



**Kimemia v Ileshkumar & another (Civil Case 262 of 2016)
[2022] KEELC 14712 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CIVIL CASE 262 OF 2016
LA OMOLLO, J
NOVEMBER 10, 2022**

BETWEEN

JOSEPH MUCHIRI KIMEMIA PLAINTIFF

AND

BABUBHAI PATEL ILESHKUMAR 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

RULING

Introduction

1. This ruling is in respect of the 1st Defendant's Notice of Preliminary Objection dated April 22, 2022.
2. The preliminary objection is on the following grounds:
 - a. This court has no jurisdiction to entertain or try this suit.
 - b. This suit is *res judicata*, the matter having been heard and finally determined in Nakuru CMCC No 482 of 2011, as well as pleaded by the Plaintiff herein.
 - c. There exists a valid final judgement and decree over the subject matter herein, which Decree has already been fully executed. This suit is hence moot, is overtaken by events, and is an exercise in futility.
 - d. This suit is bad in law, inept, fatally incompetent, unsustainable, scandalous, vexatious, oppressive, an abuse of court process and is null and void ab initio.
 - e. A judgement and decree of one court and/or the execution thereof, cannot in law be challenged by lodging a fresh suit over the same subject matter. And there cannot in law be parallel litigation or parallel judgments over the same subject matter.



Factual Background.

3. The Plaintiff commenced the present suit vide the Plaint dated July 18, 2016.
4. He avers that he is the registered and legal owner of land parcel No Nakuru Municipality Block 16/468 which he purchased from Ruth Wanjiru Shadrack for a consideration of Kshs 1, 200, 000/= vide an agreement for sale dated May 30, 2011 and amended on June 6, 2011.
5. The Plaintiff avers that he satisfied all the conditions under the agreement and that Ruth Wanjiru Shadrack subsequently transferred the suit property to him and he was registered as the owner and issued with a Certificate of Lease on June 21, 2011.
6. He also avers that he took possession of the suit property and put building materials on the land which materials are on it to date.
7. He further avers that in June, 2016, the County Government of Nakuru granted a waiver on penalties on land rates and that when preparing to take advantage of the waiver, he found out that the suit property had now been registered in the name of the 1st Defendant.
8. The Plaintiff avers that after conducting a search on the property, he found out that the 1st Defendant was issued with a Certificate of Lease on October 7, 2015 pursuant to a court order emanating from Nakuru Chief Magistrate's Court Civil Case No 482 of 2011 which was between the 1st Defendant and Ruth Wanjiru Muraya.
9. He avers that Nakuru CMCC case No 482 of 2011 was stage managed by the 1st Defendant in order to obtain a court order irregularly to cause the suit property to be transferred to his name.
10. The Plaintiff set out the particulars of fraud against the Defendants and avers that the issuance of the Certificate of Lease by the 2nd Defendant over the suit property was illegal and unlawful.
11. He avers that his claim against the Defendants is for an order of injunction restraining them and their agents from selling, trespassing, developing, dealing and/or interfering with his quiet possession.
12. He also avers that his claim is for cancellation and nullification of the Certificate of Lease issued to the 1st Defendant and rectification of the register by the 2nd Defendant.
13. The Plaintiff avers that there is no other suit pending before any court between him and the Defendants herein.
14. The Plaintiff is seeking the following prayers:
 - a. A declaration that the Plaintiff is the lawful owner of land parcel number Nakuru Municipality Block 16/468.
 - b. A temporary injunction restraining the Defendants by themselves, their agents and or servants from selling, trespassing, developing, dealing and or interfering with the Plaintiff's quiet possession of land parcel number Nakuru Municipality Block 16/468.
 - c. Perpetual injunction restraining the Defendants by themselves, their agents and or servants from selling, trespassing, developing dealing, and or interfering with the Plaintiff's quiet possession of land parcel number Nakuru Municipality Block 16/468.
 - d. Nullification and or cancellation of the Certificate of Lease for land parcel number Nakuru Municipality Block 16/468 issued to the 1st Defendant by the 2nd Defendant herein and



rectification of the register by the Land Registrar, Nakuru to restore the Plaintiff's name in the register.

