



REPUBLIC OF KENYA



**KENYA LAW**  
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**Yiamat & 4 others v Lenjir & 6 others; Duma Camp Maasai Limited  
(Interested Party) (Environment & Land Case E005 of 2022)  
[2022] KEELC 15058 (KLR) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15058 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E005 OF 2022  
CG MBOGO, J  
NOVEMBER 25, 2022**

**BETWEEN**

**JOHN LEPERES OLE YIAMAT ..... 1<sup>ST</sup> PLAINTIFF  
MARTINE OLE LEPERES ..... 2<sup>ND</sup> PLAINTIFF  
MELIYIO NOOSARON ..... 3<sup>RD</sup> PLAINTIFF  
PETER OLE NASI ..... 4<sup>TH</sup> PLAINTIFF  
KAIURRI OLE SITANY ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**DANCUN OLE LENJIR ..... 1<sup>ST</sup> DEFENDANT  
DAVID SOPIA ..... 2<sup>ND</sup> DEFENDANT  
NAIBUSORI KETUYO ..... 3<sup>RD</sup> DEFENDANT  
KENANDA SOPIA ..... 4<sup>TH</sup> DEFENDANT  
MOSES NOOSARON ..... 5<sup>TH</sup> DEFENDANT  
LEKAKENY SUKULI ..... 6<sup>TH</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, NAROK ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**DUMA CAMP MAASAI LIMITED ..... INTERESTED PARTY**



## RULING

1. Before this court for determination is a notice of motion application dated 14<sup>th</sup> July, 2022 and filed by the 2<sup>nd</sup>-6<sup>th</sup> defendants. It is expressed to be brought under Sections 7, 1A & 3A of the [Civil Procedure Act](#) and Order 2 Rule 15 (b), (c) of the [Civil Procedure Rules](#) seeking the following orders: -
  1. That the entire suit herein and the plaint be struck out with costs.
  2. That costs of the application be borne by the plaintiffs.
3. The application is premised on the grounds inter alia that the suit is res judicata by reason of the previous suit in Narok PMCC No. 20 of 2011 on the same subject matter which was dismissed on 31<sup>st</sup> October, 2011 and a decree issued.
4. The application is supported by the affidavit of Kenanda Sophia, the 4<sup>th</sup> defendant herein which was sworn on even date. The 4<sup>th</sup> defendant deposed that in the previous suit the parties were litigating under the same two titles being Cis Mara/Koyiaki/Dagurugurueti/121 and 122 wherein the plaintiffs were similar in the previous suit and sought declaratory orders of proprietary interest in the two properties under trust. He further deposed that the plaintiffs had similar averments, and that the primary proprietary interest in both suits is ownership under trust.
5. The 4<sup>th</sup> defendant further deposed that the prayers sought in the plaint for declaration of ownership by trust and beneficial ownership were similar and related in the previous suit and that the additional two parties in the suit does not change the holistic similarity of the same by way of slight panel beating and clever adjustment of the pleadings herein which is res judicata and abuse of the court process.
6. The application was opposed by the replying affidavit of the 1<sup>st</sup> plaintiff filed on 11<sup>th</sup> October, 2022. The 1<sup>st</sup> plaintiff deposed that the suit in the subordinate court was dismissed for non-attendance on the part of the plaintiffs and their advocates on record and at the time of filing the suit, the 2<sup>nd</sup>-6<sup>th</sup> defendants had not put up the subject properties for sale to the 1<sup>st</sup> defendant and therefore the sale was not litigated before the subordinate court and neither was it placed before the court then. The 1<sup>st</sup> plaintiff further deposed that the cause of action is premised on a totally different action and should not be confused with the cause of action that was before the subordinate court and as such the application is orchestrated to sanction the intended sale of the subject properties. Further, that the 2<sup>nd</sup>-6<sup>th</sup> defendants do not dispute their intention to dispose off the property which constitutes a fresh cause of action that has never been ventilated before any court.
7. The 1<sup>st</sup> plaintiff further deposed that as can be discerned from the documents filed, the only similarity is the history of proprietorship of the subject property which does not constitute the present cause of action.
8. Both parties disposed off the application by way of written submissions. The 2<sup>nd</sup>-6<sup>th</sup> defendants filed written submissions dated 5<sup>th</sup> October, 2022. The 2<sup>nd</sup>-6<sup>th</sup> defendants submitted that a party cannot evade the plea of res judicata by introducing new causes of action so as to seek the same remedies before the court. The 2<sup>nd</sup>-6<sup>th</sup> defendants relied on the cases of [Estate of Mungiria Runguchi](#) [2022] eKLR, [Independent Electoral & Boundaries Commission versus Maina Kiai](#) [2017] eKLR and [Diocese of Eldoret Trustees \(Registered\) versus Attorney General](#) [2020] eKLR and urged this court to consider that litigants will not be allowed to bring suits as new litigants or add others to circumvent the doctrine of res judicata.



