



Mugo "A" & another v Mukunya (Environment & Land Case 24 of 2022) [2023] KEELC 18015 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 24 OF 2022**

LN GACHERU, J

JUNE 8, 2023

BETWEEN

MUKUNYA MUGO "A" 1ST PLAINTIFF

WINNIE WAMBUI 2ND PLAINTIFF

AND

ELIZABETH MUGURE MUKUNYA DEFENDANT

RULING

1. The Defendant/Applicant brought this Notice of Motion Application dated 10th March 2022, under various provisions of Law seeking for the following orders;-
 1. That this Court has no jurisdiction to hear the matter as the same is res-judicata.
 2. That costs of this application be in the cause.
2. The application is premised on the following grounds;
 - a. That the matter herein offends the proviso in Section 7 of *Civil Procedure Act* Cap 21 the Laws of Kenya.
 - b. That the matter herein raises similar issues in respect to Murang'a ELC No. 111 of 2017.
 - c. That the parties in this suit are also similar to those in Murang'a ELC No. 111 of 2017.
 - d. That Murang'a ELC No. 111 of 2017, was heard and determined by a competent Court and Judgment was delivered on the 28th March, 2019.
 - e. That the issue herein which are similar to Murang'a ELC No. 111 of 2017 were heard and determined and cannot be re-litigated herein.
 - f. That it is trite principle of law that litigation must come to an end.



- g. That the matter ought to be dismissed as the same offends the proviso in Section 7 of *Civil Procedure Act* Cap 21 Laws of Kenya.
- h. It is in the wider interest of justice that the orders sought herein are granted.
3. The application is also supported by the Affidavit of George Gitamo Onsombi Advocate, who averred that since the issue herein are similar to the issues in Murang'a ELC No. 111 of 2017, then this matter cannot be re-litigated and that litigation must come to an end. He also averred that this suit ought to be dismissed as the same offends the provisions of Section 7 of the *Civil Procedure Act*, and it is for the interest of Justice that the instant prayers be granted.
 4. The application is opposed vide the Replying Affidavit of Mukunya Mugo "A" the 1st Plaintiff herein, who averred that the instant application is misconceived, as abuse of the Court process, lacks merit and is calculated to inconvenience the Plaintiffs/Applicants herein. He sought for the dismissal of the said application with costs.
 5. It was his contention that the application itself is res-judicata to the same application filed on 6th February 2020, which had stated that this suit is res-judicata to ELC No. 111 of 2017. It was his averment that this suit is not res-judicata ELC No. 111 of 2017 since in the said suit, the Court had found that the suit was non-suited and thus struck it out. Further that the issue of trespass, which is a continuing trespass was never dealt with. Further, that the Plaintiffs' ownership of the suit property Loc.1/Kiunyu/17, remains unchallenged and he urged the Court to dismiss the instant application.
 6. The Defendant/Applicant filed a Supplementary Affidavit wherein the deponent George Gitamo Onsombi Advocate reiterated that the suit is Resjudicata, but the Notice of Motion dated 6/2/2020, was not Resjudicata, as the said issue of Resjudicata was not determined by the Court. Further, he averred that the issue of ownership of the suit property had already been decided vide the Judgment that was delivered on 28th March 2019, but certainly, it was not in favour of the Plaintiffs/Respondents herein. It was his contention that the suit Murang'a ELC No. 111 of 201, having been struck out for being non-suited was not an avenue for the Plaintiffs/Respondents to file a fresh matter on the same issue.
 7. The application was canvassed by way of written submissions.
 8. The Defendant/Applicant through the Law Firm of Gitamo Onsombi Co. Advocates filed her submissions on 27th May 2022, and submitted that the suit herein is Resjudicata and therefore the Court lacks the requisite jurisdiction to hear and determine the same.
 9. It was submitted that the issues raised in this suit are the same issues that were raised in Murang'a ELC No. 111 of 2017, and that the same similar issues were determined on 28th March 2019 over the issue of ownership of the Land Parcel No. Loc.1/Kiunyu/172.
 10. It was further submitted that the Judgment of 28th March 2019, was clear that the Plaintiffs did not establish the ownership of the said suit property, and therefore the issue of ownership was fully determined and cannot be re-litigated.
 11. Further that the prayers sought in the instant suit are the same prayers that had been sought in ELC No.111 of 2017. The Defendant/Applicant relied on the cases of Njue Ngai Vs Ephantus Njiru Ngai & Another (2016) eKRL, where the court held;

“To summarize, as stated in the Uhuru Highway case (Supra), in order to rely on the defence of res judicata, there must be:



- i. A previous suit in which the matter was in issue;
 - ii. The parties were the same or litigating under the same title.
 - iii. A competent Court heard the matter in issue;
 - iv. The issue has been raised once again in a fresh suit”.
12. That since the issue for determination herein are entirely the same issues that were determined in Murang’a ELC No. 111 of 2017, then the suit herein is Res judicata and the entire suit should be dismissed.
13. It was also submitted that since the Plaintiffs did not proof ownership of the suit property in Murang’a ELC No. 111 of 2017, the Court should not assist them to fill in the gaps that led to the dismissal of the earlier suit. For this the Defendant/Applicant relied on the case of Kuna Runo & Another Vs Kipsang Langat (2005) eKLR and Njue Ngai Vs Ephantus Njiru Ngai & Another (Supra) where the Court held;

“The fresh suit filed by Njue was christened a ‘Declaratory suit’ which he contended as an alternative to ‘Judicial Review’. By whatever name called, it was a new suit and, as earlier stated, he was time barred in filing a Judicial Review application to quash the decision of the Appeals Committee made 12 years earlier. The sematic change was merely a clever turn (but that legal ingenuity was within a cul-de-sac)”.

The Defendant/Applicant also relied on the case of Attorney General & Another Vs (2012) eKRL, where it was held;-

“The Courts must always be vigilant to guard litigant evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by Court of competent Jurisdiction”.

14. The Defendant/Applicant urged the Court to dismiss the instant suit for being Resjudicata.
15. The Plaintiffs/Respondents filed their written submissions on 14th February 2023, through CM Advocates LLP and submitted that the suit herein is not Resjudicata.
16. The Plaintiffs/Respondents relied on Section 7 of the *Civil Procedure Act* and framed various issues.
17. On whether the Court has jurisdiction, the Plaintiffs/Respondents submitted that the Defendant/Applicant raised the issue of Jurisdiction after filing a Statement of Defence and Counter Claim dated 26th May 2021. That the issue of jurisdiction ought to have been raised at the earliest opportunity, but not to have waited for 10 months to question the said jurisdiction of this Court.
18. On the issue of Resjudicata, the Plaintiffs/Respondents submitted that the suit is not Resjudicata as the parties in Murang’a ELC No. 111 of 2017, are different from the parties in the current suit. That in ELC No. 111 of 2017 Mukunya B, was the 2nd Plaintiff, whereas in the present suit Winnie Wambui is the 2nd Plaintiff. That Mukunya B and Winnie Wambui, are not the same persons.
19. Further that the issues in ELC No. 111 of 2017, were not heard and finally determined as the Court stated that the said suit was non-suited and it was struck out.



20. The Plaintiffs/Respondents relied on the case of Juliana Akinyi Owino Vs Kiarie Shoe Stores (2014) eKLR, where the Court held;-

“The existence of the accident is not in dispute. What the Court found as stated above was that the Respondent had wrongly been sued. The original Plaintiff described the Respondent as a limited company whereas the amended Plaintiff described it as a business name. The trial Court found for a fact that the suit was non-suited as there was no proper Defendant”.

21. It was further submitted that since the suit was struck out for being non-suited, then the issue were not fully determined.

22. It was also the Plaintiffs/Respondents’ submissions that trespass being a cause of action, then the same cannot be a subject of Resjudicata. For this the Plaintiff relied on the case of Isaack Ben Mulwa Vs Jonathan Mutunga Mweke, Civil Appeal No. 60 of 2018 (2018) eKLR where the Court held;-

“Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be resjudicata simply because the same parties or their parents litigated over the same matter in 1985. It is a well-settled principle that continuous injuries to land caused by the maintenance of tortuous acts create separate causes of action barred only by the running of the statute of limitation against each successive acts. As explained by the learned authors Winfield and Jolowicz in Winfield and Jolowicz on tort, 11th Edition, Sweet and Maxwell, London, 1979 at page 342; ‘Trespass, whether by way of personal entry or by placing things on the Plaintiff’s land may be continuous and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass”.

23. Therefore, for the above reasons, the Plaintiffs/Respondents submitted that the Notice of Motion Application dated 10th March 2022, is not merited as trespass as a cause of action cannot be subjected to Resjudicata as it is a trespass continuous.

24. The Defendant/Applicant filed Supplementary written submissions and submitted that no new issue can be raised in submissions. It was submitted that the Plaintiffs/Respondents had submitted that the Defendant/Applicant waited for 10 months to raise the question of jurisdiction after filing her Statement of Defence and Counter Claim. That this issue ought to have been raised via Replying Affidavit so that the Defendant/Applicant could ably respond to it via a Further Affidavit. Reliance was placed on the case of ASSL Vs Asmb (2020) eKLR, where the court held

“It is trite law that new issues cannot be raised in the submissions”

25. Further that though the Plaintiffs alleged that the suit was filed due to continuous trespass, it is clear that the suit herein was filed to fill the gaps identified by the Court in its judgment of 28th March 2019. That the duty of the Court is not to assist a party fill gaps in his or her case as was held in the case of Odoyo Osodo VS Rael Obare Ojuok and 4 others (2017) eKLR, where the Court held;-

“The Court cannot allow the reopening of the case so that a party can fill the gaps in his evidence as that definitely would be prejudicial to the opposing party”.