- e. In the alternative general damages which commensurate the current value of the suit land.
 - f. Costs and Interest of the suit
 - g. Any further/other relief that the Honorable Court may deem fit.
15. The 1st Defendant filed his statement of Defence on February 9, 2017.
 16. The 1st Defendant avers that he is the registered owner of the suit property after buying it from Ruth Wanjiru Shadrack on November 15, 2010 which fact was confirmed in the judgment delivered in Nakuru CMCC case No 482 of 2011.
 17. The 1st Defendant then denied all the other averments in the Plaintiff.
 18. The Preliminary Objection first came up on April 25, 2022 and the court stated that it was not persuaded to the urgency of the matter and directed that the Notice of Preliminary Objection be served upon the other parties to the suit. The court then directed that the Preliminary Objection be heard on May 23, 2022.
 19. On May 23, 2022, the 2nd defendant stated that they would not be opposing the Preliminary Objection. Essentially, the Chief Land Registrar is in support of the preliminary objection.
 20. On June 29, 2022, submissions having been filed, the court reserved the matter for ruling.

Plaintiff's Response.

21. In response to the 1st Defendant's Preliminary Objection, the Plaintiff filed his Grounds of opposition dated April 28, 2022.
22. The Grounds of Opposition are filed under Order 51 Rule 14 of the Civil Procedure Rules and they are as follows:
 - a. That the purported preliminary objection does not meet the legal imperatives or threshold of a competent Preliminary Objection and is therefore abusive of the Court's Process, incompetent and bad in law.
 - b. That the suit is not *res judicata* for reasons that it involves entirely different parties.
 - c. That there has not been any merit and conclusive adjudication of the subject matter of the suit herein by a court of competent jurisdiction.
 - d. That the Preliminary Objection is a ploy to obtain an adjournment and to delay the trial of the matter already fixed for hearing by the parties inter partes.

1st Defendant's Submissions

23. The 1st Defendant filed his submissions dated June 28, 2022. In his submissions he states that his Preliminary Objection is on a pure point of law and submits that the present suit is Res judicata as the same matter was in issue in Nakuru CMCC No 482 of 2011 which case was heard and determined.
24. The 1st Defendant also submits that the Plaintiff herein seeks ownership of land parcel number Nakuru Municipality Block 16/468 having allegedly bought it from Ruth Wanjiru Shadrack alias Ruth Wanjiru Muraya.



25. The 1st Defendant further submits that it is clear from the pleadings and the judgement of the lower court that the case was between the 1st Defendant and Ruth Wanjiru Shadrack alias Ruth Wanjiru Muraya who also sold the same parcel of land to him.
26. It is the 1st Defendant's submission that the Plaintiffs in the two suits were litigating under the same title which is as purchasers of the suit land from the said Ruth Wanjiru Shadrack alias Ruth Wanjiru Muraya.
27. The 1st Defendant relied on Section 7 of the *Civil Procedure Act*, the cases of *Kenya Commercial Bank Ltd Vs Muiri Coffee Estate Limited & Anor* [2016] eKLR, *John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR, *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others* [2017] eKLR, *Peter Kaukau Asituba & 3 Others Vs Olekia Mahindu Makunga & Anor* [2021] eKLR among other cases.
28. The 1st Defendant submits that the only way the Plaintiff would have moved this court is by challenging the decision of the lower court by way of Appeal or Judicial Review.
29. The 1st Defendant further submits that the Plaintiff having failed to utilize all these available legal avenues, lost the opportunity to challenge the Decree of the lower court in Nakuru CMCC No 482 of 2011.
30. The 1st Defendant also relied on the cases of *Catherine C Kittony Vs Jonathan Muindi Dome & 2 Others* [2019] eKLR, *Emily Jepkemei Ngeyoni & Another Vs Nicholas Kipchumba Kogo & Another* [2006] eKLR, *Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others* Civil Appeal 184 of 2011 among other cases.
31. It is his further submissions that the challenge of the decree of the lower court ought to have been lodged before that court under Section 34 of the *Civil Procedure Act*, through an application for setting aside the judgement, or through an application for joinder as an interested Party and not through the filing of a fresh suit.
32. He concludes his submissions by urging the court to dismiss the Plaintiff's suit.

