



Kanyoni & 2 others v Nairobi City County; Gathura (Intended Interested Party) (Environment and Land Case Civil Suit 633 of 2009) [2025] KEELC 3741 (KLR) (7 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 633 OF 2009**

JA MOGENI, J

MAY 7, 2025

BETWEEN

ALEXANDER KANYONI 1ST PLAINTIFF

JOSEPH NJOROGE KIMANI 2ND PLAINTIFF

STEPHEN KAMUNGE 3RD PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

AND

JANE WAIGWE GATHURA INTENDED INTERESTED PARTY

RULING

1. This Ruling is in respect of the Notice of Motion Application dated 3/06/2024 and a Preliminary Objection dated 9/07/2024. The Intended Interested Party/Applicant hereinafter referred to as Applicant filed the Notice of Motion Application seeking the following:
 - a. Spent.
 - b. That this Honourable Court be pleased to grant leave to the Intended Interested Party/Applicant to join these proceedings.
2. The Application is supported by the Affidavit of Jane Waigwe Gathura and is based on the following grounds:
 1. That The Plaintiffs instituted this suit vide their Amended Plaint dated 1st November 2021 seeking the following orders:



- a. An order directed against the 1st Defendant compelling it to pay fair prompt and market compensation to the 1st, 2nd and 3rd Plaintiffs in the event it cannot have the 1st Defendant transfer the said parcel of land to the 1st, 2nd and 3rd Plaintiffs.
 - b. Any other relief this Honourable Court may deem fair and just to grant.
 - c. Costs of this suit.
 - d. Interest at Court rates.
2. That the Applicant is the registered proprietor of the suit property title number Nairobi/block 97/3X4 which she purchased in 2011 and therefore has a direct and substantive claim against the property.
 3. That the Applicant purchased the suit property from the initial 2nd Defendant in this suit, Falcon Properties Limited for Kshs 10,000,000/-; incurred all costs appurtenant to transfer of property including legal fees and stamp duty; and has been remitting the statutory annual land rates and land rent over the suit property for the last ^{12 years since purchase.}
 4. That the said Falcon Properties Limited was removed pursuant to “a Judgement in Civil Appeal No. 156 of 2010” which particulars are unknown as alleged in paragraph 19 of the Amended Plaint.
 5. That the Intended Interested Party/Applicant will be adversely affected by the outcome of this suit should orders for transfer of the properties be granted to the Plaintiffs.
 6. That the ultimate order of this Honourable Court cannot be enforced without the substantive presence and input of the Applicant who is the current registered proprietor of the suit property.
 7. That it is in the interests of justice that the Intended Interested Party be joined to these proceedings as she is a necessary party with a stake in these proceedings as the current registered proprietor of one of the suit properties.
 8. That it is in the interest of justice that Intended Interested Party/Applicant be joined to these proceedings to avert an injustice being occasioned by protecting the Applicant’s constitutional right to own property and to have such property protected from being taken away arbitrarily without being heard or accorded an opportunity to ventilate her case.
 9. That this Honourable Court will effectually determine this matter and prevent a likely course of further proliferated litigation thus settle all questions involved in these proceedings before any orders that may affect the proprietor are issued by this Honorable Court.
 10. That the addition of the Intended Interested Party/Applicant will not prejudice the Plaintiffs or Defendant in any manner.
 11. That this Honorable Court is empowered, at any stage of the proceedings, with or without Application to join interested parties if the ends of justice so require
3. The Application is opposed by the 1st Plaintiff/Respondent and the Advocate of the 1st Plaintiff who filed a Replying Affidavit sworn on 9/07/2024 and a Preliminary Objection dated 9/07/2024 respectively.
 4. In opposing the Application it was the contention of the 1st Plaintiff that the Applicant has exhibited a copy of a Title which was issued to her in respect to Land Parcel Nairobi Block 9/384 on 5th August



- 2011 yet any right of action that the Applicant should have over the said parcel of land expired on the 6th of August 2023 as mandatorily provided for under the [Limitation of Actions Act](#).
5. That due to the Limitation the Applicant's current Application is barred by the Doctrine of *Res Judicata* as her claim was fully adjudicated upon and Judgment delivered on 20/12/2022 in the ELC Milimani Civil Case No. 1018 of 2013 *Edward Johnson Mwangi Wanjibia vs Alexander Kanyoni and 4 Others* wherein the Plaintiff had filed a suit as the duly appointed Attorney of the Applicant herein. A copy of the Judgment is annexed as Exhibit "AK1"
 6. The Respondent further avers that the Applicant had sought leave for an extension of time within which to file an appeal against the decision in the case referred to above by filing a Notice of Appeal in the Civil Appeal Application No. E 571 of 2023. Which Application was dismissed with costs on 28/03/2024 and a copy of the Ruling was attached as exhibit "AK2"
 7. Similarly the Respondent further contends that the Applicant in this suit filed an Application dated 17/04/2024 through her Attorney seeking to be enjoined in these proceedings as an Interested Party and to be granted appropriate leave to file a Statement of Defence and Counterclaim but that said Application *vide* a Ruling of this Court dated 3/06/2024 was dismissed. Further that the Applicant's Application is vague as no proposed defence has been exhibited and that the Application cannot in any event avail the Applicant as a Defendant since she cannot sustain in law a claim against the Plaintiff as her position is to defend any claim against her.
 8. It the Respondent's position therefore that in view of all the issues averred through the Replying Affidavit that this Court lacks the requisite jurisdiction to entertain the Applicant's Application which he terms as an abuse of the process of this Court and he recommends that it should be struck out with costs.
 9. In addition to the Replying Affidavit by the 1st Plaintiff/Respondent the Advocate for the 1st Plaintiff also filed a Notice of Preliminary Objection on the following grounds:
 1. This Honourable Court lacks Jurisdiction to entertain the said Application as it offends the provisions of section 7 of the [Limitation of Actions Act](#) having been filed more than 12 years after the cause of action accrued to the proposed 2nd Defendant/Applicant.
 2. Without prejudice to the foregoing this Honourable Court similarly lacks Jurisdiction to consider the Application by the proposed 2nd Defendant/Applicant on the basis of the doctrine of *Res Judicata* since any claim that the proposed 2nd Defendant/ Applicant may have against the 1st Plaintiff was fully adjudicated and determined in Nairobi High Court civil suit number 1018 of 2013 and in the Court of Appeal at Nairobi civil Application No. E571 of 2023 and by an order of this Court dismissing an Application on behalf of the said proposed Defendant/ Applicant on the 3rd of June 2024.
 3. The purported Application by the proposed 2nd Defendant/ Applicant is an abuse of the process of this Court and should be struck out with costs
 10. Parties canvassed the Application and the Preliminary Objection through written submissions wherein they reiterate the grounds stated in their respective pleadings.
 11. I have carefully considered the pleadings filed by the parties herein, their written submissions and the authorities that they cited. The main issues for determination are as follows: -
 - i. Whether the Preliminary Objection is merited;
 - ii. Whether the instant Application is an abuse of the Court process and;



- iii. Whether the Applicant in the Notice of Motion Application dated 3/06/2024 has made out a case for the granting of the orders of joinder.
12. What amounts to a Preliminary Objection was discussed in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, where it was held 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. Examples are an objection to 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... 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
13. The main ground in the Notice of Preliminary Objection is with regard to the jurisdiction of this Court to entertain the Application dated 3/06/2024 seeking joinder and whether the Application is res judicata.
14. My finding is that the objection to the Court’s jurisdiction is a point of law, since it has the potential of determining the setting aside Application with finality without the need of ascertaining any additional facts. The issue for consideration is whether the Application is indeed res judicata having been determined in the case cited by the 1st Plaintiff/1st Respondent’s Counsel.
15. According to the 1st Plaintiff/Respondent and the Advocate of the 1st Plaintiff it is his contention that the Applicant has exhibited a copy of a Title which was issued to her in respect to Land Parcel Nairobi Block 9/384 on 5th August 2011 yet any right of action that the Applicant should have over the said parcel of land expired on the 6th of August 2023 as mandatorily provided for under the *Limitation of Actions Act*.
16. Therefore that due to the limitation the Applicant’s current Application is barred by the Doctrine of Res Judicata as her claim was fully adjudicated upon and Judgment delivered on 20/12/2022 in the ELC Milimani Civil Case No. 1018 of 2013 *Edward Johnson Mwangi Wanjibia vs Alexander Kanyoni and 4 Others* wherein the Plaintiff had filed a suit as the duly appointed Attorney of the Applicant herein. A copy of the Judgment is annexed as Exhibit “AK1”
17. At the same time the Respondent further avers that the Applicant had sought leave for an extension of time within which to file an Appeal against the decision in the case referred to above by filing a Notice of Appeal in the Civil Appeal Application No. E 571 of 2023. Which Application was dismissed with costs on 28/03/2024 and a copy of the Ruling was attached as exhibit “AK2”.
18. Similarly the Respondent further contends that the Applicant in this suit filed an Application dated 17/04/2024 through her appointed Attorney vide the Power of Attorney executed seeking to be enjoined in these proceedings as an Interested Party and to be granted appropriate leave to file a Statement of Defence and Counterclaim but that said Application vide a Ruling of this Court dated 3/06/2024 was dismissed. Further that the Applicant’s Application is vague as no proposed defence has been exhibited and that the Application cannot in any event avail the Applicant as a Defendant since she cannot sustain in law a claim against the Plaintiff as her position is to defend any claim against her.
19. It is the Respondent’s position therefore that in view of all the issues averred through the Replying Affidavit that this Court lacks the requisite jurisdiction to entertain the Applicant’s Application which



