



REPUBLIC OF KENYA



KENYA LAW
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**Gekara v Gekara & 3 others (Environment and Land Case
97 of 2021) [2025] KEELC 5224 (KLR) (14 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE 97 OF 2021**

DO OHUNGO, J

JULY 14, 2025

BETWEEN

JOSEPHINE KWAMBOKA GEKARA PLAINTIFF

AND

HENRY BOSIRE GEKARA 1ST DEFENDANT

BENJAMIN MOKUA GEKARA 2ND DEFENDANT

JOSEPH OKERO GEKARA 3RD DEFENDANT

OTAO GEKARA 4TH DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 5th March 2025, filed by Zachary Onchwari Gekara. He seeks orders that he be allowed to testify in the matter as Defendant and that costs of the application be in the cause. The application is drawn and filed by Asati, Anyona and Company Advocates and is supported by an affidavit sworn by the applicant. It is based on the following grounds:
 1. That the applicant is the legal representative of the estate of the deceased Josephine Kwamboka Gekara and related by being the son.
 2. That the plaintiff testified in two different files being 1143/2016 and 58 /2015 both evidence was recorded in Kisii before transfer of the to Nyamira.
 3. That Nahason Gekara Okero in file No 1143 /2016 gave evidence as defendant.
 4. That the applicant wants to gave (sic) evidence as the defendant then closes the case.
 5. That the evidence of the applicant is in line with the defence which has not been concluded.
 6. That the respondents began their case as plaintiffs and have closed their case.



7. That it will not be prejudicial in anyway (sic) to the respondents in the event the applicant is allowed to testify and in any event it will assist the court to reach a just conclusion.
 8. That the application is highly merited and should be allowed as prayed.
2. The application is opposed through Grounds of Opposition dated 12th March 2025, drawn and filed by Nyariki & Co. Advocates. The following are the grounds on which the application is resisted:
 1. That the applicant's application lacks substance is ambiguous, hollow and baseless.
 2. That the applicant's application is flat, confused as it does not seek a remedy capable of being granted by this Honourable court.
 3. That the applicant's application is scandalous, misplaced, confused and unmerited as it does not purport to seek any relief capable of being granted by the court.
 4. That the application seeks to have the plaintiff to testify as a defendant in the same matter.
 5. That this application is unmerited and should be dismissed ex debito justiae (sic).
 6. That the applicant's application is Res judicata in view of the court's ruling dated 11th December 2024.
 3. The application was canvassed through written submissions. The applicant filed submissions dated 3rd April 2025 in which he argued that he is the Plaintiff in the file and the administrator of the estate of Josephine Kwamboka Gekara (deceased). He added that as the Defendant in all three consolidated cases on behalf of Josephine Kwamboka Gekara (deceased), he should be allowed to testify. That although he is the Plaintiff in Kisii ELCC No. 58 of 2015 which became the lead file, he wishes to testify as the Defendant so as to give his version of the case and that he filed his witness statement. That the Plaintiff in Kisii ELCC No. 58 of 2015 has so far not testified in the matter and should not be shut out.
 4. In reply, the respondents filed brief submissions dated 8th April 2025 in which they contended that the application is res judicata in view of the last ruling on record, that the applicant has not complied with the last directions, that the application is incomprehensible, that the relief sought cannot be granted since the application is ambiguous and self-defeating and that the Court is being asked to do the impossible. They concluded by urging the Court to dismiss the application with costs.
 5. I have carefully considered the application, the grounds of opposition and the submissions. The issues that arise for determination are whether the application is res judicata and whether the orders sought should issue.
 6. For better context, it is necessary to give a background of the cases and the proceedings thus far. Litigation in these consolidated matters commenced on 16th October 2012 before the High Court at Kisii when David Arita Gekara (Suing as the legal representative of the late Monicah Sigara Gekara) filed Kisii HCCC No. 377 of 2012 against Nahashon Gekara Okero and Josephine Kwamboka Gekara. The suit, which was commenced through Plaint drawn by Nyariki & Co. Advocates, was later transferred to ELC at Kisii thereby becoming Kisii ELCC No. 1143 of 2016.
 7. On 11th February 2015, Josephine Kwamboka Gekara filed Kisii ELCC No. 58 of 2015 against Henry Bosire Gekara, Benjamin Mokuia Gekara, Joseph Okero Gekara and Otao Gekara. The Plaint dated 11th February 2015 was drawn by Asati & Company Advocates.