Plaintiff's Submissions.

33. The Plaintiff in his submissions identified the following issues for determination:
 - a. Whether or not this Honorable Court has jurisdiction to hear and determine the instant suit.
 - b. Whether or not this suit is Res judicata.
 - c. Whether or not this Honorable Court is functus officio.
34. On the first issue, the Plaintiff relies on the cases of *Owners of the Motor Vessel 'Lilian S' Vs Caltex Oil (Kenya) Limited* [1989] KLR, *Samuel Kamau Macharia vs KCB & Others* [2012] and *Leonard Omullo Vs National Land Commission* [2021] eKLR.
35. The Plaintiff also relies on Section 13 of the *Environment and Land Court Act* and submits that this court has the jurisdiction to hear and determine this matter.
36. On the second issue, the Plaintiff relies on Section 7 of the *Civil Procedure Act*, the case of *IEBC vs Maina Kiai & 5 Others (supra)* and submits that for a bar of *res judicata* to succeed, all the five requirements have to be met and that they have to be construed conjunctively.



37. The Plaintiff went on to submit that the present suit involves entirely different parties from the Nakuru CMCC case No 482 of 2011 which was between Babubhal Patel Ileshuk Umar Vs Ruth Wanjiru Muraya and that the only difference is that the 1st Defendant in this suit is the Plaintiff in the lower court case.
38. The Plaintiff submits that the 1st Defendant has to prove that issue raised in the later litigation should have been directly and substantially in issue in Nakuru CMCC case No No 482 of 2011.
39. He further submits that the issues for determination in the present matter and those raised in Nakuru CMCC case No 482 of 2011 are substantially different and that there has not been any conclusive adjudication of the subject matter of the suit herein by a court of competent jurisdiction.
40. On the third issue, the Plaintiff relied on the case of *ICEA Lion General Insurance Co Ltd Vs Julius Nyaga Chomba* [2020] where the court relied on the Supreme Court decision in Election Petitions No's 3, 4 & 5 *Raila Odinga & Others Vs IEBC & Others* [2013] which cited with approval an excerpt from an article by Daniel Malan Pretorious in "*The Origins of functus officio Doctrine with Specific Reference to its Application in Administrative Law*" [2005] 122 SALJ 832. That the court also relied on the holding of the case of *Jersey Evening Post Limited Vs Al Thani* [2002] JLR 542 at 550.
41. The Plaintiff concludes his submissions by stating that the 1st Defendant's Preliminary Objection does not meet the legal threshold of a competent Preliminary Objection and is therefore an abuse of the court process, incompetent, bad in law and should be dismissed.
42. Upon perusal of the Preliminary Objection, Grounds of Opposition and submissions the three issues arise for determination are as follows:
 - a. Whether the preliminary objection is competent.
 - b. Whether this suit is *res judicata*.
 - c. Who shall bear costs of the preliminary objection

Analysis and Determination.

A. Whether the preliminary objection is competent

- 43 In the case of *Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd* (1969) EA 696 Law JA and Newbold P (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows on what constitutes a competent preliminary objection:

Law, JA:

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection



does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

44. The Court of Appeal in the case of *Nitin Properties Ltd Vs Singh Kalsi & another* [1995] eKLR further held as follows:

“ A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

45. The Supreme Court in the case of *Hassan Ali Jobo & another Vs Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR stated that:

“ a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

46. It is my view that the 1st Defendant’s Preliminary Objection meets the threshold as set out in the above cases. It raises a pure point of law which this court is inclined to determine in limine.

B. Whether this suit is res judicata.

47. The 1st Defendant alleges that the present suit is Res judicata as the same subject matter was in issue in Nakuru CMCC No. 482 of 2011 which was heard and determined.

48. The Plaintiff on the other hand submits that the matter is not Res judicata as it does not meet the threshold as set out in the law.

49. The legal doctrine of res judicata is found in Section 7 of the *Civil Procedure Act*. It provides as follows:

"7. Res judicata

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.:

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.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.



Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

50. There are several judicial decisions that have been rendered in respect of this doctrine. In *Independent Electoral and Boundaries Commission Vs Maina Kiai and 5 others*, Nairobi CA No 105 of 2017 (supra) set out the elements that must be satisfied conjunctively for a bar of res judicata to be sustained.

They are as follows:

- 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 issues was competent to try the subsequent suit or the suit in which the issue is raised.
51. The decision in *Uburu Highway Development Ltd Vs Central Bank of Kenya* [1999] eKLR also offers useful guidance on the element of res judicata. It rendered the elements as;
- a. The former judgment or order must be final;
 - b. The judgment or order must be on merits;
 - c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identity of parties, of subject matter and cause of action.
52. Therefore, in order for a bar of *res judicata* to be sustained, the Defendant/Applicant must meet the criteria set out in section 7 of the *Civil Procedure Act* read together with numerous decisions that have been rendered by the Kenyan courts on this matter.
53. The 1st defendant has makes reference to Nakuru CMCC No 482 of 2011 but regretablely did not find it necessary to attach the pleadings or judgement in the former suit to aid the court in its finding.
54. On a scrutiny of the court record, I stumbled upon a Notice of motion application dated July 18, 2016. The affidavit in support of this application has numerous annexures which have been useful in establishing the nature of the dispute in the former suit was and how it was determined. The important ones are the judgement and decree in Nakuru CMCC No 482 of 2011.
55. The first criterion in determining whether a bar of res judicata has been successfully raised is that the matter directly and substantially in issue in the former suit must be directly and substantially in issue in the present suit.



56. Nakuru CMCC No 482 of 2011 is the former suit. On perusal of the judgement, the prayers sought were as follows:
- a. Specific performance, alternatively;
 - i. Ksh 199,700/= being deposit as purchase price.
 - ii. Ksh 90,000/= being liquidated damages for breach of contract.
 - iii. Ksh 10,000/= being costs of the sale agreement.
 - b. Cost of the suit.
 - c. Interest at bank rates at 16% from November 15, 2010 till payment in full.
 - d. Any other relief this Honorable court may deem fit and just to grant.
57. The orders sought in this suit are as follows:
- a. A declaration that the Plaintiff is the lawful owner of land parcel number Nakuru Municipality Block 16/468.
 - b. A temporary injunction restraining the Defendants by themselves, their agents and or servants from selling, trespassing, developing, dealing and or interfering with the Plaintiff's quiet possession of land parcel number Nakuru Municipality Block 16/468.
 - c. Perpetual injunction restraining the Defendants by themselves, their agents and or servants from selling, trespassing, developing dealing, and or interfering with the Plaintiff's quiet possession of land parcel number Nakuru Municipality Block 16/468.
 - d. Nullification and or cancellation of the Certificate of Lease for land parcel number Nakuru Municipality Block 16/468 issued to the 1st Defendant by the 2nd Defendant herein and rectification of the register by the Land Registrar, Nakuru to restore the Plaintiff's name in the register.
 - e. In the alternative general damages, which commensurate the current value of the suit land.
 - f. Costs and Interest of the suit
 - g. Any further/other relief that the Honorable Court may deem fit.
58. The prayers sought in Nakuru CMCC No 482 of 2011 are in the nature of specific performance against the Ruth Wanjiru Muraya. In the alternative, the plaintiff seeks certain sums of money which have been set out above.
59. The prayers sought in the present suit are
- a. A Declaration that the Plaintiff is the lawful owner of land parcel number Nakuru Municipality Block 16/468
 - b. A temporary injunction restraining the Defendants by themselves, their agents and/ or servants from selling, trespassing, developing, dealing and/ or interfering with the Plaintiff's quiet possession of land parcel number Nakuru Municipality Block 16/468.
 - c. Perpetual injunction restraining the Defendants by themselves, their agents and/or servants from selling, trespassing, developing, dealing and/or interfering with the Plaintiff's quiet possession of land parcel number Nakuru Municipality Block 16/468.