- he terms as an abuse of the process of this Court and he recommends that it should be struck out with costs.
20. The 1st Plaintiff/1st Respondent has contested that the instant Application is an abuse of the Court process and that the same is res judicata. The Doctrine of Res Judicata, often associated with Section 7 of the *Civil Procedure Act*, prevents a case from being retried if the matter has already been decided in a previous suit between the same parties or those claiming under them. It ensures that a party is not subjected to the same litigation twice over the same issue.
21. The Preliminary Objection herein is premised on the alleged violation of the doctrine of res judicata. The doctrine of res judicata is premised on Section 7 of the *Civil Procedure Act*. It prevents the Court from re-determining a matter/issue that has been finally determined by a competent Court. It is not in doubt that this issue goes to the jurisdiction of the Court and is capable of preliminarily disposing off the suit.
22. However, the question as to whether the issue of res judicata can be argued by way of Preliminary Objection has been the subject of debate. In the case of *Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another* [2014] eKLR, the Court held as follows:
- “That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on Preliminary Objection. Court of laws have always had a well-founded quarrel with parties who resort to raising Preliminary Objections improperly.”
23. In the same breath, the Court in the case of *Moses Mbatia vs Joseph Wamburu Kihara* [2021] eKLR, also considered whether the question of res judicata was a proper Preliminary Objection as follows:
- “It is my view that all the relevant facts as summarized above are not in dispute and the matter did not call for the exercise of the trial Court’s discretion. Resultantly therefore the objection is a pure point of law.”
24. The 1st Plaintiff/1st Respondent alleges that the Motion filed herein on 3/06/2024 is res judicata and that the issue was determined vide a Ruling by this Court for an Application dated 17/04/2024. That the Application was filed through the intended Interested Party Applicant’s Attorney seeking to be enjoined in these proceedings as an Interested Party and to be granted appropriate leave to file a Statement of Defence and Counterclaim but that said Application vide a Ruling of this Court dated 3/06/2024 was dismissed.
25. The existence of the Notice of Motion Application and the Ruling are not factually disputed. The Court is privy to the aforesaid. In the circumstances, the Court does not consider that any extraneous evidence is required in this regard and finds that the objection is properly before it.
26. Section 7 of the *Civil Procedure Act* provides that:
- “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.”

27. In the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus;

“(57) The essence of the Res judicata doctrine is further explicated by Wigram, V-C in *Henderson v. Henderson* (1843) 67 E.R. 313, as follows:

“where a given matter becomes the subject of litigation in, and 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 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 cases, 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” [emphasis supplied].

(58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

28. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit was the same matter which was directly and substantially in issue in the former suit.

29. Further, the former suit must have been between the same parties or parties under whom they claim; the parties litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

30. It is crucial to note that the doctrine of res judicata does not apply only to suits but also to Applications such as the one that is before this Court. This legal position was stated in the case of *Mburu Kinyua*



vs Gachini Tuti [1978] KLR 69 at 81 and reiterated by the Court of Appeal in Uburu Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR as follows:

“That is to say, there must be an end to Applications of similar nature; that is to say further, wider principles of res judicata apply to Applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new Applications filed after the original one was dismissed. There must be an end to interlocutory Applications as much as there ought to be an end to litigation.”

31. Upto this point it is important to examine the orders sought in ELC Milimani Civil Case No. 1018 of 2013 *Edward Johnson Mwangi Wanjihia vs Alexander Kanyoni and 4 Others* which are:

- a) Eviction of the Defendants, their tenants, subtenants, lessees’, employees, agents, servants and any other person claiming under them from all that piece of land known as LR Number Nairobi/Block97/3X4 or in the alternative
- b) A mandatory injunction compelling the Defendants their tenants, subtenants, lessees’, employees, agents, servants and any other person claiming under them to vacate and or hand over vacant possession to the Plaintiff of LR Number Nairobi/Block 97/3X4
- c) Mesne profits for occupation of the land from 2012 upto the date of handing over vacant possession
- d) Any other relief that this Honorable Court may deem fit to grant.”

32. In the current suit the prayers sought relate to issuance of a permanent injunction against the 1st and 2nd Defendants, an order of specific performance against the 2nd Defendant in favour of the 1st, 2nd and 3rd Plaintiffs, transfer of suit property by the 2nd Defendant to the 1st, 2nd and 3rd Plaintiffs, or in the alternative an order to compel the 1st Defendant to pay fair prompt and market compensation to the 1st, 2nd and 3rd Plaintiffs.

