



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kungu v Kungu & another (Environment and Land Appeal E013 of 2021)
[2022] KEELC 4855 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E013 OF 2021
LN GACHERU, J
SEPTEMBER 22, 2022**

BETWEEN

SAMSON NDUNGU KUNGU APPELLANT

AND

VERONICA WAITHERA KUNGU 1ST RESPONDENT

JOHN MUNGAI 2ND RESPONDENT

(Being an appeal from the Ruling delivered on 8th July, 2021, by Hon. E. Mutunga (P. M.) in Kandara Chief Magistrates Court in ELC Case No. 2 of 2021)

JUDGMENT

1. The Appellant Samuel Ndung'u Kung'u, was the Plaintiff in Kandara ELC Case No. 2 of 2021, while the Respondents herein were the Defendants therein. In respect to the Notice of Motion Application dated 4th March 2021, the Respondents herein were the Defendants/Applicants, while the Appellant herein was the Respondent in the said application.
2. By a Notice of Motion Application dated 4th March 2021, the Defendants/Applicants therein, sought for orders; -
 - a. That the Honourable Court be pleased to strike out the Plaintiff's Application dated January 25, 2021, and the entire suit with costs to the Defendants for being *Res-Judicata*, offending the provisions of Section 7 of the [Civil Procedure Act](#).
 - b. That the Costs of the Application be borne by the Plaintiff.
3. The Application was premised on five (5) grounds set out on the face of it and on the Supporting Affidavit of Veronica Waithera Kung'u, sworn on March 4, 2021. In the said Supporting Affidavit, Veronica Waithera Kungu, deponed that there had been various litigations involving the suit land Loc



4/naaro/1557. That the Plaintiff had commenced a suit being Nyeri Elc 236 Of 2013 (samuel Ndungu Kungu Vs. Veronica Waithera Kungu) and a Judgment and decree had already been delivered. That she is advised by her advocates that the provisions of Section 7 of the Civil Procedure Act state that no suit can be brought after a matter touching on the same subject matter bearing the same parties or parties who claim through them have been heard and determined by a Court of competent jurisdiction. That the matter was therefore *res-judicata* and should be struck off.

4. The Application was opposed by the Plaintiff/Respondent the Appellant herein, through a Replying Affidavit sworn by Samuel Ndungu Kungu on 31st May 2021. It was the Plaintiff/Respondent's disposition that contrary to the depositions of the Defendants/Applicants, Nyeri ELC 236 of 2013, was between him, and Veronica Waithera Kungu. That John Mungai, the 2nd Defendant was not a party to the said suit. That the issues in question in Nyeri ELC 236 of 2013, were totally different from the issues in the instant suit. That the 1st Defendant had not complied with the Orders of the Court in Nyeri ELC 236 of 2013. That the 2nd Defendant was not a beneficiary in Thika Succession 431 of 2009, and there was no legal basis for enjoining him in Nyeri ELC 236 of 2013. That the character of the instant suit and Nyeri ELC 236 of 2013, are fundamentally and substantially different as they relate to completely different causes of action.

5. The Application was canvassed via written submissions and on July 8, 2021, the trial Court delivered a ruling in favour of the Defendants/Applicants and stated as follows;

“In the upshot is that I find the Defendants/Applicants Application to have merit and the same is allowed as prayed.”

6. The Appellant herein was the Plaintiff/Respondent therein was aggrieved by the above determination of the Court in favour of the Respondents herein and has sought to challenge the said Ruling through the Memorandum of Appeal dated July 27, 2021, and sought for orders that this Honourable Court be pleased to;

1. Set aside, vacate, and/or vary the ruling of the lower Court delivered on July 8, 2021, in its entirety, dismiss the Respondents' application dated March 4, 2021 and reinstate the Appellant's suit and Application dated January 25, 2021, for hearing on merits.
2. Award costs of this appeal, and the Respondents' Application dated March 4, 2021 at the lower Court to the Appellant.
3. Grant any other and/or further orders as it may deem just and fit.

