



**Kamau v Kinyanjui & 23 others (Environment & Land Case  
234 of 2017) [2022] KEELC 15018 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15018 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 234 OF 2017**

**BM EBOSO, J  
NOVEMBER 23, 2022**

**BETWEEN**

**BERNARD GACHIE KAMAU ..... PLAINTIFF**

**AND**

**LIVINGSTONE WANYOIKE KINYANJUI & 23 OTHERS ..... DEFENDANT**

**RULING**

1. What falls for determination in this ruling is a notice of motion dated April 19, 2022, brought by the 2nd – 17th defendants. The motion seeks an order striking out this suit on the ground that the suit is *res judicata*. The seventeen defendants/applicants contend that the key issue in this suit was determined through a Judgment rendered by the Thika Chief Magistrate Court on December 10, 2018 in Thika CMC Civil Case No 879 of 2010. The plaintiff/ respondent does not agree with that view. Consequently, the single question to be answered in this ruling is whether this suit offends the doctrine of *res judicata* and is therefore unsustainable. Put differently, the question to be answered in this ruling is whether, under the doctrine of *res judicata*, this court has been divested of jurisdiction to entertain this suit. Before I answer the above question, I will outline a brief background leading to the application. For clarity, reference to the “plaintiff” means Bernard Gachie Kamau and reference to “defendants” means Livingstone Wanyoike Kinyanjui and the 23 other defendants in this suit or the 2nd to 17th defendants in this suit.
2. In the year 2010, the 2nd – 17th defendants (the applicants) in this suit instituted Thika CMC Civil Case No 879 of 2010 against the plaintiff. They contended in the said suit that they were the bonafide proprietors of the following parcels of land: Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243 and 6244 [the suit properties]. It was their case that they were the proprietors of the suit properties, having purchased them from the then registered proprietor and having paid valuable consideration for the properties. They contended that on or about August 10,



2010, the plaintiff invaded their properties and removed the demarcation beacons. They sought the following verbatim reliefs from the Chief Magistrate Court against the plaintiff:

- a. A declaration that the plaintiffs are the legally registered owners of the suit properties being Land Parcel No Ruiru/Kiu Block 2/3758 and as subdivided into Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243 and 6244 respectively.
  - b. A permanent injunction order restraining the defendant, his servants, agents and/or any persons claiming under him from interfering in any manner whatsoever with the plaintiffs' title and possession of all that parcel of land known as Land Parcel No. Ruiru/Kiu Block 2/3758 and as subdivided into Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243 and 6244.
  - c. Costs and interest of this suit.
  - d. Any other or such further relief as this honourable court may deem fit and just to grant.
3. Upon being served with the court papers relating to the above suit in the Chief Magistrate Court, the plaintiff filed a defence and counterclaim dated December 2, 2010. The defence and counterclaim were amended on October 13, 2014. The case of the plaintiff was that the titles held by the defendants were obtained fraudulently, through misrepresentation and through falsified documents. The plaintiff contended that he was the lawful proprietor of parcel numbers Ruiru/Kiu Block 2/6218 to 6244 which were subdivisions out of land parcel number Ruiru/Kiu Block 2/3758. By way of counterclaim, the plaintiff sought the following verbatim reliefs against the defendants in the said suit in the Chief Magistrate Court:
- a. A declaration that the suit premises being Land Parcel No. Ruiru/Kiu Block 2/3758 and as subdivided into Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243 and 6244 (the suit premises) is owned *bona fide* by the defendant herein.
  - b. An order that the title documents (title deeds) issued to the 1st plaintiff, in respect of the suit premises being Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243, 6244 (the suit premises) to the 2nd and 17th defendants be and is hereby cancelled by a decree of this honourable court (sic).
  - c. General damages
  - d. Costs of this suit and the counterclaim.
4. While the above suit was still pending in the Chief Magistrate Court, in the year 2016, the plaintiff instituted Milimani ELC Case No 1539 of 2016 against the 24 defendants in the present suit. His case in the new suit at Milimani Environment and Land Court was that he was the lawful proprietor of land parcel number Ruiru/Kiu Block 2/3758 which had been subdivided into title numbers Ruiru/Kiu Block 2/6218 to 6244. He contended that the titles issued in relation to land parcel number Ruiru/Kiu Block 2/3758 and the titles relating to the above subdivisions were procured fraudulently because the suit property belonged to him. He sought the following verbatim reliefs in Milimani ELC Case No 1539 of 2016 against the 24 defendants:
- a. A declaration that Land Parcel No Ruiru/Kiu Block 2/3758 as formerly registered belongs to the plaintiff.



- b. An order directing the 22nd defendant to cancel title deeds No. Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243 and 6244 and rectification of the land register to insert the name of the plaintiff as registered proprietor of the suit properties.
  - c. Damages for trespass, loss of use and opportunity.
  - d. Costs of the suit.
5. The 2nd to the 17th defendants in Milimani ELC Case No 1539 of 2016 were parties who were plaintiffs in Thika CMC Civil Case No 879 of 2010.
6. The 1st, 18th and 24th defendants filed a statement of defence and counterclaim dated February 2, 2017. They contested the plaintiff's claim. They added that because there subsisted Thika Chief Magistrate Court Civil Case No 879 of 2010 relating to the same subject matter, the new suit at Milimani ELC Case No 1539 of 2016 offended Section 6 of the *Civil Procedure Act* (sic) and the same needed to be stayed. They added that the suit was an abuse of the process of the court. Through their counterclaim, they contended that the eighteenth defendant was the bonafide owner of Land Parcel No Ruiru/Kiu Block 2/3758 vide Ballot No 1680 and Share Certificate No 0622 issued to him by the 20th defendant. They added that the 18th defendant lawfully sold the said parcel of land to the 1st defendant in the year 2004, for valuable consideration. They added that in the year 2009, the first defendant lawfully subdivided the said land into Ruiru/Kiu Block 2/6218 to 6244 and sold the resultant subdivisions to the 2nd to the 17th defendants who were holding bonafide titles. They alleged that the plaintiff had conspired with other persons with the intention of illegally taking away the land from the lawful proprietors.
7. Through the counter claim, they sought the following verbatim reliefs against the plaintiff:
  - a. A declaration that the first defendant is the bonafide registered proprietor of land parcel no Ruiru/Kiu/Block 2/3758.
  - b. A declaration that the 1st to 17th defendants are the bonafide proprietors of resultant subplots numbers Ruiru/Kiu/Block 2/6218 to 6244.
  - c. A permanent injunction do issue against the plaintiff restraining him from interfering with parcel number Ruiru/Kiu Block 2/3758 and the resultant sub-plot numbers Ruiru/Kiu Block 2 /6218 to 6244.
  - d. Costs of the counter claim (sic).
  - e. Any other relief the court may deem fit and just to grant.
8. On February 27, 2017, the Environment and Land Court at Milimani [Eboso JJ] transferred Milimani ELC Case No 1539 of 2016 to Thika Environment and Land Court. The said suit was subsequently registered at Thika Environment and Land Court as Thika ELC Case No 234 of 2017 [the present suit].
9. In September 2017, the 2nd to the 17th defendants brought a notice of motion dated August 1, 2017, seeking an order staying proceedings in this suit, pending the hearing and final determination of Thika CMC Civil Case No 879 of 2010. The said applicants contended that the subject matter in the two suits and the issues that fell for determination in the two suits were similar. The application was opposed by the plaintiff. Upon hearing the application, this Court [Gacheru JJ] agreed with the



applicants and stayed this suit through a ruling rendered on June 19, 2018. The Learned Judge rendered herself thus:

“Therefore this court has discretion to stay such proceedings and the said discretion is provided for by the law. There is indeed existence of parallel proceedings over Ruiru/Kiu Block 2/3758. The court has discretion to stay such proceedings. The plaintiff has averred that instead of staying the proceedings, the court should order for consolidation of the two suits. However, it should be noted that CMCC No 879 of 2010 is an old matter which has been on-going. Ordering for consolidation of the same would prejudice CMCC 879 of 2010 as it is now at an advanced stage. By ordering a consolidation, then there will be delay in finalization of CMCC No 879 of 2010 and that would go against the spirit of Section 1A and 1B of the Civil Procedure Act. The court finds that the necessary order to be issued herein is to find that the issues raised by the plaintiff herein can be adequately delt in CMCC No 879 of 2010 and there would be no need of consolidating the two suits.” [emphasis is mine]

10. Consequently, no proceedings were taken in this suit between June 20, 2018 and January 17, 2022. During the said period, the primary suit and the counter-claim in Thika CMC Civil Case No 879 of 2010 was fully heard and determined by the Thika Chief Magistrate Court. Through a Judgment rendered in the Chief Magistrate Court by Hon A M Maina (SPM), the following verbatim decree was issued:
  1. That this court issues a declaration that the plaintiffs are legally registered owners of the suit properties being Land Parcel No. Ruiru/Kiu Block 2/3758 and as subdivided into Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243 and 6244 respectively.
  2. That this court issues a permanent injunction order restraining the defendant, his servant, agents and/or any persons claiming under him from interfering in any manner whatsoever with the plaintiffs’ titles and possession of all that parcel of land No Ruiru/Kiu Block 2/3758; and as subdivided into Ruiru/Kiu Block 2/6218; 6219, 6220, 6221, 6222, 6223, 6224, 6225, 6226, 6227, 6228, 6229, 6230, 6231, 6232, 6233, 6234, 6235, 6236, 6237, 6238, 6239, 6240, 6241, 6242, 6243, and 6244 respectively
  3. Costs and interest of this suit.
11. Subsequent to that, the defendant in Thika CMC Civil Case No 879 of 2010, who is now the plaintiff in the present suit, filed an application inviting the Magistrate Court to review its Judgment in Thika CMC Civil Case No 879 of 2010. Through a ruling rendered on October 15, 2019, the Trial Magistrate dismissed the application for lack of merit.
12. Aggrieved by the ruling of the Trial Magistrate dismissing his application for review of the Judgment, the defendant in Thika CMC Civil Case No 879 of 2010 [the plaintiff in the present suit] lodged an appeal in this Court, to wit, Thika ELC Appeal No 65 of 2019. This Court [Gacheru J] heard the appeal and determined it through a Judgment rendered on September 30, 2021. This Court dismissed the appeal for lack of merit. It does emerge from the record of this court that upon dismissal of the appeal, the plaintiff in this suit lodged a second appeal to the Court of Appeal. It is, however, not clear whether or not the Court of Appeal has disposed the said second appeal.
13. Subsequent to this court’s disposal of the plaintiff’s appeal, on January 18, 2022, a representative of the plaintiff took a mention date in this file for the purpose of procuring directions on further proceedings



in this suit. What followed was the application under consideration, through which the applicants seek an order striking out this suit on the ground that it offends the doctrine of *res judicata*.

14. The application was supported by an affidavit sworn on April 19, 2022 by Stephen Mwanza Gachie and a further affidavit sworn by the same deponent on July 15, 2022. It was canvassed through written submissions dated July 15, 2022 filed by Gachie Mwanza & Company Advocates. The plaintiff opposed the application through his replying affidavit sworn on June 1, 2022 and written submissions dated September 23, 2022, filed by SIM Advocates LLP. The plaintiff contends in his replying affidavit that the claim in this suit is materially different from the claims in Thika CMC No 879 of 2010. It is his case that Thika CMC Civil Case No 879 of 2010 “concerned an action for trespass to land”. He further contends that the present suit has several parties who are crucial to the resolution of the dispute whereas had only some of the parties. He specifically contends Thika CMC Civil Case No 879 of 2010 that the Land Registrar and Githunguri Constituency Ranching Company Limited were not parties to Thika CMC Civil Case No 879 of 2010. He urges the court to dismiss the application.
15. I have considered the application, the response to the application, the pleadings and the relevant records relating to the two suits; the parties’ respective submissions on the application; the relevant legal frameworks and the relevant jurisprudence on the key issue in the application. (the record relating to Thika CMC Civil Case No 879 of 2010 is contained in the Record of Appeal relating to Thika ELC Appeal No 65 of 2019). As observed in the opening paragraph of this ruling, the key question to be answered in this ruling is whether this suit is offends the doctrine of *res judicata*.
16. The doctrine of *res judicata* has been codified through statutory enactment under Section 7 of the [Civil Procedure Act](#) which 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.”
17. The rationale of the doctrine of *res judicata* was outlined by the Court of Appeal in [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR as follows:

