



**Mwakeo & 480 others v Mohamed & another (Environment & Land Case 300 of 2013) [2022] KEELC 13811 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13811 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 300 OF 2013  
NA MATHEKA, J  
OCTOBER 25, 2022**

**BETWEEN**

**SAID MATANO MWAKEO & 480 OTHERS ..... PLAINTIFF**

**AND**

**ALI SAID MOHAMED ..... 1<sup>ST</sup> DEFENDANT**

**SOUD SAID MOHAMED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The defendant/ respondent raised a preliminary objection to the plaintiff/ applicant's originating summons dated December 19, 2013 on the grounds of the provisions of the law under section 7 of the Civil Procedure Act cap 21.
2. The plaintiffs filed the originating summons herein dated December 19, 2013 seeking order of proprietorship of the property known as plot No 1/11/ MN CR No 1135 by way of adverse possession. The defendants filed a defence and counter claim dated February 8, 2016 opposing the plaintiffs' claim and also stated that, there is another case No HCCC No 375 of 2010 which is in respect of the same subject matter; i.e. plot No 1/11/ MN CR 1135 and same parties. The plaintiffs in this later case were also seeking adverse possession of the same subject matter.
3. On January 28, 2019, the High Court Honourable Justice C Yano, after hearing the HCCC No 375 of 2010, dismissed the plaintiffs' claim for adverse possession and allowed the defendants' counter claim and ordered the plaintiff to vacate the suit property within 60 days failure of which an order of eviction to issue against the plaintiffs.
4. The respondents submitted that the doctrine of *res judicata* does not stop any person from bringing a genuine claim such as the present one. That the plaintiffs' claim is not akin or recalled to the previous matter. That the current case involves two different claimants seeking different remedies and not any matter already decided by any court of competent jurisdiction.



5. 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.”

6. 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.”

7. 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 ER 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.”

8. 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.

9. In that respect, the Court of Appeal held in the case of the [Independent Electoral and Boundaries Commission vs 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.”

10. The defendants submitted that on January 28, 2019, the High Court Honourable Justice C Yano, after hearing the HCCC No 375 of 2010, dismissed the plaintiffs' claim for adverse possession and allowed the defendants' counter claim and order the plaintiff to vacate the suit property within 60 days failure of which an order of eviction to issue against the plaintiffs. That case No HCCC No 375 of 2010 was in respect of the same subject matter; ie plot No 1/11/ MN CR 1135 and had the same parties.

11. 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. In my view, by filing this suit, the plaintiffs are trying to litigate a concluded matter. 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.”

12. I find that this suit is *res judicata* and an abuse of the court process. The application has merit and the preliminary objection is upheld. I therefore strike out the plaintiffs' case with costs to the defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF OCTOBER 2022.**

**N.A. MATHEKA**

**JUDGE**

