Lake Naivasha Crescent Camp Limited v Wagiciengo Holdings Limited & another; Ndonji (Intended Defendant) (Environment & Land Case 88 of 2024) [2025] KEELC 3588 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3588 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT & LAND CASE 88 OF 2024

MC OUNDO, J

MAY 8, 2025

(FORMERLY NAKURU ELC 38 OF 2023)

BETWEEN

LAKE NAIVASHA CRESCENT CAMP LIMITED ..... PLAINTIFF

AND

WAGICIENGO HOLDINGS LIMITED ..... 1ST DEFENDANT

ANASTACIA WAIRARA WAGICIENGO ..... 2ND DEFENDANT

AND

JAMES ODERA NDONJI ..... INTENDED DEFENDANT

RULING

1. The Notice of Motion dated 15th November, 2024 is brought under the provision of Order 1 Rule 10(2) and Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and all other enabling provision of law, where the Intended Defendant/Applicant has sought for the following orders.

    i. That James Odera Ndonji be granted leave and allowed to join the instant proceedings as a Defendant.

    ii. That an Order of Court do issue adopting the Arbitral Award dated 29th October 2024 as a Judgement of the Court.

    iii. That upon prayers (i) and (ii) above being granted, an Order of Court do issue directing the rent deposited in the joint Bank account in the name of the Plaintiff and the Defendants'

Advocates to be released to the Applicant and all subsequent rent going forward to be paid to the Applicant.

iv. That an order of the Court do issue allowing the Applicant to enter the suit premises for inspection and valuation.

v. That the costs of the Application be provided for.

2. The said Application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by James Odera Ndonji, the Intended Defendant/Applicant herein who deponed that he was the registered owner of the suit property herein having purchased the same for value from the 1st and 2nd Defendants herein. That being the registered owner, he had an interest in the instant suit hence he ought to be granted an opportunity to join the suit herein. That the Plaintiff would not suffer any prejudice if the instant matter was heard and orders sought granted as his presence before the court was necessary for the Court to effectually and completely adjudicate upon and settle the question involved in the present suit.

3. That he was aware that an award had been delivered dismissing the Plaintiff's Claim before the Arbitration Tribunal and prayed that the said award be adopted as a Judgement of the Court.

4. He also deponed that on the 31st January 2024, the Court had directed that the rent subject of the suit property herein be deposited in a Joint Bank Account in the name of the Plaintiff and the Defendant's Advocates pending the outcome of the Arbitration Proceedings. He thus prayed that as the owner of the suit property, the Court do issue an order directing the release of the rent that had been paid therein to him since the Arbitration proceedings had been finalized. He further prayed that all subsequent rent payable by the Plaintiff be made to him. It was also his prayer that he be granted access to the suit property for purposes of undertaking valuation and ascertaining its status.

5. In response to the Intended Defendant/Applicant's Application, the Plaintiff/Respondent filed Grounds of Opposition dated 3rd December, 2024 wherein it opposed the said Application on the following grounds: -

i. The application is misconceived, wishy-washy, untenable in law and a complete abuse of the court process.

ii. The Intended Defendant/Applicant's application for joinder is Res Judicata in view of the Ruling of the Honourable Court of 31st January, 2024.

iii. That the Honourable Court lacks jurisdiction to entertain the application for enforcement of the Arbitral Award in view of the provision of Section 37 of the *Arbitration Act*.

iv. That there is no process under the *Arbitration Act* that is known as the adoption of an award, the same was foreign and alien since the known process was enforcement of an award under Section 37 of the *Arbitration Act*.

v. That the Intended Defendant/Applicant does not have any locus with respect to the enforcement of the Arbitral Award thus the application is a mockery of the *Arbitration Act* and court process.

vi. That accordingly, the Intended Defendant/Applicant's Application dated 15th November, 2024 be dismissed with costs as it was an outright circumvention of the *Arbitration Act* by a stranger.

6. The 1st and 2nd Defendants did not participate in the Intended Defendant/Applicant's Application.

7. Directions were taken to dispose of the Application dated 15th November, 2024 by way of written submissions wherein the Intended Defendant/Applicant vide his submissions dated 21st February, 2025 and in support of his Notice of Motion Application dated 15h November, 2024 summarized the factual background of the matter before framing his issues for determination as follows:

    i. Whether the Application is *res judicata*.

    ii. Whether the Court lacks jurisdiction to entertain the application for enforcement of the Arbitral Award in view of the provisions of Section 37 of the *Arbitration Act*.

    iii. Whether the Environment and Land Court can enforce an arbitral Award.

    iv. Whether James Odera Ndonji should be enjoined in these proceedings.

    v. Whether the Intended Defendant/Applicant has any locus standi with respect to enforcement of the Arbitral Award.