7 The grounds of Appeal are;-

1. The Learned Magistrate erred in both Law and fact in making a finding that the Appellant's suit at the lower Court was *res judicata* and for striking the same out with costs.
2. The Learned Magistrate erred in both Law and fact in failing to have regard to evidence tendered by the Appellant that the causes of action in the instant lower Court suit Kandara ELC Case No. 2 of 2021 and Nyeri ELC No. 236 of 2013 were fundamentally different and that therefore the Respondents' case of Res Judicata was not made out.
3. The Learned Magistrate erred in both Law and fact in confining his examination of the *Res Judicata* case pleaded by the Respondents, only to the



similarity of the Subject matter and parties, but failing to address the weighty matter of the causes of action in the two cases and thereby arrived at the wrong decision.

4. The Learned Magistrate erred in both Law and fact in disregarding the Appellant's case that the cause of action that precipitated the lower Court suit arose on or about 13th January 2021, and could not therefore possibly have been litigated in Nyeri ELC Court which was in any event *functus officio* as far as ELC 236 of 2013 was concerned.
5. The Learned Magistrate erred in both Law and fact in failing to find that the Appellant's suit at the lower Court was justified given the illegal conduct of the Respondents that infringed on his proprietary interest to the suit land and precipitated the case at the Lower Court.
8. On May 18, 2022, the Court directed that this Appeal be canvassed by way of written submissions. The Appellant through the Law Firm of Nyambura Njuguna & Co Advocates, filed his written submissions dated June 22, 2022, and relied on a litany of cases and urged this Court to allow the Appeal as prayed. That the cause of action in Nyeri ELC 236 of 2013, was fundamentally different from the cause of action in Kandara ELC 2 of 2021. That there was no cause of action subsisting regarding the specific matters raised in Kandara ELC 2 of 2021, during the pendency of Nyeri ELC 236 of 2013.
9. On the other hand, the Respondents filed their written submissions dated 6th July 2022, through the Law Firm of Kanyi Kiruchi & Co Advocates. It is the Respondents' submissions that the Subject matter and Orders sought in Nyeri 236 of 2013, are substantially similar to the orders sought in Kandara ELC 2 of 2021. That the parties are similar and the causes of action in the two cases arise from the same subject matter. The Respondents urged the Court to dismiss the Appeal with costs.
10. The Court has carefully considered the instant appeal, rival written submissions and the authorities relied on. It has also considered the impugned Ruling and read the trial Court's record. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination by this Court with reasons for such determination as provided by Section 78 of the *Civil Procedure Act*.
11. In other words, a first appeal is by way of retrial and this Court, as the first appellate Court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
12. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

[A]n appeal to this Court from a trial...is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."
13. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge



has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide.

14. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court stated with regard to the duty of the first appellate Court;

This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

15. This Court notes that the instant appeal turns on whether the learned Magistrate exercised his discretion properly in allowing the Defendants/Applicants' Application dated 14th March 2021, filed by the Respondents herein.

16. Before this Court can interfere with such discretion, it must be satisfied that the learned Magistrate misdirected himself in some matter and as a result arrived at a wrong decision or that he misapprehended the law or failed to take into account some relevant matter. Madan, JA (as he then was) captured the principle more succinctly in *United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd* (1985) EA 898 as follows:

"The Court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The Court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

17. Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the rival written submissions, and the Ruling by the trial Court, this Court finds that the issue for determination is whether the Appeal is merited.

i. Whether the instant Appeal is merited.

18. It is trite that a person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. The Black's law Dictionary 10th Edition defines "*res judicata*" as//

"An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

19. 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.”

20. 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.”

21. Further in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, 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.”

22. 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.”

23. 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.
24. Having laid out the basis for the principle of *res judicata*, this Court will now proceed to probe whether *Kandara ELC Case No. 2 of 2021*, is *resjudicata* to *Nyeri ELC 236 of 2013*. In carrying out the said



probe, this Court will identify and critically analyse the pleadings filed in both suits to identify the parties, the subject matter, the reliefs sought, the issues for determination therein, and if the same are similar in both suits. Further this Court will seek to find out if Judgment on the identified issues has been delivered by a Court of competent jurisdiction, and if the same issues are the subject of litigation in the instant suit.