33. Suffice to state that the parties in the current suit are all not the same as the one in ELC Milimani Civil Case No. 1018 of 2013 *Edward Johnson Mwangi Wanjihia vs Alexander Kanyoni and 4 Others*. The 1st Plaintiff and the 1st Defendant were parties in ELC Milimani Civil Case No. 1018 of 2013. The 1st Plaintiff was the 1st Defendant and the Intended Interested Party was the Plaintiff through Edward Johnson Mwangi Wanjihia who she appointed vide the Power of Attorney.

34. The issue of ownership of the suit property was settled by a Court of competent jurisdiction when the Court stated at paragraph 54 of the Judgment dated 20/12/2022 by my brother Justice Edward Wabwoto:

“From the evidence that was tendered herein, the Plaintiff certificate of lease was issued after the 1st Defendant had already purchased the suit property by way of public auction that was undertaken on 8th December 2007. In view of the foregoing, it is therefore the finding of this Court that the Plaintiff has not been able to satisfactorily convince this Court that he is the bona fide and legitimate owner of the subject property.”



35. At the same time, the Court stated at paragraph 65,
- “65 The Plaintiff’s title was procured un-procedurally when already the suit property had been sold by public auction. In view of the foregoing, I am unable to grant the Plaintiff the reliefs sought herein.”
36. In the end the Court found that the Plaintiff’s suit against the Defendants had not been proved to the required standards and dismissed it.
37. From the foregoing I am thus constrained to examine whether the Application before this Court is res judicata in view of the finding of my brother Justice Wabwoto. Also in view of the fact that a similar Application was made and dismissed vide a Ruling of this Court dated 3/06/2024. It is worth noting that the intended Interested Party/Applicant never appealed the Ruling dismissing the Application dated 3/06/2024, and as such, it is binding.
38. Whereas the 1st Plaintiff/1st Respondent asserts that the Applicant is attempting to re-litigate issues already decided contravening the principle of res judicata and abusing the process of the Court, this is disputed by the Applicant.
39. This Court in the case of *William Koross v Hezekiah Kiptoo Komen & 4 Others* [2015] eKLR, espoused the principles of the doctrine of res judicata as follows:
- “The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all- too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go. Speaking for the bench on the principles that underlie res judicata, YV Chandrachud J in the Indian Supreme Court case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 stated, and we agree;
- “The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.”
40. In reference to the Application by the Applicant for joinder which was dismissed on 3/06/2024, and was not appealed means that the issue of joinder was already determined. The fact that the Applicant now wants to be joined to the suit by side stepping her own executed Power of Attorney is an attempt at re-litigating the Application for joinder. The fact that at one point the Applicant sought joinder through a Power of Attorney appointed litigant and now she seeks joinder as an intended Interested Party, does not negate the fact that a Court of competent jurisdiction dismissed the Application and no appeal was preferred against the decision. There can be no other finding other than that the Application herein is res judicata.
41. In conclusion, I find and hold that Application is not only res judicata, but also an abuse of the Court process.
42. I therefore find the Notice of Preliminary Objection dated 9/07/2024 merited and in regards to the Notice of Motion Application dated 3/06/2024 I dismiss it since the Applicant has not met the threshold for joinder as an affected party.



43. In the upshot, the Notice of Preliminary Objection dated 9/07/2024 is merited and the costs of the Preliminary Objection are awarded to the 1st Plaintiff/Applicant Whereas the intended Interested Party's Applicant's Application dated 3/06/2024 lacks merit and the same is hereby dismissed with costs.
44. The Court has considered the Preliminary Objection and to my mind, the issues and the details relating to the suit property which is being addressed and/or deliberated upon in the previous suit are separate and distinct from the issues that underpin the current suit by the 1st Plaintiff/1st Respondent. It therefore follows that then it is not res judicata. Infact except for the two parties I have mentioned above, there is no doubt that there are parties who were not in the previous suit and the issues are completely different.
45. Thus Court's jurisdiction in determining the Motion aforesaid is unquestioned.
46. The Court is therefore of the considered view that the institution of the current Motion constitutes an abuse of the process of the Court as defined by the Court of Appeal in the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 [2009] eKLR as follows:
- “The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”
47. It is noted that vide their respective submissions, the Plaintiff has alluded to consolidation of the suits, while the Defendants call for striking out of the present suit. It is trite that submissions are not an avenue for raising new issues and the Court cannot venture into a determination of the same. The Preliminary Objection was as against the Motion of 6th November, 2023.
48. In the end, the Court makes the following determination;-
- i. The Preliminary Objection dated 20th November, 2023 is merited.
 - ii. The Motion dated 6th November, 2023 be and is hereby struck out with costs.
 - iii. The Plaintiff shall bear the costs of the Preliminary Objection.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

**MOGENI J
JUDGE**