8. On the first issue for determination as to whether the Application herein was res judicata, the Applicant first reiterated Paragraphs 31-34 of the Court's Ruling that had been delivered on 31st January, 2024 before placing reliance in the decided case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17nof 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) to submit that whereas the Plaintiff had submitted that the Court had jurisdiction in granting the orders of the 31st January, 2024 when they had been in his favour yet he now turned around to argue that the same Court did not have jurisdiction to entertain an application of a similar nature, the circumstances having changed.

9. He submitted that were the court to decline to hear the instant Application, the Intended Defendant/ Applicant would be forced to file a fresh suit against the Plaintiff herein leading to duplicity of suits for an issue that could be determined by the Court which was the same court that had issued the orders. He explained that the court at the time had declined to enjoin the Applicant for the reasons that there had already been an existing arbitration process and that there had been no evidence that ownership had changed hands.

10. He thus submitted that the instant Application was not res judicata as the circumstances had since changed; being that the Arbitration had since been finalized wherein an award dated 29th October, 2024 had been rendered and the transfer process finalized in his favour. That indeed, if the Plaintiff had intended to challenge the arbitral award, then the same could only proceed with the registered owner as a party, the circumstances having changed since the inception of the suit herein and the ruling of 31st January 2024.

11. On the second issue for determination as to whether the Court lacked jurisdiction to entertain an application for enforcement of the Arbitral Award, the Applicant submitted that the provisions of Section 37 of the *Arbitration Act* related to grounds of setting aside an arbitral award. That the Plaintiff's Ground of Opposition dated 3rd December 2024 had not laid with specificity that grounds that would cause the Honourable Court to set aside the Arbitral award and therefore the Ground of Opposition had been misplaced since the said section merely provided for the procedure and grounds for appealing arbitral awards but did not limit or oust the jurisdiction of the Court to enforce an award under the provisions of Section 36 of the said *Act.* That indeed, the jurisdiction of the court to enforce an arbitral award remained intact, unless the award had been set aside. It was thus his submission that the said ground of opposition had been amorphous and incapable of being considered by the Court.

12. As to whether the Environment and Land Court could enforce an Arbitral Award, he submitted that whereas the Plaintiff had argued that an arbitral award could only be enforced and/or recognized at the High Court by virtue of Rule 4(1) of the *Arbitration Rules*, the *Arbitration Act* had come into effect on 2nd January, 1996 at a time when the High Court had been the only superior court in the country. That after the establishment of the *Environment and Land Court Act* whose status was the same as that of the High Court, it had the jurisdiction to determine disputes relating to the environment and land in Kenya including Arbitration proceedings arising out of disputes related to the environment and land. That the Arbitration having been commenced subsequent to an order of the Court, the same could only be recognized and/or enforced by the Court and not by filing a separate suite at the High Court.

13. On the fourth issue for determination as to whether the Applicant, James Odera Ndonji should be joined in the proceedings herein, he placed reliance on the provisions of Orders 1 Rule 10(2) and (3) as well as the decision in the case of *Lucy Nungari Ngigi & 128 Others v National Bank of Kenya Limited & Another* [2015] eKLR to submit that the Court had the discretion to join a party who would be necessary to enable it effectually and completely to adjudicate upon and settle all questions involved in the suit. That he being the subsequent registered owner of the suit property, as per the annexed search, having purchased the same for value from the 1st and 2nd Defendants, it was incumbent that he be joined to the suit and more so since no final orders had been issued. He relied on the decision in the case of *Joseph Njau Kingori v Robert Maina Chege & 3 Others* [2002] eKLR to submit that no prejudice would be occasioned to the Plaintiff because he would then have the opportunity to broach evidence on contested issues and lastly that the joinder would pre-empt a likely course of proliferated litigation.

14. That in the absence of the joinder, he would suffer irreparable loss were he not allowed to defend the instant suit as orders preserving his interests in the suit property would not issue. That the Defendants no longer had any interest in the suit property and as such a decree in favour of or against the Plaintiff would be a decree for execution against him or in his favour.

