



REPUBLIC OF KENYA



**Githinji & 7 others v Warui (Environment & Land Case E026 of 2023)
[2023] KEELC 21546 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E026 OF 2023
JM MUTUNGI, J
NOVEMBER 10, 2023**

BETWEEN

**SAMSON WAWERU GITHINJI 1ST PLAINTIFF
GLADWELL NYAWIRA KIHARA 2ND PLAINTIFF
GLADWELL HELLEN W. GITHINJI 3RD PLAINTIFF
VICTORIA NJERI GITHINJI 4TH PLAINTIFF
PETER MWANGI GITHINJI 5TH PLAINTIFF
FRANCIS KOIGI GITHINJI 6TH PLAINTIFF
MAGDALENE WANGUI NJOGU 7TH PLAINTIFF
MARGARET WANJIA KITHINJI 8TH PLAINTIFF**

AND

PETER WANJOHI WARUI RESPONDENT

RULING

1. The Plaintiffs instituted the present suit *vide* a plaint dated April 18, 2023 and simultaneously with the Plaint the Plaintiffs filed a Notice of Motion of even date. The Plaintiffs inter alia sought an order for eviction against the Respondent, and/or his servants, agents and assigns, payment of mesne profits and costs of the suit. The motion sought for an order of inhibition to issue against land parcel No. Plot 90 Kutus (suit property). The Plaintiff amended the Notice of Motion on May 23, 2023 to include an order of temporary injunction, to issue against the Defendant and/or his servants and assigns.



2. The Respondent filed a Notice of Preliminary Objection dated May 17, 2023 and raised the following grounds:
 1. The Application and suit are incompetent, bad in law and a gross abuse of the due process of court as this Honourable Court is functus officio as all the matters in dispute concerning the ownership, occupancy and use of the suit property namely Plot No. 90 Kutus were conclusively adjudicated upon and settled in the judgment dated June 7, 2012 and amended on May 3, 2013 in Embu High Court Civil Case No. 83 of 1998.
 2. This Application and suit herein are grossly misconceived and does not lie in law by virtue of being res judicata thereby offending section 7 of the Civil Procedure Act.
 3. The Application and suit herein offend the provisions of Section 8 and 34 of the Civil Procedure Act as read with order 22 rule 6 of the Civil Procedure Rules.
3. The Court on July 5, 2023 gave directions that the Preliminary Objection should be disposed of first and that it should be canvassed by way of written submissions. The Plaintiffs filed their written submissions on September 7, 2023 whilst the Defendant filed his submissions on September 26, 2023.
4. Having considered the Defendant's objection and the parties' written submissions, the singular issue for determination in regard to the Defendant's objection is whether this court has jurisdiction to hear and determine the present suit on the ground of res judicata.
5. The Court of Appeal in the Case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 laid down the principle as to what constitutes a Preliminary Objection. A Preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the *Mukisa Biscuit Case (supra)* Law, JA stated as follow: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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 the arbitration.”
6. In the present matter the Defendant has hinged his Preliminary Objection on the fact that the issues raised in the present suit have previously been adjudicated upon in Embu High Court Civil Case No. 83 of 1998 between Robin Githinji (deceased) and the Defendant; and that a final Judgment was rendered in the case. The question whether or not the Plaintiff's suit is res judicata goes to the jurisdiction of the Court to entertain the suit. If the suit is res judicata on account of the fact that there exists a previous suit which has conclusively been heard and determined by a competent Court of law, then the Court lacks the jurisdiction to entertain the same. If the Court was to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and void.
7. The Defendant contends that all matters in dispute concerning the ownership, occupancy and the use of the suit property were conclusively adjudicated upon and settled in the Judgment delivered in the High Court at Embu civil Case No. 83 of 1998 between Robin Githinji (deceased) and the Defendant herein. He submits that the Plaintiffs herein are the beneficiaries of Robin Githinji and that in Civil Case No. 83 of 1998, Robin Githinji had sought for a declaration that he owned the suit property



and for an eviction order against the Defendant. He further submits that the High Court in Embu declared Robin Githinji as the owner of the suit property and failed to issue an order of eviction as the same had not been proved. The Defendant further submits that the instant suit raises no new cause of action and that it cannot fall within the two exceptions to the doctrine of res judicata. It is his position that the instant suit does not raise constitutional matters and as such the Plaintiffs have failed to show their likelihood to suffer substantial injustice. On the second exception, the Defendant posits that the claim of encroachment by the Plaintiffs cannot be categorized as special circumstances because it was raised in the Civil Case No. 83 of 1998.

