



**Kamau v Gatonye & another (Environment & Land Case
E516 of 2024) [2025] KEELC 4320 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E516 OF 2024**

**JG KEMEI, J
MAY 29, 2025**

BETWEEN

JENNIFER WANGARI KAMAU PLAINTIFF

AND

JOSEPH GATONYE 1ST DEFENDANT

DAVID MUCHIRI GIKONYO 2ND DEFENDANT

RULING

(In respect of the Defendants’ Notice Motion dated the 20/3/25 and the Plaintiff’s Notice of Motion dated 18/3/2025)

1. Vide the Plaintiff’s suit dated the 9/12/24, the Plaintiff avers that she is the registered and lawful proprietor of the property known as Plot Number B-01 Komarock Shopping Centre “B” (suit land) She avers that she has been in continuous and peaceful possession since acquiring ownership. The Plaintiff accuses the Defendants of unlawfully trespassing onto the suit property hence interfering with her proprietary rights causing her anguish and emotional distress. The Plaintiff therefore seeks for orders of: a permanent injunction restraining the Defendants and their agents from entering, trespassing, or in any way interfering with the Plaintiff’s quiet possession and enjoyment of the suit property. The Plaintiff also prays for an eviction order to issue against the Defendants as well as General damages for trespass and emotional distress caused by the Defendants’ unlawful actions.
2. Simultaneously the Plaintiff filed a motion of even date seeking inter alia a permanent injunction restraining the Defendants from trespassing interfering with the suit land; an order directing the defendants to vacate the Plaintiffs land , general damages for trespass and the OCS Kayole Police station to ensure compliance.
3. The application was fixed for hearing interpartes on the 23/1/25 when the motion was dismissed under Order 17 rule 1 for nonattendance and want of prosecution.



4. Undeterred the Plaintiff filed the current application dated the 18/3/25 seeking the following orders;
 - a. pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the Defendants/Respondents, their agents, servants, or any person acting under their instructions, from evicting, trespassing, interfering with, or in any manner whatsoever dealing with the Plaintiff/Applicant's lawful occupation, use, and possession of the suit property known as Plot Number B01, Komarock Shopping Centre "B" pending hearing and determination of the suit.
 - b. That this Honourable Court do issue an order directing the Officer Commanding Station (OCS) Kayole Police Station to ensure that the status quo is maintained and that the Plaintiff/Applicant is not subjected to any eviction, harassment, or interference by the Defendants/Respondents until the matter is heard and determined.
 - c. That this Honourable Court be pleased to grant such further orders as it may deem just and fit in the interest of justice
5. The application is premised on the grounds on the face of it and the supporting affidavit of Jennifer Wangari Kamau where she deponed that she is the lawful owner and occupier of the suit land and has a legal right to the peaceful use occupation and enjoyment of the same. She contended that the defendants have unlawfully and without any justifiable cause threatened to forcefully evict the plaintiff from the premises despite the fact that the matter is still pending in court. she avowed that the Defendants have trespassed on the suit land and continue to harass intimidate and interfere with the Plaintiff's quiet possession hence affecting her livelihood and causing her extreme distress. That the unlawful eviction and interference by the defendants will cause irreparable harm and damage to the plaintiff which cannot be adequately compensated by monetary terms and that it is in the interest of justice that the orders sought be allowed.
6. In response to the application the Defendant filed a motion dated the 20/3/25 seeking orders that the application dated 18/3/25 and the instant suit are resjudicata.
7. The application is premised on the grounds on the face of it and the supporting affidavit of Sarah Namayanja Gatonye , the legal administrator and of the estate of the 1st Defendant. She avowed that the issues raised in this suit were heard and determined in the former suit being Milimani ELC No 579 of 2009 – Joseph Gatonye & David Muchiri Gikonyo Vs Jennifer subject matter was delivered by Justice Bor on 1/10/2019.
8. Vide a replying affidavit sworn on 8/4/2025 the Plaintiff contended that the suit is not resjudicata since the issues raised in the present suit are distinctly new and have not been previously litigated between the same parties. That the judgment delivered in ELC 579 of 2009 does not cover the current cause of action. In addition, she avowed that the Plaintiff's claim arises out of fresh facts acts and or omission that occurred subsequent to the alleged former judgement and therefore in her opinion the doctrine of resjudicata does not apply. That the mere existence of a previous suit or judgment as alleged by the defendants does not automatically bar the present suit which is based on distinct facts and different reliefs as shown in SNG-1 &2. That the plaintiffs case raises a valid cause of action as well as serious triable issues warranting determination on their merits.
9. With respect to the motion dated the 18/3/25, she reiterated her averments that she is the lawful owner of the suit land as showed by the exhibits annexed which include ownership certificates allotment letters site plans, payment receipts establishing lawful claim to plot No B-01. In contrast, she contended that the defendants are the owners of a distinct parcel of land Known as Plot No C9 and have no legal or equitable interest in plot No B-01. She added that the dispute that was previously determined related



exclusively to Plot No C9 and not B-01. That she is facing a threat of eviction and demolition of her structures by the defendants.

10. On the 25/3/25 the court directed that both applications will be heard together and parties consequently elected to canvass the application through written submissions which I have read and considered.

Analysis and determination

11. The key issues for determination are; whether the application and the suit are resjudicata.; whether the application dated the 18/3/25 is merited: who bears the costs of the two applications.
12. Section 7 of the *Civil Procedure Act*, provides for the doctrine of res judicata as a bar for the court to determine a subsequent or similar suit in the following terms;

“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”.