15. That he had the locus standi with respect to enforcement of the Arbitral Award, and to seek the prayers sought by virtue of being the registered owner of the suit property. That in any case, were the Court to rule that he lacked the locus standi, the Arbitral Award was still capable of being recognized/enforced by the Court by virtue of being filed by the Defendants in the suit herein. That he had demonstrated sufficient reasons for the grant of the orders sought in the Application herein hence in the interest of justice the same should be allowed with costs.

16. In opposition to the application, the Plaintiff/Respondent vide its Submissions dated 20th February, 2025 summarized the factual background of the matter and then framed one issue for determination to wit; whether the Court had jurisdiction to entertain the Intended Defendant/Applicant's Application dated 15th November, 2024.

17. The Respondent's submission was that the Court's jurisdiction had been ousted because the prayer for joinder was res judicata, the prayer for adoption of the award was alien in the *Arbitration Act*, and the Court lacked jurisdiction under Section 36 of the *Arbitration Act* to enforce the Arbitral Award which was the express preserve of the High Court. That finally, the Application had been filed by a stranger who lacked the locus standi.

18. The Plaintiff placed reliance on the provisions of Section 7 of the *Civil Procedure Act* as well as the decisions in the case of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others* [1996] eKLR and *Njue Ngai v Ephantus Njiru Ngai & Another* [2016] eKLR to submit that the instant Application was res judicata, a similar application by the Applicant dated 6th June, 2023 having been dismissed by the court in its ruling of 31st January, 2024.

19. That there was no process known as adoption of the Arbitral Award under the *Arbitration Act* of 1995. Instead what was provided for was the recognition and enforcement of the Arbitral Award under Section 36 of the Act. That interestingly, the Applicant had not sought for recognition and/or enforcement of the Arbitral Award but had also premised his application under the *Civil Procedure Act* and *Rules*. It was thus its submission that the application was incompetent as it had run afoul of the provisions of the *Arbitration Act* and Rules.

20. That an Application for adoption of Arbitral Award was unknown to the Arbitration Law and secondly had the Applicant intended to file an application for recognition and enforcement of the Arbitral Award as provided for under the law, the same was amiss and incurable for the following reasons:

    i. The Applicant lacked the locus standi to file the Application in view of the express provisions of Rule 4 (1) of the *Arbitration Rules*.

    ii. Section 36 of the *Arbitration Act* was express that the filing of an Application for enforcement and recognition of the Arbitral Award to the High Court and not the Environment and Land Court and through a Chamber Summons and not a Notice of Motion as per the provisions of Rule 9.

    iii. Under Rule 4(3) of the *Arbitration Rules*, the application ought to be filed in a separate and new matter and lastly that the instant Application had been brought under Section 7 of the *Arbitration Act* contrary to the provisions of Sections under Rule 3(1).

21. That the Applicant lacked the locus standi to initiate the Application herein since he had neither been a party in the proceedings before the Arbitral Tribunal nor had he been a party to the Arbitration Agreement and therefore he had no right to initiate the suit as per the provisions of Rule 4 (1) of the Arbitration Rules that contemplated that only a party to the Arbitration Agreement could file an award in the High Court. Reliance was placed on the decision in the case of *Okoiti & another v Attorney General & another* (Petition 29 of 2020) [2021] KESC 28 (KLR) (Civ) (3 December 2021) (Ruling)

22. That jurisdiction was everything without which a court ought not take any extra step as was held in the case of *Owners of Motor Vessel "Lilian S" v Caltex Oil [Kenya} Limited* [1989] KLR. That the Application was not only incompetent but a complete abuse of the Court process and should be dismissed with costs to the Plaintiff.

Determination.

23. I have considered the Application dated 15th November 2024, the response in opposition, the submissions, the authorities herein cited and the Applicable law. The Applicant herein brings this application seeking to be joined to the proceedings as a Defendant having purchased the subject suit property herein from the 1st and 2nd Defendants and having now been registered as its proprietor. The Applicant further seeks for the adoption of an Arbitral Award dated 29th October 2024 as a Judgement of the Court and that upon these two prayers being granted, that the court directs for the rent that had been deposited in the joint Bank account in the name of the Plaintiff and the Defendants' Advocates be released to him and all subsequent rent going forward to be paid to him. Lastly the Applicant sought to be allowed to enter the suit premises for inspection and valuation and for costs of the Application.