25. Firstly, it is not in dispute that a Court of competent jurisdiction has already substantively heard and determined Nyeri ELC Case No. 236 of 2013, and Judgment for the same was delivered on November 10, 2016. With regard to the subject matter it is not in dispute that the parcel of land No. LOC 4/NAARO/1557, was the suit land in Nyeri ELC 236 of 2013, and it is still the suit land in Kandara ELC Case No. 2 of 2021.
26. It is also not in dispute that the Appellant herein was the Plaintiff in Kandara ELC Case No. 2 of 2021 and also in Nyeri ELC 236 of 2013. Further the Respondents herein are Defendants in Kandara ELC Case No. 2 of 2021. However, a perusal of the pleadings in Nyeri ELC 236 of 2013, reveals that the 1st Defendant in Kandara ELC Case No. 2 of 2021, is the only Defendant therein. Even so the inclusion of the 2nd Respondent herein in Kandara ELC Case No. 2 of 2021, is not enough reason to reach a conclusion on Res judicata.
27. Unless it is established that the facts founding the inclusion of the 2nd Defendant in the Kandara ELC Case No. 2 of 2021, are substantially and directly similar to the facts and issues in Nyeri ELC 236 of 2013.
28. To determine whether the facts and issues in Kandara ELC Case No. 2 of 2021, and in Nyeri ELC 236 of 2013, are substantially and directly similar, this Court will peruse the pleadings and prayers sought in both suits and draw a conclusion therefrom.
29. A perusal of the Plaintiff filed in Nyeri ELC 236 of 2013, is indicative of the fact that the Appellant herein filed the said suit to assert his reversionary interests over the suit land being LOC 4/NAARO/1557. The Plaintiff averred that he was apprehensive that the Defendant therein had colluded with the District Land Registrar and procured registration of the suit land in her name contrary to the Confirmed Grant issued in Thika Succession 431 of 2009. That he was apprehensive that the Defendant therein was in the process of selling the suit land in total disregard of the said Confirmed Grant and his duly acquired reversionary interest in the suit land.
30. The Appellant herein in the said suit sought for orders against the 1st Respondent herein as follows;
 - a. A permanent injunction to restrain the Defendant either by herself, her servants, agents from disposing, selling, transferring, or in any other manner howsoever from disposing off land parcel LOC 4/NAARO/1557, whose reversion rests with the Plaintiff.**
 - b. An order that an inhibition be registered over LOC 4/NAARO/1557, preventing the Defendant from conducting any dealings on the land to the detriment of the Plaintiff's reversionary interests thereon and the same be served upon the District Land Registrar Murang'a for compliance.**
 - c. Costs of the suit of the suit together with interest thereon at such rate and for such period of time as the Honourable Court may deem fit to grant.
31. The suit was substantively heard and on November 10, 2016, the Honourable Judge delivered a Judgment in favour of the Plaintiff and issued the following orders;



