



**Kombe v Kivuvani (Environment & Land Case 212 of 2020)
[2022] KEELC 12579 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 212 OF 2020
NA MATHEKA, J
SEPTEMBER 27, 2022**

BETWEEN

DORIS POLA KOMBE PLAINTIFF

AND

NELSON MWANZIA KIVUVANI DEFENDANT

RULING

1. That the defendant raised a Preliminary Objection dated May 13, 2022 under section 7 of the *Civil Procedure Act* cap 2 Laws of Kenya and section 28 of the *Environment & Land Court Act* the effect that this suit is *res-Judicata*. That the matters raised were fully litigated between the same parties and or parties litigating under the same title, touching on the same land in Civil Case No 29 of 2018 *Nelson Mwanzia Kivulani v Safari Karisa Jefwa and Abrary Mohammed Omar*.
2. The plaintiff submitted that the parties in Civil Case No 29 of 2018 are *Nelson Mwanzia Kivulani v Safari Karisa Jefwa and Abrary Mohammed Omar* and are different in the present suit. That the suit land had not been registered at the material time and was unregistered plot No 197 at Kalima Upepo Shanzu.
3. This court has considered the application and submissions therein. 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.”



4. 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 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 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 one party and either denied or admitted, expressly or impliedly, by the other.”

5. 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.”

6. 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.

7. In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission v 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.”



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.”

8. I have perused the pleadings in Civil Case No 29 of 2018 *Nelson Mwanzia Kivulani vs Safari Karisa Jefwa and Abrary Mobammed Omar*. The 2nd defendant appeared in court and stated that this Plaintiff in the instant suit was his mother and was sickly. The subject matter was plot No 197 at Kalima Upepo Shanzu which is the same in the instant case. 1st defendant was the alleged seller in that case and is the same one in the plaintiff’s pleadings. Indeed, I find that the subject matter is the same and the parties are similar. 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 on ownership and the sale agreements. The plaintiff now appears after she was well aware of the previous suit and hence cannot evade the doctrine of *res judicata*. In my view, by filing this suit, the plaintiff is trying to litigate a concluded matter. Nothing stopped her from joining the previous suit and producing the requisite documentary evidence and or appealing the said decision.
9. In the case of *Diocese of Eldoret Trustees (Registered) vs 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.”
10. 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 Plaintiff’s case with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

