the consent judgment entered in the former suit. The question therefore that this court must confront is whether this court is barred by section 7 of the Civil Procedure Act from hearing and determining this matter.
 23. To begin with, I will address the issue as to whether the issues in the former suit were the same issues in the current suit. As I understand it, the Plaintiff's claim herein raises the issue as to whether the Plaintiff is the lawful owner of the suit property, and, whether the transfer thereof to the 3rd Defendant was fraudulent. Having perused the decree in Machakos ELC No. 224 of 2009, I note that one of the prayers was a declaration that only bona fide and fully paid purchasers as at the expiration of the three agreements between the 1st and 2nd Defendants herein, were entitled to the plots in the original parcels of land in L.R No. 7340/90. The fact that the decree allocated the Plaintiff another plot different from the suit property and that the suit property was allocated to the 3rd Defendant is not disputed. In my considered view, as Machakos ELC 224 of 2009 dealt with the issue of the proprietary rights of the purchasers of L.R No. 7340/90, which included the Plaintiff, and concluded that issue by granting the Plaintiff L.R. No. KAJ/Kaputiei North/89695, then, I find and hold that the issue raised herein by the Plaintiff is directly and substantially the same issue raised and determined in Machakos ELC No. 224 of 2009, with finality.
 24. The parties in Machakos ELC 224 of 2009 were Ndatani Enterprise Company Ltd and Taita Consultants Limited v Railway Housing Cooperative Society Limited. The Plaintiff was not a party in that suit. Section 7 of the Civil Procedure Act refers to either one being a party to a previous suit or a party under whom they claim. It is not disputed that the Plaintiff in this matter, purchased the suit property from the 2nd Defendant herein. Thus, there is privity between the Plaintiff herein and the Plaintiff in ELC No.224 of 2009, who is the 2nd Defendant in this case. I therefore find that the parties in the former suit and the parties in the instant suit are the same.
 25. In addition, the plaintiff herein clearly shows that the Plaintiff was aware of the existence of the former suit, as his claim is premised on an order issued in that matter on an application for injunction filed



by the 2nd Defendant herein. The order was made on 15th March 2010, restraining the 1st Defendant herein from interfering with the suit land, other than by transferring the same to the purchasers. The Plaintiff relies on that order as a basis for the protection of his proprietary rights. As the said order did not translate into a decree, having been issued at an interlocutory stage, the final determination of the former suit is the decree, which the Plaintiff is aggrieved with.

26. It appears, the Plaintiff did not find it necessary to seek to be joined as a party to the former suit, despite the fact that the same sought to determine the proprietary rights of the purchasers of parcel L.R No. 7340/90. The Plaintiff's argument that he was not aware of the judgment cannot shield him from the reality that the claim in the former suit was made on his behalf and therefore the final determination of the same is binding on him. I am fortified in my finding by the reasoning in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, where the Court of Appeal had this to say about a party who lets another party fight their battle;

The doctrine of Res inter alios acta alteri nocere non debet which holds that: "things done between strangers must not cause an injury to people who are not parties to such acts" is relevant in the circumstances of this case. Essentially, it means that a contract cannot adversely affect the rights of one who is not a party to it. This doctrine was applied in the case of *Powel v Wittshire and Others* [2004] 3 AII ER 235, where the court held that estoppel per rem judicatam could not bind a person who claimed under the person against whom a judgment had been obtained unless he had obtained his interest from that person after judgment had been given. In that case however, the court quoted with approval Lord Denning in the case of *Nana Ofori Atta II v Nana Abu Bosra II* (1957) 3 AII ER 559 at 243 in which he stated that;

.....Those instances do not, however, cover this case which is not one of active participation in the previous proceedings or actual benefit from them, but of standing by and watching them fight out or at most giving evidence in support of one side or the other. In order to determine this question, the West African Court of Appeal quoted from a principle stated by *Lord Penzance in Wytcherley v Andrews* [1871] LR 2 P & D 327 AT 328. The full passage is in these words;

There is a practice in this court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative court held that if a person, knowing what was passing, was content to stand by and see his battle fought by some body else- in the same interest, he should be bound by the result, and not be allowed to re-open the case.

27. Therefore, I find and hold that the Plaintiff in this matter, having watched the 2nd Defendant fight his battle in Machakos ELC No.224 of 2009, cannot turn around and disown the decree therein, by filing a fresh claim, on the basis that the conclusion of that battle was a consent judgment that did not take into account his interests. He knew or ought to have known that the former suit could be finalized in any manner, including; by consent, withdrawal or determination on merit. As the former suit was filed by his privy, he is bound by the determination of that suit. If he is dissatisfied with that decision, his recourse cannot be in a fresh suit.
28. On the issue as to whether the court that determined the former suit was competent, I note that the same was determined in the Environment and Land Court, by a judge of that court, who adopted the parties' consent as judgment of the court. As the Environment and Land Court is competent to determine the issue raised in this suit; namely whether the Plaintiff is the lawful owner of the suit property and whether the transfer thereof to the 3rd Defendant was done fraudulently, I find and hold



that the court that determined the former suit was competent to try this suit. I also note that the decision that granted the suit property to the 3rd Defendant is a decree dated 7th November 2017, and therefore a final determination of the issues raised in the former suit.

29. As the Plaintiff's core complaint is that the decree in the former suit did not consider his proprietary interests in the suit property, he cannot challenge that decree by way of a fresh suit in this court, as that will amount to filing an appeal against the decision of this court within the same court, which action is frowned upon by Section 7 of the *Civil Procedure Act*.
30. In the end, I find and hold that this suit is res judicata and the same is hereby dismissed with costs to the Defendants.
31. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 14TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Munyoki for the 3rd Defendant

Ms Lucheveleli holding brief for Mr. Omondi for the 1st Defendant

No appearance for the Plaintiff

Ms Josephine Misigo – Court Assistant