26. The Defendant/Applicant insisted that the issues raised herein were heard and determined by a competent Court in Murang’a ELC No. 111 of 2017 and this suit is disguised as raising the issue of continuing trespass which is not the case.



27. The Court has considered the instant application dated 10th March 2022, the pleadings herein, the Court records and the jurisprudential authorities on the issue of Jurisdiction and Resjudicata and finds the issue for determination are;-
1. Whether the Court has jurisdiction?
 2. Whether the suit herein is Resjudicata
 3. Whether the Notice of Motion application dated 10th March 2022 is merited.
 4. Who should pay costs of the application.
28. From the available evidence, it is evident that the suit herein was initially filed via a Plaint dated 4th June 2019, and was described as Murang'a ELC No. 18 of 2019. The Plaintiffs herein had sought for various prayers. After several interlocutory applications, the matter was transferred to Thika ELC and given No. Thika ELC No. 46 of 2020. Later the suit was transferred back to this Court and given the Current case No. Murang'a ELC No. 24 of 2022. From the above back ground, this case was filed in Court in the year 2019, and has now been in the Court system for about 4 years now. The Defence and Counterclaim was filed on 26th May 2021. On 10th March 2022, the Defendant filed the instant application which is the subject of this Ruling.
29. However, the trial Court at Thika ELC found and held that the suit property is domiciled in Murang'a and therefore the suit was transferred back to this Court on 26th October 2022. Thereafter the parties complied with the filing of the written submissions and thus this ruling.

Whether the Court has Jurisdiction?

30. In prayer No. 1, of the instant Notice of Motion Application, the Defendant/Applicant had sought for an order that the Court has no jurisdiction. The said prayer was opposed by Plaintiffs.

What is Jurisdiction?

31. According to Blacks Law Dictionary 1st Edition Page 980, Jurisdiction is defined as “the Court’s power to decide a case or issue a Decree”.
32. It is evident from the above description that Jurisdiction is power to hear and decide a case.
33. It is trite that jurisdiction is a creature of Statute and the Law and no Court can grant itself jurisdiction. The Defendant/Applicant has averred and submitted that this Court has no jurisdiction because the matter herein is Resjudicata.
34. On their part, the Plaintiffs/Respondents have averred that this Court has jurisdiction to hear this matter and that the Defendant/Applicant is barred from raising the issue of jurisdiction at this stage since she has already filed her Defence and Counterclaim.
35. However, it is trite that jurisdiction being an issue of Law can be raised at anytime of the proceedings. However, Courts have time and again held that it is better to raise the issue of jurisdiction at the earliest possible opportunity. See the case of Ndimu Vs Ndumi & Another (2008). EA 269 where the Court held;-

“A question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the matter straight away”.



36. Though the Plaintiffs have submitted that the issue of Jurisdiction was brought 10 months after the Defence and Counterclaim were filed, the Court finds and holds that the issue of jurisdiction can be raised at any stage of the proceedings.
37. The Defendant/Applicant had submitted that the Court should ignore the issue of bringing the issue of jurisdiction late in the proceedings because it was not pleaded in the Replying Affidavit, but was brought out in the submissions. However, as the Court has found and held above, the issue of jurisdiction being a pure point of law can be raised at any stage of the proceedings; It can even be raised by the Court itself during the hearing. Therefore, the submissions that the issue of Jurisdiction was not raised in the Plaintiffs/Respondents' Replying Affidavit is not founded and this Court will not ignore the said submissions on issue of Jurisdiction.
38. As earlier stated, Jurisdiction is a creature of statute. The Jurisdiction of this Court is granted by Section 13 of the *Environment and Land Court Act* the said Section states;-
- “The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land”.
39. The Plaintiffs herein have sought for various prayers among them “a Declaration that the Plaintiffs as Joint Trustees are the owners and proprietors Jointly of the property described as Loc.1/Kiunyu/172 measuring approx. 3.41ha being held in trust of Mukunya ‘B’ and that the Defendant occupation of the same is illegal and unlawful and therefore amounts to trespass”.
40. The above claim is a claim over title to and occupation to land. The claim falls under the claims that can be entertained by an Environment and Land Court as provided under Section 13 of the *Environment and Land Court Act*. The fact that the Defendant/Applicant is claiming that the suit herein is Resjudicata does not deprive this Court of its jurisdiction to hear and determine this claim.
41. Having analysed the issues as above, this Court finds that it has jurisdiction to hear and determine this claim.

whether the suit herein is Resjudicata?