8. The following day, on 12th February 2015, Nahashon Gekara filed Kisii ELCC No. 59 of 2015 against Henry Bosire Gekara, Benjamin Mokuia Gekara, Joseph Okero Gekara and Daudi Ombachi Gekara. The Plaint dated 11th February 2015 was also drawn by Asati & Company Advocates.
9. David Arita Gekara filed Notice of Motion dated 15th October 2015, in Kisii HCCC No. 377 of 2012, seeking consolidation of the three matters. Following a consent letter dated 16th October 2015, written on the letterhead of Asati & Co. Advocates, which was duly filed and adopted, the three matters were consolidated. The parties did not however specify which of the files would be the lead file.
10. The matters thereafter proceeded for hearing. On 21st January 2020, David Arita Gekara testified as PW1. The testimony was recorded in Kisii ELCC No. 1143 of 2016 and the coram for that date indicates that Mr Nyariki appeared for the Plaintiff while Mr Anyona appeared for the Defendants. PW1 was cross examined by Mr Anyona and re-examined by Mr Nyariki.
11. Subsequently on 5th November 2020, Henry Bosire Gekara testified as PW2 with the coram for the date stating that Mr Sagwe held brief for Mr Nyariki for the Defendants while Mr Anyona appeared for the Plaintiff. PW2 was cross examined by Mr Anyona and re-examined by Mr Sagwe. At the end of the proceedings of that date, the Plaintiff's case was closed, upon an application by Mr Sagwe. Thereafter, defence hearing was scheduled by consent for 30th November 2020. PW2's testimony and all the proceedings of 5th November 2020 were recorded in Kisii ELCC No. 58 of 2015.
12. Come 30th November 2020, Benjamin Mokuia Gekara testified as DW1. Once again, Mr Nyariki introduced himself as appearing for the Defendants while Mr Anyona appeared the Plaintiff. The coram notwithstanding, the record shows that DW1 was cross examined by Mr Nyariki and re-examined by Mr Anyona. At the end of the proceedings of that date Mr Anyona indicated that he intended to call three more witnesses. The matter was then adjourned to 31st May 2021 for further defence hearing. PW2's testimony and all the proceedings of 5th November 2020 and 30th November 2020 were recorded in Kisii ELCC No. 58 of 2015.
13. Owing to non-attendance by parties on 31st May 2021, the further defence hearing did not proceed. Instead, the matter was scheduled for mention on 27th July 2021, on which date Mr Anyona informed the Court that his client had unfortunately passed away in June 2021. The matter was then scheduled for mention on 8th November 2021 to allow for substitution. In the meantime, the consolidated cases were transferred to ELC Nyamira where upon arrival they were assigned the global case number Nyamira ELCC No. 97 of 2021 with the parties being captured as listed in Kisii ELCC No. 58 of 2015. Proceedings from 8th November 2021 onwards were conducted before ELC Nyamira.
14. On 8th November 2021, Mr Nyamweya who was holding brief for Mr Anyona for the Defendants told the Court that the First Defendant had also passed away. Subsequently on 14th December 2021, Josephine Kwamboka Gekara (deceased) who was the Plaintiff in Kisii ELCC No. 58 of 2015 was substituted by Zachary Onchwari Gekara.
15. I now address the first issue for determination. The respondents contended in their grounds of opposition that the application is res judicata in view of the court's ruling dated 11th December 2024. They however did not address the issue in their submissions. I will nevertheless address it since res judicata is an issue that goes to the jurisdiction of the court.
16. Res judicata is embodied in Section 7 of the [Civil Procedure Act](#) which provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between



parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

17. The effect of the doctrine is that it deprives a court of jurisdiction to hear and determine any matter that falls within the four walls of the doctrine. For an objection based on the doctrine to succeed, there must be a previous suit in which the matter was in issue; the parties in both matters were the same or litigating under the same title; the previous matter was heard and determined by a competent court and the issue is raised once again in the new suit. The doctrine is a complete estoppel against any suit that runs afoul of it. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR and *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.
18. I have perused the ruling dated 11th December 2024. It was in respect of Notice of Motion dated 28th June 2024, an application drawn and filed by Asati, Anyona and Company Advocates on behalf of the Defendants, seeking setting aside of proceedings of 19th June 2024 and re-opening of the matter for defence hearing. In the proceedings of 19th June 2024, Mr Nyariki who the coram of the day indicates was for the Defendants, closed the Defence case. The Court then gave directions that the Plaintiff file submissions within fourteen days and that the Defendant file submissions within seven days of service. The matter was then scheduled for delivery of judgment on 25th July 2024.
19. In the ruling of 11th December 2024, the Court dismissed Notice of Motion dated 28th June 2024 with costs. In essence therefore, the parties are at the stage where they were at the close of the proceedings of 19th June 2024. They are supposed to file their final submissions. The present application seeks to revisit the issue of whether further evidence can be taken in the case, a matter that the Court declined through the ruling of 11th December 2024.
20. If any party was dissatisfied with the ruling, they ought to have appealed against it. I have perused both the Case Tracking System (CTS) and the physical file. I have not seen any Notice of Appeal in respect of the ruling. The parties will have to live with the options they have taken in the matter thus far, instead of inviting the Court to do that which it cannot do for want of jurisdiction. It is plain enough that jurisdiction cannot be conferred by consent of the parties or by innovation whether in drafting of pleadings or on the part of the Court. If the Court proceeds in a matter in which it lacks jurisdiction, even if the parties applaud, urge and nudge it on, its determination would amount to a nullity. The Supreme Court reiterated the position in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR. By extension, mere good intentions to accommodate further evidence from the applicant cannot grant jurisdiction.
21. I agree with the respondents that Notice of Motion dated 5th March 2025 is res judicata. I strike it out with costs to the respondents. Parties to file and serve submissions within the timelines that were given on 19th June 2024. For the avoidance of doubt, all the evidence tendered by the parties is on record and the Court will locate it where it is. There shall be no need to file an application for transfer of evidence.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 14TH DAY OF JULY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Anyona for the Plaintiff

Mr Sagwe holding brief for Mr Nyariki for the Defendants



Court Assistant: B Kerubo

