



**Kipkoech v W.E Tilley (Muthaiga) Ltd & another (Environment & Land
Case 993 of 2013) [2022] KEELC 15130 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 993 OF 2013
JA MOGENI, J
NOVEMBER 1, 2022**

BETWEEN

GEOFFREY KIPKOECH PLAINTIFF

AND

WILFRED RIITHO NJERU 1ST DEFENDANT

W.E TILLEY (MUTHAIGA) LTD 2ND DEFENDANT

RULING

1. In the Notice of Motion dated January 21, 2022, the 2nd Defendant has prayed for the following orders:
 - a. Spent.
 - b. The Plaintiff's suit herein be struck out
 - c. The costs of this application and the suit be awarded to the 2nd Defendant.
2. The Application is supported by the Affidavit of the 2nd Defendant Wilfred Ritho Njeru and it has 1-7 grounds.
3. The 2nd defendant deponed that the present suit is res judicata since the matters in this suit have been litigated in several suits and decided. That the plaintiff lacks the locus standi to institute a personal action for wrongs allegedly committed against a company because the company is a person in law and can institute the suit itself.
4. He further averred that to allow this suit to proceed is tantamount to prying on matters already litigated to be opened up afresh in the Winding up Cause No 21 of 2003. Further that all issues raised in the instant suit were determined by Judges Grace Nzioka and Justice D Majanja. That several courts found no merit in issues now being raised again by the plaintiff and that litigation must come to an end.



Therefore, court must find that the plaint dated August 15, 2013 is without merit and so the suit should be dismissed with costs to the 2nd defendant.

5. It was deponed by the 2nd defendant that the plaintiff's claim before this court is a deliberate abuse of the court process by invoking a multiplicity of proceedings which were long settled before a court of competent jurisdiction.
6. In response, the Plaintiff filed grounds of opposition dated February 28, 2022 and stated that the application is a meant to delay the disposal of the suit. That it is an abuse of the court process having been filed 9 years since the institution of the suit.
7. The plaintiff contended that the 2nd defendant has misconceived and misinterpreted the provisions of section 7 of the *Civil Procedure Act* and that the suit is not res judicata. According to the plaintiff the 2nd defendant has misapprehended the doctrine of stare decisis as the Environment and Land Court and therefore not bound by the decision of the High Court.
8. The 2nd Defendant's advocate filed and the plaintiff's advocate both filed written submissions which I have considered. This suit was commenced through a plaint dated August 15, 2013 seeking the following orders:
 - a. A declaration that the sale by the 2nd Defendant to the 1st Defendant and subsequent transfer in favour of the 1st Defendant of all that parcel of land known as Land Reference Number 18995/3 Baba Dogo, Ruaraka, Nairobi is null and void
 - b. An order directing the 1st Defendant to re-enter and hand over all that parcel of land known Land Reference number 18995/3, Baba Dogo, Ruaraka Nairobi to Lakestar Insurance Company Limite (In Liquidation).
 - c. A permanent injunction do issue restraining the 1st Defendant its agents servant and/or employees from entering into trespassing into developing, constructing and/or erecting any building, house and/or structure, charging, mortgaging, transferring, selling by private treaty and/or public and/or dealing in any manner whatsoever with all that parcel of land known as Land Reference number 18995/3 Baba Dogo, Ruaraka, Nairobi.
9. I have had an opportunity to peruse the Winding Up Cause No 21 of 2003 and I note that High Court Judge Mutungi Onesmus (as he then was) made orders for the winding up of Lakestar Insurance Company and appointed the 2nd defendant as the interim Liquidator, as at June 30, 2003.
10. From the foregoing, the only issue for determination is whether this suit is res judicata Nairobi ELC No 993 of 2013.
11. Section 7 of the *Civil Procedure Act* 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. The 2nd Defendant has annexed on its Affidavit multiple court decisions which found no merit in issues that the plaintiff presented before the various courts. These judgments flow from the Winding Up



Cause No 21 of 2003. In the Civil Application No Nai.110 of 2005 which was an application for leave to extend time to enable filing of a Notice of Appeal and Record of Appeal, Judge of Appeal (as he then was) WS Deverell dismissed the application. The Civil Case No 363 of 2008 suffered the same fate of dismissal and the application dated March 25, 2010 was dismissed on the grounds that it was not arguable. All these cases were connected to the Winding Up Cause No 21 of 2003. The 2nd defendant's affidavit of Lakestar Cases filed and decided cases has listed 22 cases relating to the same suit property and most of the time the same parties. I note that several applications filed in relation to the Winding Up Cause 21 have been dismissed including applications for appeal.

13. If I may just refer in abit of detail to some of the decisions made in the recent cases, there is ELC 375 of 2011 which was transferred to the High Court Commercial Division and re-registered as HCCC 421 of 2014. Hon Justice Nzioka dismissed the case and held that the plaintiff had not proved its case and the suit was incompetent for want of locus standi at the same time the Hon Justice Nzioka also dismissed the claim against the 1st defendant.
14. The doctrine of res judicata serves the salutary aim of bringing finality to litigation. Without it, there would be no end to litigation. From the annexed court documents, it is clear that there have been multiple court decisions which have found no merit on the plaintiff's claim and most of them have found that the plaintiff had a role in the collapse of the Lakestar Insurance Company leading to its liquation in the line with the applicable law. The liquidation is what led to the sale of the company's assets including the suit property in the instant suit.
15. In the case of *Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another* (2017) eKLR referred to *Uburu Highway Development Ltd V Central Bank & Others*, CA No 36 of 1996 the Court of Appeal stated that:-

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

16. It is my finding that the issues in this suit have been directly and substantially dealt with in various suits litigated before the ELC, the High Court and up to the Court of Appeal between the same parties although under different capacities. In filing these multiple suits, the plaintiff has ensured that some parties remain the same and others have been added and subtracted according to the prayers made but the subject matter has remained the same. It is commendable to note that the courts have been able to arrive at more or less similar findings and dismissed the most of the applications and suits. In fact, in its ruling of HCCC 363 of 2008 the court was of the view that the plaintiff's litigious nature amounted to abuse of the court process.
17. Given the foregoing, and from the proceedings and the decrees it is clear that this is a case that falls on all fours within the doctrine of res judicata. I would like to reiterate what a party requires to prove that a case is res judicate by considering what was said in the case of *Henderson vs Henderson* (1843) 67 ER 313 res-judicata was described as follows;

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The



pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.

18. Though this may not have clearly come out of the multiple cases that the plaintiff has filed and which I have referred to here, it is important that the courts remain eternally vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add others to circumvent the doctrine of res judicata. The action of adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely through applications made to court such as this one.
19. I find that this suit is res judicata and an abuse of the court process.
20. For the reasons enunciated above, I allow the 2nd defendant’s Application dated January 21, 2022 and make the following orders:
 - a. This suit is struck out for being res judicata .
 - b. The Plaintiff to pay to the 2nd Defendant the cost of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI ON THIS 1ST DAY OF NOVEMBER 2022

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MOGENI J

JUDGE

In the Virtual presence of :.

Mr Kaka for 1st Defendant

Mr Manyara for Plaintiff/Respondent

No appearance for the 2nd Defendant

Caroline /Yvette : Court Assistants

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MOGENI J

JUDGE