42. Blacks Law Dictionary 10th Edition Page 1504 describes Resjudicata as “A thing adjudicated; - An issue that has been definitely settled by a Judicial decision; An Affirmative Defence barring the same parties from litigating a second Law suit on the same claim or any other claim arising from the same transaction”.
43. Further the same dictionary states that the three essential elements are;-
1. An earlier decision on the issue
 2. A final judgment on the merits
 3. The involvement of the same parties or parties in privity with the original parties.
44. From the above description, it is trite that the plea of Resjudicata is available to minimize a situation where litigation does not come to an end. The doctrine of the Resjudicata is based on three maxims; First that no man should be vexed twice over the same cause; secondly, that it is in the interest of State that there should be an end to litigation and thirdly that a Judicial decision must be accepted as correct. See the case of Evelyn Kowido & Another t/a Evedel Enterprises Vs Bamburi Supermarkets Ltd Mombasa HCCA No. 18 of 2006



45. The Law that governs the Doctrine of Resjudicata is Section 7 of the *Civil Procedure Act* which states;-
- 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.”
46. The Defendant/Applicant has contended that the suit herein is Resjudicata to Murang’a ELC No. 111 of 2017, which is already determined. That the Plaintiffs filed this Suit to fill in the gaps that were identified by the Court in its judgment of 28th March 2019.
47. The elements to be established in an application for order that a suit is barred by the doctrine of Resjudicata were enumerated in the case of John Florence Maritime Services Limited & Another VS Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR, where the Court of Appeal set out the ingredients of res judicata as follows:
- From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & Another v the Attorney General and Others [2005] 1 EA 83.”
48. The Plaintiffs have averred and submitted that in Murang’a ELC No. 111 of 2017, the suit was not determined on merit, but was struck out for being non-suited. The court has considered the judgment of the Court in Murang’a ELC No. 111 of 2017, which was delivered on 28th March 2019.
49. Indeed, in paragraph 39 of the said Judgement, the Court struck out the suit for being non-suited. The suit was not dismissed, for lack of evidence, but was struck out for being non-suited. The Court found and held that Winnie Wambui, the 2nd Plaintiff herein who was a Trustee was not a party to that suit – ELC No. 111 of 2017.
50. From the reading of the Judgment of the Court issued on 28th March 2019, it is cleared that the suit thereon was struck out and therefore not dismissed. When a suit is dismissed, it is obvious that a fresh suit cannot be filed. However, when a suit is struck out, a party can file a fresh suit. Given that Murang’a ELC No. 111 of 2017, had been struck out, then the Plaintiffs thereon could file a fresh suit. See the case of Samuel Kiiru Gitau Vs John Kamau Gitau Nairobi HCCC No. 1249 of 1998, where the Court held;-
- “For a matter to be Resjudicata, it must be one on which the Court has previously exercised its Judicial mind and has after argument and consideration come to a conclusion on the contested matter and this reason, a matter is said to have been heard and finally decided notwithstanding that the former suit was disposed of by decree of an award”.
51. Further, it is evident that in Murang’a ELC No. 111 of 2017, the Plaintiffs were Mukunya Mugo ‘A’ and Mukunya Mugo ‘B’ against the Defendant Elizabeth Mugure Mukunya. In the instant suit, the 2nd Plaintiff is Winnie Wambui, who was not party in ELC No. 111 of 2017 and thus the reasons why the said suit was held to be non-suited.



52. Having considered the argument for and against the instant application, the Court finds and holds that the suit herein is not Resjudicata Murang'a ELC No. 111 of 2017. The instant suit should be allowed to proceed for main hearing and to be determined on merit.

Whether the Instant Notice of Motion application dated 10th March, 2022 is merited?

53. Having found that the Court herein has jurisdiction to hear and determine the suit herein and having found that the suit herein is not Resjudicata Murang'a ELC No. 111 of 2017, the Court finds and holds that the instant application is not merited and the same is dismissed entirely.

Who should pay the costs of the application?

54. As provided by Section 27 of the *Civil Procedure Act*, costs are awarded at the discretion of the Court. However, costs do follow the event and are ordinarily awarded to the successful litigant.
55. The Plaintiffs/Respondents are the successful litigants are awarded costs of this application.
56. Having carefully considered the instant Notice of Motion Application dated 10th March 2022, the Court finds and holds it not merited and the said application is dismissed entirely with costs to the Plaintiffs/Respondents.
57. This being a suit that was filed in the year 2019, it is already a backlog and the Court directs that the said suit should be set down for hearing expeditiously so that the contested issues can be resolved once and for all.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF JUNE, 2023.

L. GACHERU

JUDGE

8/6/2023

Delivered online in the presence of; -

Joel Njonjo - Court Assistant

Mr. Okwalo holding brief Ms. Mureithi for Plaintiffs/Respondents

Mr. Onsombi for Defendant/Applicant

L. GACHERU

JUDGE

8/6/2023