“The rule or doctrine of *res judicata* serves the statutory 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 common-sensical 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 and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”
18. The Court of Appeal in [Kenya Commercial Bank Limited v Benjob Amalgamated Limited](#) [2017] eKLR reiterated that the elements of *res judicata* are conjunctive rather than disjunctive. This means that for a suit to be deemed as *res judicata* on account of a former suit the following five elements must be established.
  - a. The suit or issue was directly or 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 hear and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.
19. The key issue in Thika CMC Civil Case No. 879 of 2010 was the validity of title numbers Ruiru/Kiu Block 2/3758 issued to the 18th defendant who sold it to the 1st defendant who in turn subdivided the land into title numbers Ruiru/Kiu Block 2/6218 – 6244 and sold them to the 2nd – 17th defendants. The key issue in the present suit is exactly the same as the key issue in Thika CMC Civil Case No 879 of 2010.
  20. The 2nd to the 17th defendants were the plaintiffs in the primary claim in Thika CMC Civil Case No 879 of 2010. They were the defendants in the counter claim in the said suit. The plaintiff in the present suit was the defendant in the primary claim in Thika CMC Civil Case No 879 of 2010. He was the plaintiff in the counter-claim in Thika CMC Civil Case No 879 of 2010. He counter-claimed against the plaintiffs in the said suit on account of the titles they had acquired from the first defendant in the present suit. The said titles are Ruiru/Kiu Block 2/6218 to 6244. These are the titles that are the subject matter of the present suit. They are subdivision titles out of title number Ruiru/Kiu Block 2/3758. The plaintiff had the opportunity to join the two previous title holders of Ruiru/Kiu Block 2/3758 together with Githunguri Constituency Ranching Company as defendants in the counter- claim but he elected not to do so.
  21. The parties in Thika CMC Civil Case No 879 of 2010 were litigating as proprietors and disputed proprietors of the same land parcel number Ruiru/Kiu Block 2/3758 and the subdivisions surveyed out of the land, namely, parcel numbers Ruiru/Kiu Block 2/6218 to 6244. They are similarly litigating in the same capacities in the present suit.
  22. The key issue in Thika CMC Civil Case No 879 of 2010 was heard and finally determined through a Judgment rendered on 10/12/2018. A subsequent application for review of the Judgment was similarly determined through a ruling rendered on October 15, 2019. An appeal against the said ruling was determined through a Judgment of this Court [Gacheru J] rendered on September 30, 2021.
  23. Lastly, there is no contestation about the fact that Thika Chief Magistrate Court which determined the suit was a competent court for the purpose of trying the key issue.
  24. The totality of the foregoing is that the applicants in the application under consideration have demonstrated that all the elements of *res judicata* do exist in this suit. The result is that under the doctrine of *res judicata*, which is contained in Section 7 of the [Civil Procedure Act](#), this court has no jurisdiction to entertain this dispute or re-adjudicate the dispute as a primary adjudicator.
  25. Consequently, this court is obligated to down its tools in tandem with the principle in [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR by striking out this suit in terms of prayer 1 of the notice of motion dated April 19, 2022. Prayer 1 of the notice of motion is accordingly granted. The plaintiff shall bear costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF NOVEMBER 2022**

**B M EBOSO**



## **JUDGE**

In the Presence of: -

Mr. Simiyu for the Plaintiff

Ms Wanjiku for the 2nd – 17th Defendants

Mr Muthomi for the 1st, 18th and 24th Defendants

Court Assistant: Ms Osodo