8. The Defendant further submitted that the Judgment relating to the previous suit was delivered on June 7, 2012 and amended on May 3, 2013 in the High Court at Embu. He contends that Robin Githinji further sought to have the amended Judgment clarified by the High Court and a Ruling was delivered on November 2, 2015 by F. Muchemi, J who affirmed the Judgment as delivered on 7/06/2012 and amended on 3/05/13. The Defendant further stated the Plaintiff went on to file an application in Nyeri Court of Appeal under Civil Application No. NYR 55 of 2015 dated November 27, 2015 seeking extension of time to file an appeal out of time, which application was dismissed *vide* a Ruling dated February 3, 2016. As a consequence, the Defendant contended that this Court has no jurisdiction as it was rendered functus officio when it heard and determined the suit at Embu.
9. The Plaintiffs in their submissions admit that indeed Robin Githinji filed Embu High Court Civil Case No. 83 of 1998 where he sought to be declared as the owner of the suit property and for an eviction order to issue against the Defendant. The Plaintiff further admit that the issue of encroachment by the Defendant in the suit property was dealt with by the High Court in Embu and admit that the High Court in Embu pronounced that Robin Githinji (deceased) was the owner of the suit land. It is their position however, that sometime in July 2022, the Defendant encroached/trespassed in their suit property and started constructing permanent structures on the suit property without any authority or colour of right.
10. The Plaintiffs further submit that the instant suit is not Res Judicata as it falls within the two exceptions to the doctrine of Res Judicata. They posit that the Plaintiffs are likely to suffer substantial injustice because there exists new circumstances that did not exist at the time of the previous suit and which were not proven by the Plaintiff. They refer to the letter dated 4th August 2022 and a Part Development Plan (PDP) obtained from the Ministry of Land, Housing and Urban Development of the County Government of Kirinyaga which reiterated that the suit property measured 100 feet by 100 feet and which belonged to Robin Githinji Mbui. In regard to the exception of special circumstances warranting the Court to make an exception, the Plaintiffs submit that the series of photographs annexed to the Supporting Affidavit demonstrates trespass and/or encroachment and that illustrates a change in the complexion of the case.
11. In essence therefore, it is the Plaintiffs' position that the instant suit falls within the two exceptions to the doctrine of *res judicata* and therefore may not be pursued further by the same parties; a cause of action may not be relitigated once it has been judged on the merits; finality. They refer to *res judicata* and urges that the defendant's preliminary objection should be dismissed. They relied on the cases of *Kibundi Versus Mukubwa & anor* (1993) eKLR and *Musankishay Kalal Paulin v D.C.I & 4 others* (2002) eKLR.



12. The substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya which 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”

The [Black's law Dictionary](#) 10th Edition defines “*res judicata*” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

13. In the Case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#) (2017) eKLR, the Supreme Court while considering the above provision held that all the elements outlined hereunder must be satisfied conjunctively for the doctrine of Res Judicata to be invoked. That is:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. The 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 issue was competent to try the subsequent suit or the suit in which the issue is raised.”

14. The Judgment dated June 7, 2012 by Honourable H.I. Ongu'di exhaustively dealt with the issue pertaining to encroachment of the suit property. The decree exhibited as one of the Plaintiffs' annexures clearly shows Robin Githinji (deceased) was declared as the owner of the suit property and the prayer for eviction was dismissed by the Court as there was no proof of encroachment onto the suit property by the Defendant.

15. I am in agreement with the Defendant's submission that the issue of encroachment was conclusively dealt with and determined as per the Judgment rendered by Ongu'di, J on June 7, 2012. Having regard to the said Judgment and the clarification of the Judgment made on May 3, 2013 it was clear that plot No. 90 Kutus owned by the Plaintiffs deceased father and Plot No. 592 owned by the Defendant were separate and distinct plots. The issue of encroachment was directly and substantially in issue in Embu High Court Civil Case No. 83 of 1998 and the Court could only have ordered the eviction of the Defendant if encroachment had been proved. No encroachment was proved and hence no eviction of the Defendant was ordered.

16. In the present case the Plaintiffs wish to have the issue of encroachment and eviction of the Defendant considered afresh. There is no question that the Plaintiffs are claiming through their deceased father who had litigated with the Defendant on the same subject matter and where similar issues as in the present matter were raised. Given the circumstances. I am not able to hold that there is a new cause of action and/or that the subject matter or the issues are different from the subject and the issues in the previous suit. There perhaps could be what may be perceived as new evidence, but could such evidence



through exercise of due diligence not have been available at the time the trial occurred? At best I see the instant suit, as an attempt by the Plaintiffs to seek a review of the earlier Judgment but then the procedure and process of seeking review has not been followed which would render the present suit misconceived and unsustainable.

17. It appears the Plaintiffs in an effort to circumvent the doctrine of Res Judicata, have employed Judicial craftsmanship to rely on the two exceptions that requires a party to demonstrate special circumstances or the likelihood of suffering substantial injustice to persuade the Court to make an exception to the application of the resjudicata doctrine. I do not consider the exceptions are applicable in the circumstances of the present case.
18. The Court of Appeal Case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that: -

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata..

The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

19. In the present case, the Plaintiffs points out three issues: (1) that the defendant recently encroached into their land and started constructing permanent structures therein; (2) that the letter and the map from the County Government of Kirinyaga indicates that the Defendant does not own the plot No. 592 Kutus; (3) the series of photographs annexed is proof to show that the Defendant is encroaching on the suit property. In my view, the issue of ownership or lack thereof of Plot No. 592 Kutus ought to have been made a ground of defence by the Plaintiffs in the former suit. Similarly, the letter dated 04.08.2022 by the County Government of Kirinyaga raises the aspect of fresh evidence as opposed to fresh circumstance. I also believe that with a little due diligence on the part of the Plaintiff in the former suit, he could have probed on the ownership or lack thereof, of Plot No. 592 Kutus, but he chose and I cannot fault the Learned Judge for finding that the Plaintiff was unable to show the nexus between the Plot 592 Kutus and the suit property. In regard to the photographs attached to the Application, I note that they do not show any new structures and one cannot tell which plot they belong to or are in and thus the defence of there being recent trespass on the suit property cannot be sustained.



20. Going by the above, I find that there is nothing peculiar that distinguishes the instant suit from the former suit and I also find that the Plaintiffs have failed to demonstrate special circumstances to warrant the Court to make an exception and/or it has not been demonstrated there is likelihood of substantial injustice being suffered by the Plaintiffs.
21. The Court in the previous case was categorical on the existence of both plot No. 90 Kutus and Plot No. 592 as distinct plots. This Court cannot override the Judgment issued on June 7, 2012 by a Court with concurrent jurisdiction as it cannot exercise appellate jurisdiction over the decision of that Court. The options the Plaintiffs had were either to appeal against the decision or apply for its review under the review provisions. Their option of appealing suffered when their application for leave to appeal out of time was declined. Litigation has to somehow come to an end and my view is the Plaintiffs must accept that the Court pronounced itself finally on the issue of ownership of plot No. 90 and 592 Kutus and on the issue of encroachment and eviction that the Plaintiffs raise in the present suit.
22. The upshot is that I find merit in the defendant's Preliminary Objection and hold that the issues in dispute having been adjudicated upon and settled in the Judgment dated June 7, 2012 as amended on May 3, 2013 in Embu High Court Civil Case No. 83 of 1998 this Court was rendered *fuctus officio*. The present suit is {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;a cause of action may not be relitigated once it has been judged on the merits; finality.}} *res judicata* and cannot be sustained.
23. The suit is struck out with costs to the Defendant.

RULING DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 10TH DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC -JUDGE