24. In opposition to the application, the Plaintiff's argument through its Grounds of Opposition was to the effect that the application was misconceived, wishy-washy, untenable in law and a complete abuse of the court process. That the application for joinder is Res Judicata in view of the Court's Ruling of 31st January, 2024. That further, the Court lacked jurisdiction to entertain the application for enforcement

of the Arbitral Award in view of the provision of Section 37 of the *Arbitration Act* for there was no process under the *Arbitration Act* known as "the adoption of an award." That the Applicant did not have the locus with respect to the enforcement of the Arbitral Award as he had neither been a party in the proceedings before the Arbitral Tribunal nor to the Arbitration Agreement. That accordingly, the Applicant's Application be dismissed with costs.

25. The 1st and 2nd Defendants did not participate in the Intended Defendant/Applicant's Application.

26. Having summarized what is before me, I find the issues that give rise for determination being as follows:

    i. Whether the Applicant James Odera Ndonji be joined to the instant proceedings as a Defendant and if so;

    ii. Whether the Court should adopt the Arbitral Award dated 29th October 2024 as a Judgement of the Court and thereafter direct the rent deposited in the joint Bank account in the name of the Plaintiff and the Defendants' Advocates to be released to the Applicant and all subsequent rent going forward to be paid to the Applicant.

    iii. Whether the Applicant should enter the suit premises for inspection and valuation.

27. It is worth noting that pursuant to the filing of a suit against the 1st and 2nd Defendants, simultaneously with a Plaint dated the 8th May 2023, the Plaintiff moved the court under Section 7(1) of the *Arbitration Act* and Rule 2 of the *Arbitration Rules* seeking an interim injunction against the Defendants pending the hearing and determination of an intended arbitration to restrain them from interfering with its quiet possession of LR No. 396/9 and 396/10 or in the alternative an order of status quo protecting its contractual interests accruing from the lease agreement dated 2nd December 2011, pending the hearing and determination of the intended arbitration.

28. In its ruling of 23rd October, 2023, the court allowed the application granting the Plaintiff an interim injunction for a period of ninety (90) days from the date of the ruling pending the commencement and final determination of the arbitration proceedings.

29. Needless to state that whilst the arbitration proceedings were still ongoing, Bark & Associates Limited Company and James Odera Ndonji (the Applicant herein) vide an Application dated 6th June, 2023 sought leave to be allowed to join the proceedings as the 3rd and 4th Defendants wherein vide its ruling of 31st January 2024, the court dismissed the application for reason that were they joined as parties during the ongoing of the arbitration, it would change the character of the case.

30. On the first issue for determination as to whether the Applicant's application for joinder was Res judicata; this doctrine is enshrined in Section 7 of the *Civil Procedure Act* 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."

31. In the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR, the Supreme Court at paragraph 86 rendered itself on the threshold for proving the applicability of the doctrine of Res Judicata by stating as follows; -

> " We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
>
> a) There is a former Judgment or order which was final;
>
> b) The Judgment or order was on merit;
>
> c) The Judgment or order was 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 identical parties, subject matter and cause of action."

32. There having been a dismissal of a similar Application, and being mindful of attributes of the decision in the *John Florence Maritime Services Limited* (*supra*), I find and hold that the Applicant herein cannot thus prosecute a fresh application in respect of the same issues that had been dismissed in a similar application simply because an Arbitration had since been finalized.

33. The rationale for the doctrine of res judicata was discussed by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR wherein it had observed as follows; -

> " The rule or doctrine of res judicata serves the salutary 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."

34. The Applicant's application for joinder is herein rendered Res judicata the court's Ruling of 31st January 2024 and is struck out.

35. Having struck out the Applicant' Application seeking to be joined in this proceedings, it then goes without saying that the Applicant had no locus standi to seek the subsequent prayers in his application him not having been a party to either the proceedings herein or the proceedings before the tribunal. The issue of locus standi was defined in the case of *Alfred Njau & 5 Others vs. City Council of Nairobi* [1983] eKLR to mean- "the right to appear in Court."

36. Indeed, the Court of Appeal in this case had held as follows:

> " .....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to."

37. Subsequently the prayers sought by the Applicant will fall by the wayside too. The Application dated 15th November, 2024 is herein struck out with costs.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE