



**Ng'ati Farmers Co-operative Society v Attorney General & 7 others; Wachira & 126 others (Interested Party) (Environment and Land Judicial Review Case E004 of 2021) [2022] KEELC 4776 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4776 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2021  
FM NJOROGE, J  
SEPTEMBER 20, 2022**

**BETWEEN**

**NG'ATI FARMERS CO-OPERATIVE SOCIETY ..... APPLICANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**KENYA ELECTRICITY GENERATING COMPANY PLC ..... 2<sup>ND</sup> RESPONDENT**

**COUNTY COMMISSIONER NAKURU COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR NAIVASHA ..... 4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF CRIMINAL INVESTIGATION ..... 5<sup>TH</sup> RESPONDENT**

**COMMISSIONER OF CO-OPERATIVES ..... 6<sup>TH</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 7<sup>TH</sup> RESPONDENT**

**COUNTY GOVERNMENT OF NAKURU ..... 8<sup>TH</sup> RESPONDENT**

**AND**

**NDIRANGU WACHIRA & 126 OTHERS ..... INTERESTED PARTY**

**RULING**

1. This is a ruling with respect to the 2<sup>nd</sup> respondent's Notice of Preliminary Objection as set out in its Grounds of Opposition dated March 4, 2022 as follows:
  - a. That the application is frivolous, incompetent and bad in law.



- b. That no, or no adequate, evidence has been provided to show that leave to launch proceedings was granted.
  - c. That the application is *res judicata* as disclosed by a decree dated October 28, 2020, whereat the applicant's case was dismissed, in Ng'ati Farmers Cooperative Society and Another vs Kenya Electricity Transmission Company Limited and Others ELC Case Number 76 of 2016.
  - d. That consequent upon grounds 1, 2 and 3 above, by a preliminary objection, notice of which is hereby given, the judicial review Application be struck out, or dismissed with costs.
  - e. That in any event, the application is an abuse of court process.
  - f. As contained in the replying affidavit, lodged herewith.
  - g. Such further, or other grounds, as, by the leave of court may be argued.
2. The preliminary objection was canvassed by way of written submissions.
  3. The 2<sup>nd</sup> respondent filed its submissions dated June 21, 2022 on the same day. It submitted on whether the suit is *res judicata*. The 2<sup>nd</sup> respondent relied on section 7 of the [Civil Procedure Act](#) 2010 and submitted that 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.
  4. It also relied on the case of [Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others](#) [2017] eKLR and submitted that the suit herein is Res Judicata as the facts and issues raised in the suit are indistinguishable to the facts and issues in ELC CASE No. 76 of 2016.
  5. It further relied on the case of [E T vs Attorney General & Another](#) [2012] eKLR and submitted that the ex parte applicant is seeking to re-open issues that were raised or ought to have been raised in the earlier proceedings.
  6. No other party filed their submissions.

### **Analysis and determination**

7. Upon perusal of the grounds of opposition and the submissions, the only preliminary issue that arises for determination is whether the present suit is *res judicata*.
8. Section 7 of the [Civil Procedure Act](#) (Cap 21) 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.
9. This principle of *res judicata* was explained in the case of *North West Water Ltd V Binnie & Partners* [1990] 3 ALL E R 547 where the court stated as follows:

“Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between different parties arising out of identical facts and dependent on the same evidence since, not only was the party seeking to



re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, for the issue to be re-litigated.”

10. The 2<sup>nd</sup> respondent has to therefore demonstrate that the matter in issue is identical in both suits, that the parties in both suits are the same, that there is concurrence of jurisdiction of the court, that the subject matter is the same and that there is a final determination as far as the previous decision is concerned.
11. The 2<sup>nd</sup> respondent alleges that the application is *res judicata* as the issues raised in this application were substantially the same as those raised in ELC Case no 76 of 2016. In support of this argument, the 2<sup>nd</sup> respondent has annexed a copy of an order issued in ELC case no 76 of 2016 between Ngati Farmers Co-operatives Society & Another vs. Kenya Electricity Transmission Company Limited & 9 others issued October 28, 2020. The said order dismissed the suit for want of prosecution. The objector submits that parties can not evade the doctrine of *res judicata* by merely altering the sequence of the parties.
12. Section 7 of the [Civil Procedure Act](#) provides that the principle of *res judicata* shall apply where the issues in the previous suit have been heard and finally determined.
13. The court in the case of *Tee Gee Electrics and Plastics Company Ltd vs Kenya Industrial Estates Limited* [2005] KLR 97 stated as follows:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.
14. It is my view therefore that a suit that has been dismissed for want of prosecution is not the same as a suit that has been heard and determined on its merits.
15. I have examined the order issued on October 28, 2020 ELC case no 76 of 2016 -Ngati Farmers Co-operatives Society & Another vs Kenya Electricity Transmission Company Limited & 9 others. The most critical part thereof states as follows:

“2. That the plaintiff/respondent suit herein be dismissed for want of prosecution.”
16. The suit ELC Case no 76 of 2016 - Ngati Farmers Co-operatives Society & Another vs Kenya Electricity Transmission Company Limited & 9 others was therefore not heard on its merits. In the circumstances of this case, the 2<sup>nd</sup> respondent’s preliminary objection dated March 4, 2022 therefore lacks merit and it is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2022.**



**MWANGI NJOROGE**  
**JUDGE, ELC, NAKURU**