9. The plaintiffs filed written submissions dated 18<sup>th</sup> October, 2022. The plaintiffs raised one issue for determination which is whether the suit is res judicata. The plaintiffs submitted that the essential condition for the applicability of res judicata is that the succeeding suit of proceedings is founded on the same cause of action which the former suit was founded and this is not the case as the defendants claim. They further submitted that there are new developments that had not arisen at the time they lodged the previous suit which action has only been undertaken in the year 2022 and which issue has never been determined by any court of law.
10. The plaintiffs further submitted that he who alleges must prove and, in this cases, the 2<sup>nd</sup>-6<sup>th</sup> defendants have not presented before this court the pleadings that were lodged before the subordinate court. The plaintiffs relied on the case of *Gladys Ndungu Nthuki versus Letsbego Kenya Limited; Mueni Charles Maingi (intended plaintiff)* [2022]eKLR, *Siri Ram Kaura versus MJE Morgan* Civil Application No. 71 of 1960 [1961]EA 462, *C. K Bett Traders & 2 Others versus Kennedy Mwangi & Another* [2021]eKLR and *Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others* [2017]eKLR and they urged this court to consider that res judicata cannot suffice in the manner at hand as the defendants have not proved that.
11. The plaintiffs further submitted that the plaintiffs were condemned unheard in the previous suit and new happenings have developed after the dismissal of the suit in the year 2012 and it would be a miscarriage of justice and great prejudice if they would be turned away unheard another time despite the fact that this honourable court is possessed with the requisite jurisdiction to hear and determine the suit before it.
12. I have carefully considered and analysed the application, replying affidavit, written submissions and authorities cited by both parties and the issue for determination is whether the instant suit is res judicata.
13. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
14. A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. I place reliance in the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR where the Supreme Court stated: -  
"The doctrine will apply only if it is proved that:
  - i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.
  - iii. That those parties were litigating under the same title.
  - iv. That the issue in question was heard and finally determined in the former suit.
  - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit."
15. In determining whether the application is res judicata, I have perused the pleadings in Civil Suit No. 20 of 2011 filed by the plaintiffs against the defendants save for the fact that there is an addition in the instant suit. In the suit filed at the subordinate court, the cause of action relates to fraud and misrepresentation whereas in the instant suit, the plaintiffs' cause of action is that the defendants have



now sold the suit property to the 1<sup>st</sup> defendant (an additional new party) and now seek injunctive orders. Generally, the prayers sought in both suits are similar save for the cause of action.

16. Notably, is the fact that in the subordinate court, the suit was first dismissed for non-attendance on 31<sup>st</sup> October, 2012. The plaintiffs made attempts to reinstate the suit later through an application dated 18<sup>th</sup> November, 2021. The same was dismissed vide a ruling dated 11<sup>th</sup> April, 2022.
17. It is my humble view that the main suit in the subordinate court was not heard and determined on merits through a full trial. I will not seek to further divulge in details on the circumstances of the dismissal on want of prosecution.
18. I will place reliance in the case of *Republic v Ministry of Roads & Another Ex-Parte Vipingo Ridge Limited & another* [2015] eKLR the court held that for an order to operate as res judicata, “it must be shown to have been a determination of an aspect of the controversy before the court” (emphasis mine).
19. This court finds that the plaint dated 10<sup>th</sup> February, 2011 was not heard and determined, and this is one of the prerequisite for invocation of the doctrine of res-judicata. This court is also hereby guided by the case of, *Suleiman Said Shabbal vs Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR which held thus, “To constitute res-judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
20. Arising from the above, I find that the notice of motion application dated 14<sup>th</sup> July, 2022 lacks merit and the same is dismissed. Costs to be in the cause. Further mention on 13<sup>th</sup> December, 2022. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON 25<sup>TH</sup> NOVEMBER, 2022.**

**MBOGO C.G.**

**JUDGE**

**25/11/2022.**

**In the presence of: -**

CA: Timothy Chuma