- d. Nullification and/or cancellation of the certificate of lease for land parcel number Nakuru Municipality Block 16/468 issued to the 1st Defendant by the 2nd Defendant herein and rectification of the register by the Land Registrar, Nakuru to restore the Plaintiff's name in the register.
 - cc. In the alternative general damages which commensurate the current value of the suit land
 - e. Costs and interest of the suit
 - f. Any further order relief that the Honourable Court may deem fit.
60. While in the present and former suit the subject matter is Land parcel No Nakuru Municipality Block 16/468. Does that automatically make the present suit Res judicata? I endeavor to answer this question in the subsequent paragraphs.
61. In Nakuru CMCC No 482 of 2011, the 1st Defendant herein was the Plaintiff and he alleged that he bought the suit property from Ruth Wanjiru Muraya and before she could transfer the property to him, she sold the same to a third party who he stated had commenced construction on the property.
62. In the present suit, the Plaintiff states that he bought the suit property from Ruth Wanjiru Shadrack who the 1st Defendant points out that is the same person as Ruth Wanjiru Muraya and was issued with a Certificate of Lease in the year 2011.
63. The Court in its judgement in Nakuru CMCC No 482 of 2011 allowed the 1st Defendant's (plaintiff in the former suit) claim with respect to land parcel number Nakuru Municipality Block 16/468 and gave orders for specific performance together with costs of the suit.
64. I find that the issues raised in this suit were not directly or substantially in issue in the former suit.
65. The second criterion is that the suit must be between the same parties under whom they or any of them claim.
66. The parties in Nakuru CMCC No 482 of 2011 are Babubhai Patel Ileshkumar Vs Ruth Wanjiru Muraya while the parties in the present suit are Joseph Muchiri Kimemia Vs Babubhai Patel Ileshkumar and the Chief Land Registrar.
67. The only constant in the present and former suit is Babubhai Patel Ileshkumar. He is the 1st Defendant in the present suit and the Plaintiff in Nakuru CMCC No 482 of 2011. The plaintiff herein was not a party in the former suit and no evidence has been tabled that he was invited to participate in the former suit and didn't and/or he had knowledge of it and failed to seek to be joined in it.
68. I find that the former and present suit are not between same parties or parties under whom any of them claim.
69. The third criterion is that the judgement in the former suit must be final. The judgement in Nakuru CMCC No 482 of 2011 was delivered on September 12, 2014 and subsequently, upon application by the 1st Defendant herein who was the Plaintiff in that matter the court ordered the Executive Officer of the court to sign all the relevant documents of transfer of the suit property to the 1st Defendant's name on October 22, 2015. While the finality of the judgement in the former suit is not disputed, I find that it was only final as to the parties therein and is therefore of no consequence in the present suit.
70. The fourth criterion is that the judgement must be on merits. This means that judgment is delivered after according all the parties an opportunity to be heard.



71. The court in its judgement in Nakuru CMCC No 482 of 2011 noted that the Defendant in that matter neither entered appearance nor filed a Statement of Defence. The Defendant only filed submissions and the court goes on to state that it taken into consideration the submissions filed by the defendant.
72. The Plaintiff, in the former suit, testified and his evidence was uncontroverted. Consequently, the court granted orders of specific performance as prayed in the Plaintiff.
73. It is evident that judgment was on merit but it involves a party other than the Plaintiff herein. The 1st Defendant can therefore not sustain a bar of res judicata on this criterion.
74. The fifth criterion is that the judgement should have been rendered by a court having jurisdiction over the subject matter. None of the parties herein have disputed the jurisdiction on the court in Nakuru CMCC No 482 of 2011. In any event, the Plaintiff herein was not a party to that suit.
75. While the subject matter in the former and present suit relates to land parcel number Nakuru Municipality Block 16/468, the parties are different and the orders they are seeking are also different.

C. Which party shall bear the cost of the preliminary objection?

76. On the question of costs of the preliminary objection, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

77. The Upshot of the foregoing is that the 1st Defendant's Notice of Preliminary Objection dated April 22, 2022 is dismissed with costs to the Plaintiff.
78. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF NOVEMBER, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Waiganjo for Magana for the 1st Defendant/Applicant.

Mr. Kisila for the Plaintiff/Respondent.

No appearance for 2nd Defendant/ Respondent

Court Assistant; Ms Monica Wanjohi.