13. To succeed in the plea of res judicata, the following elements must be proved;
 - a. The court that heard the matter must have been competent
 - b. The matter directly and substantially in issue must be the same as that formerly determined.
 - c. The parties must be the same and or litigating under the same titles.
 - d. The matter must have been heard and finally decided.
14. These principles were stated in the case of *The Independent Electoral and Boundaries Commission - vs- Maina Kiai & 5 Others*, [2017] eKLR, where the Court of Appeal held 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.
15. The purpose of the doctrine of res judicata was succinctly expounded in the case of *John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2021) eKLR, para 54 as follows;

“The doctrine of Res judicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further



reliefs not claimed in the earlier actions. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

16. Starting with the application, it is not in dispute that the Plaintiff filed a motion on 9/12/24 seeking more or less similar prayers that is to say temporary/permanent orders restraining the defendants from interfering with the suit land. As earlier alluded, the said application was dismissed on the 23/1/25. On the 18/3/25 the Plaintiff filed a similar application which has now been challenged by the defendants on the grounds of resjudicata.
17. To answer the question whether a dismissal order is a ruling or a judgment for that matter I am guided by the decision of the court in *Njue Ngai v Ephantus Njiru Ngai & Another* (2016) eKLR, where the honourable court of appeal observed as hereunder;

“Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of *Peter Ngome vs Plantex Company Limited* [1983] eKLR stating:-

Rule 4(1) does not say “judgment shall be entered for the defendant or against the plaintiff”. It uses the word “dismissed”. The *Civil Procedure Act* does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2nd ed p 1025:

Judgement is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.”

Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order,” “Judgment – in England, the word judgment is generally used in the same sense as decree in this code”.

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law. A dismissal of a suit, under Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8”.

18. From the above, a dismissal order is a judgment and ruling as the case may be. In the circumstances of this case therefore the instant application is resjudicata in all aspects. It is hereby dismissed.



19. The next area is an analysis of the instant suit vis a vis the suit in ELC 579 OF 2009. I have had occasion to keenly peruse the judgement of the court and of importance are the following passages;

“The 1st Defendant maintained that her plot was Komarock Phase II Shopping Centre B-01 measuring 0.15 hectares. This plot ceased to exist once the land in that area was surveyed and given parcel numbers in Nairobi Block 133. The suit land belonged to the City Council of Nairobi, which allocated it to various persons. The fact that the City Council of Nairobi surveyed the disputed land and then went ahead to process and issue leases to the Plaintiffs and at some point issued an enforcement notice to the 1st Defendant goes to show that the Council recognised that the Plaintiffs were entitled to the suit land. The variation in size of the plots also tends to support the Plaintiffs’ claims since their plot dimensions are similar to those reflected in the amended Registry Index Map for Nairobi Block 133. The sizes in the letters of allotment issued to the Plaintiffs are closely similar to those in their certificates of lease and in any event a combination of the Plaintiffs’ two plots does not give you the size of the plot which the 1st Defendant lays claims to.

29. Weighing the evidence of the Plaintiffs against that of the 1st Defendant, the court finds that the Plaintiffs have proved on a balance of probabilities that they are the owners of the suit land. The 1st Defendant failed to prove her claim to the suit land on a balance of probabilities.

30. The court grants prayers (i), (ii), (iii) and (iv) of the Plaint filed by Joseph Gatonye on 17/11/2009 in ELC Suit No. 579 of 2009. Joseph Gatonye is awarded general damages in the sum of Kshs. 2 Million against Jennifer Wangari Kamau. The City Council of Nairobi will pay the costs in respect of ELC Suit No. 579 of 2009 to both Joseph Gatonye and Jennifer Wangari Kamau.

31. The court grants prayers (c) and (d) of the counterclaim dated 13/6/2018 filed by Joseph Gatonye and David Muchiri Gikonyo in ELC Suit No. 498 of 2009. The costs of the counterclaim will be borne by the City Council of Nairobi.

32. The court dismisses the claim by Jennifer Wangari Kamau. The City Council of Nairobi will pay costs of the suit in ELC No. 498 of 2009 to Jennifer Wangari Kamau, David Muchiri Gikonyo and Joseph Gatonye.”

20. The import of the above excerpts of the judgement are that the parties in the instant suit and the previous suit are the same. The subject matter of this suit was in issue in the previous suit. Contrary to the plaintiff’s averments that the dispute involving parcel B-01 remains unresolved the court spoke resoundingly as follows;

“The 1st Defendant maintained that her plot was Komarock Phase II Shopping Centre B-01 measuring 0.15 hectares. This plot ceased to exist once the land in that area was surveyed and given parcel numbers in Nairobi Block 133.”

21. In conclusion the court dismissed the claim by the current Plaintiff. This court is persuaded that the parties are similar, litigating on the same subject matter whose dispute was fully and completely determined by a competent court.

22. As a court I am obligated to exercise vigilance against the drafting of pleadings so as to give a new facelift to an otherwise decided old case. The Plaintiffs claim was completely adjudicated in ELC 579 OF 2009



and there is nothing for this court to relitigate again. The Plaintiff cannot be allowed to have a second bite to the cherry. The current suit runs afoul public policy that litigation must come to an end. This suit is best consigned to the archives of dismissals.

23. Final orders for disposal

- a. The 1st and defendants Notice of motion dated 20/3/25 is merited. It is allowed.
- b. The Plaintiffs notice of motion dated the 18/3/25 together with the suit dated the 9/12/2024 are resjudicata. They are hereby dismissed
- c. The costs shall be in favour of the 1st and 2nd Defendants.

24. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

1. N/A for the Plaintiff
2. Mr Kangogo for the 1st and 2nd Defendants
3. C/A – Ms Yvette Njoroge