- a. That a permanent injunction be and is hereby issued restraining the Defendant either by herself, her servants, agents from disposing, selling, transferring, or in any other manner howsoever from disposing off land parcel LOC 4/NAARO/1557 whose reversion rests with the Plaintiff.
 - b. That an order of inhibition be and is hereby issued preventing the Defendant from conducting any dealings on the said land to the detriment of the Plaintiff's reversionary interests.
 - c. That an order be and is hereby issued compelling the Defendant to effect registration of land parcel LOC 4/NAARO/1557, in accordance with the Judgment in Thika Succession Cause 431 of 2009.
 - d. That each party do bear its own costs.
32. With this Judgment in mind and at hand, the Appellant herein proceeded to file another suit more specifically being Kandara ELC Case No. 2 of 2021, where he sought orders against the 1st and 2nd Respondents herein jointly and severally as follows;
- a. A permanent injunction restraining the 1st Defendant from conducting any dealings with, permitting any trespass onto and/ authorizing any activities on the suit land LOC 4/ NAARO/1557 to the detriment of the Plaintiff's reversionary interest thereon.
 - b. A permanent injunction restraining the 2nd Defendant from trespassing onto, further depositing building materials on and/or putting up any construction and/or in any other manner whatsoever dealing with the suit land LOC 4/NAARO/1557, as to interfere with the Plaintiff's reversionary interest thereon
 - c. A mandatory injunction directed at the 2nd Defendant to remove building materials deposited on the suit land at his own cost
 - d. Costs of the suit and interests thereon
 - e. Any other relief as the honourable Court shall deem just and fit to grant
33. It is this suit that prompted the Application dated 4th March 2021, and subsequent Ruling of 8th July 2021, upon which the instant appeal emanates from. A perusal of the Plaint in Kandara ELC Case No. 2 of 2021, indicates that the Appellant herein filed the suit against the 1st and 2nd Respondents herein. It is the averment of the Plaintiff that on or about January 13, 2021, a lorry of stones was deposited on the suit land in apparent preparation for construction. That at a meeting convened by the Chief on January 18, 2021, the 1st Respondent herein confirmed that she had consented and given authority to the 2nd Defendant(Respondent) to put up his permanent dwelling home on the suit land. The Plaintiff avers further that the actions of the 1st Defendant (Respondent herein) were in total disregard of his reversionary interest over the suit land and as a result the 2nd Defendant(Respondent) was a trespasser.
34. It appears therefore that the Plaintiff instituted Kandara ELC Case No. 2 of 2021, to restrain the 1st Defendant from conducting any or authorizing any dealings on the suit land that would interfere with the reversionary rights of the Plaintiff (Appellant herein) and to discontinue the 2nd Defendant(Respondent), who had no interest in the land, from constructing a house on the said land.
35. Based on the above analysis, it is clear that in both Nyeri ELC 236 of 2013, and Kandara ELC Case No. 2 of 2021, the Appellant herein sought a permanent injunction against the 1st Respondent herein from dealing with the suit land in any manner to the detriment of his Reversionary interest acquired via transmission.



36. Having analysed the pleadings and the Court record in Nyeri ELC 236 of 2013, and Kandara ELC Case No. 2 of 2021, this Court is of the view that the issues for determination in both suits was/ is the interference of the Plaintiff's/Appellant's reversionary rights over the suit land and protection of the same from interference by the 1st Respondent or any other party with the authority of the 1st Defendant. The Court notes further that this issue was conclusively dealt with in Nyeri ELC No. 236 of 2013, wherein the Court issued orders as enumerated hereinabove.
37. In addition, the Court notes that the 2nd Respondent was not a party to the proceedings in Nyeri ELC No. 236 of 2013. However, that fact is not enough reason to warrant this Court to revisit the issue of injunction as prayed in Kandara ELC Case No. 2 of 2021. In any case, the Appellant did not at the trial Court produce any cogent evidence save for photographs, which this Court cannot verify, to show that the 2nd Respondent herein had in any manner interfered with his reversionary interests over the suit land.
38. It is trite law that Court Orders are not issued in vain and the law is categorical on the available remedies for non-compliance. This Court appreciates that the Orders of the Court in Nyeri ELC 236 of 2013, were in favour of the Appellant herein. The Appellant has the option of moving the said Court appropriately where such orders have not been complied with, or have been disregarded instead of filing multiple suits. Indeed, the Appellant should have sought to enforce the Decree of the Court in Nyeri ELC No. 236 of 2013, instead of filing a new suit.
39. To this end, this Court finds and holds that Kandara ELC Case No. 2 of 2021, is *Res judicata* to Nyeri ELC 236 of 2013. The upshot of the foregoing is that the Appellant's Appeal is found not merited and consequently the said Appeal is dismissed entirely with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 22ND DAY OF SEPTEMBER, 2022

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Mrs Magwa for the Appellant

Ms Muchemi H/B for Mr Kanyi Kiruchi for the 1st & 2nd Respondents

L. GACHERU

JUDGE

22/9/2022

