



REPUBLIC OF KENYA



**Njathi v Gacheru (Environment & Land Case E140 of 2021)  
[2022] KEELC 13509 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13509 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E140 OF 2021**

**BM EBOSO, J**

**OCTOBER 3, 2022**

**BETWEEN**

**MARTHA NYAMBURA NJATHI ..... PLAINTIFF**

**AND**

**TIMOTHY KIGURU GACHERU ..... DEFENDANT**

**RULING**

1. The plaintiff initiated this suit through a plaint dated 29/11/2021. She sought among other reliefs: (i) a declaration that she is the legitimate owner of land parcel Number Ruiru/Mugutha Block 1/ T.1173 [the suit property]; (ii) a permanent injunction restraining the defendant against trespassing on, encroaching on, constructing on, damaging, charging, transferring, alienating or leasing the suit property or harassing or evicting the plaintiff from the suit property; and (iii) an order cancelling the title issued to the defendant in relation to the suit property.
2. Her case was that she acquired the suit property in 1973 by dint of her membership in Nyakinyua Investments Limited. She has been in possession of the suit property since then. She contended that on or about 16/9/2021, she discovered that the defendant had fraudulently obtained a title relating to the suit property, dated 30/3/2012. She itemized various particulars of fraud on the part of the defendant.
3. Simultaneous with the plaint, she brought a notice of motion of even date seeking an interlocutory injunctive order restraining the defendant against interfering with the suit property.
4. The defendant entered appearance and filed a notice of motion dated 21/3/2022, seeking the following verbatim orders:
  - a. That this honourable court be pleased to strike out this matter for being *res-judicata* in light of Thika Chief Magistrate Court Civil Case No 346 of 2016 – Timothy Wainaina Kuria v Paul Wainaina Kuria.



- b. That this honourable court be pleased to strike out Thika ELC Misc Application No E-051 of 2021 - Martha Nyambura Njathi v Timothy Kiguru Gacheru for being *subjudice* and therefore an abuse of the court process.
  - c. That costs of this application and this suit be borne by the plaintiff.
5. The defendant's notice of motion dated 21/3/2020 is the subject of this ruling. The said application was supported by the defendant's affidavit sworn on 21/3/2022. He deposed that he was the registered proprietor of the suit property, having purchased it from Beth Nguhi Njoroge. He contended that he was registered as proprietor of the suit property in March 2012. He caused the sub-division of the land into four parcels, Ruiru/Mugutha Block 1/T. 10685; T.10686; T10687; and T10688.
  6. He further contended that in 2016, he filed Thika CMC Civil Case No. 346 of 2016 against the plaintiff's son, Paul Wainaina Kuria, seeking eviction orders and/or an order of vacant possession of the suit property. He added that the said suit was heard and the court rendered a Judgment in the suit on 2/8/2021, granting the reliefs sought in the suit. He further deposed that, owing to non-compliance with the decree, he sought assistance of the Police and the structures that had been erected on the suit property by the plaintiff's son were removed. He contended that the present suit was triggered by the enforcement of the decree of the lower court.
  7. He added that besides the present suit, the plaintiff filed Thika ELC Misc Application No E051 of 2021 seeking an injunctive relief. He contended that the said suit is an abuse of the process of the court.
  8. The plaintiff did not file and serve a response to the defendant's application, despite being given the opportunity to do so. Similarly, the plaintiff did not file written submissions.
  9. The application was canvassed through written submissions dated 18/7/2022, filed through M/s Kanyi Kiruchi & Co Advocates. I have considered the said submissions. The application now falls for determination.
  10. Two issues fall for determination in the application under consideration. The first issue is whether this suit is *res-judicata* by dint of it having been preceded by Thika CMC Civil Case No 346 of 2016 - Timothy Kiguru Gacheru v Paul Wainaina Kuria. The second issue is whether this suit is the proper platform on which to seek an order striking out Thika ELC Misc Application No E051 of 2021 - Martha Nyambura Njathi v Timothy Kiguru Gacheru. I will make brief sequential pronouncements on the two issues in the above order.
  11. The defendant contends that because he sued one Paul Wainaina Kuria in Thika CMC Civil Case No 346 of 2016 and obtained *ex parte* Judgment against the said Paul Wainaina Kuria, this suit is *res-judicata*. The doctrine of *res-judicata* is contained in Section 7 of the [Civil Procedure Act](#). The said section 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.”
  12. I have considered the defendant's contention in the context of the above framework, alongside the explanatory notes to the framework in the [Civil Procedure Rules](#). It is clear that for the doctrine of *res-judicata* to be invoked to strike out a suit, it must be demonstrated that the impugned suit involves the



same parties or parties under whom they or any of them claim. Secondly, the matter in issue must have been directly and substantially in issue in a former suit.

13. Thika CMC Civil Case No 346 of 2016 was disposed exparte. Secondly, the plaintiff in the present suit was not a party to Thika CMC Civil Case no 346 of 2016. Thirdly, whereas in Thika CMC Civil Case No 346 of 2016, Timothy Kiguru Gacheru contended that Paul Wainaina Kuria had in April 2016 invaded the suit property and had engaged in acts of waste and wanton damage to the suit property, in the present suit the plaintiff alleges that she is the legitimate owner of the suit property and that Timothy Kiguru Gacheru has obtained a fraudulent title to the suit property. She seeks an annulment of the said title.
14. From the above brief analysis, it is clear that the key elements of the doctrine of *res-judicata* have not been established in this application. The doctrine cannot, in the circumstances, be invoked to strike out the plaintiff's suit and thereby lock the plaintiff out of the seat of justice. Put differently, the doctrine of *res-judicata* is not applicable in the circumstances of the application under consideration.
15. The second issue is whether this suit is the proper platform on which to seek an order striking out Thika ELC Misc Application No E051 of 2021. One of the orders sought in the application under consideration is a prayer that Thika ELC Misc Application No E051 of 2021 be struck out. The defendant contends that the said suit is an abuse of the process of the court. Without saying much, to the extent that the plea is being canvassed on the platform of Thika ELC Case No. E140 of 2021 instead of Thika Misc Application No E051 of 2021, the plea is misplaced. The proper platform on which to canvass the plea is the impugned suit, Thika ELC Misc Application No E051 of 2021. It would be irregular to strike out Thika ELC Misc Application No E051 of 2021 on the platform of Thika ELC Case No E140 of 2021. If the defendant genuinely wishes to pursue an order striking out the said suit, he is at liberty to file and argue an application in the said suit. My finding on the second issue is that this suit is not the proper platform on which to seek an order striking out Thika ELC Misc Application No E051 of 2021.
16. The result is that the defendant's notice of motion dated 21/3/2022 is rejected on the above grounds.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF OCTOBER 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Wachira for the Defendant

Court Assistant: Sydney

