



**Kamande v Muchiri (Environment & Land Case 1329 of 2014)
[2025] KEELC 3825 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1329 OF 2014**

OA ANGOTE, J

MAY 15, 2025

BETWEEN

BONIFACE MACHARIA KAMANDE PLAINTIFF

AND

SAMUEL NJOROGE MUCHIRI DEFENDANT

JUDGMENT

Background

1. The Plaintiff instituted this suit against the Defendant vide a Plaint dated 9th October, 2014 seeking the following reliefs:
 - i. An order of eviction to issue against the Respondent(sic) in respect to Soweto Plot 3/480.
 - ii. A permanent injunction restraining the Respondent (sic), his servants and/or agents from trespassing, alienating, selling, disposing off, constructing and/or in any way from interfering with the Plaintiff's possession of that land that is Soweto Plot No 3/480.
 - iii. General damages for trespass.
 - iv. Costs of the suit and interests.
2. It is the Plaintiff's case that he is the bona fide owner of all that parcel of land known as Soweto Plot No. 3/480 situate in Nairobi (hereinafter the suit property) being an allottee thereof and that sometime in the year 2008, the Defendant gained unlawful entry into the suit property without his consent, maliciously destroyed his structures lawfully on the property and proceeded to erect his own.
3. As a consequence of the foregoing, he averred, he has been deprived of the exclusive use and enjoyment of the suit property and has suffered great loss and damages. It was averred by the Plaintiff that despite demands, the Defendant has refused and/or neglected to vacate the land.



4. The Defendant filed a Defence on 29th June 2015, denying the assertions made in the Plaint. He maintained that he is the rightful owner of Plot No. 3/339 and asserted that the Plaintiff has mistakenly identified it as Plot No. 3/480, despite evidence to the contrary.
5. Further, the Defendant contended, the suit is an abuse of the court process and contravenes Section 7 of the *Civil Procedure Act*, as the same issues were previously litigated in CMCC No. 5682 of 2011 before the Milimani Chief Magistrates Court in Nairobi. Consequently, he averred, this court is divested of jurisdiction in the matter.

Hearing and Evidence

6. The matter proceeded for hearing on the 28th March, 2019. The Plaintiff, as PW1, adopted his witness statement dated 9th October, 2014 as his evidence in chief and produced the documents in the bundle of an even date as PEXHB1-3.
7. PW1 testified that he acquired Plot No. 3/480 from Mr. Kimemia, a former District Officer, having previously been a squatter. He stated that he was issued with a plot allocation certificate in 2009, after which he began paying rates. He further testified that his house, identified on the map as Plot No. 3/480, was demolished by the Defendant on the 11th July, 2012 and that he had constructed 14 iron sheet rooms on the property.
8. It was his further testimony that the Defendant claims ownership of Plot No. 3/339 and that this plot is not in close proximity to Plot No. 3/480. He also stated that the Defendant has constructed a single room on the property.
9. During cross-examination, PW1 testified that he was 13 years old in 1991. He admitted that he could not recall the specific rates he had paid for the land; that a case was filed in the lower court, resulting in his eviction from the suit property under police supervision and that the photos presented in evidence were from a different property.
10. During re-examination, he stated that the alterations on the plot card were carried out by an officer at City Hall and the photographs were not from a different property.
11. DW1 was Dr. Wilfred Muchiri Murionga, a lecturer at Chuka University. He testified that he knows the Defendant (now deceased), who is his first cousin; that the Defendant purchased Plot No. 3/339 situate in Soweto, Nairobi, from its original owner, David Chemei, a surveyor with the City Council whom he introduced him to, on the 24th January, 1991.
12. He further stated that he was a witness to the sale agreement and appended his signature to it; that he is familiar with the plot's location and possesses a beacon certificate, which shows that the adjacent plots are Plot Nos. 3/338 and 3/340; that the plot claimed by the Plaintiff is nowhere near the Defendant's parcel of land and that the Defendant paid all outstanding rates in 2017, amounting to Kshs. 62,000, and is awaiting the issuance of a title deed.
13. DW1 further stated that the Plaintiff was evicted from the suit property pursuant to a court order issued by the lower court. He stated that he was in possession of the plot card in the Defendant's name in respect to Plot No. 3/339, along with 11 receipts confirming rate payments between 2009 and 2017. He noted that it was impossible for the Plaintiff to have been allotted a plot when he was 13 years old as he alleges.
14. He testified that the Plaintiff had constructed rental houses on half of the suit property but he could not confirm the exact number thereof; that the Defendant on his part had built a single room on the



- plot, which remains intact and that according to the decision of the lower court, the individual who was to be removed from the suit property was Samuel Macharia, whereas the Plaintiff is identified as Boniface Macharia Kamande. He confirmed that the Plaintiff had been in occupation of the suit property and conceded that he is not a surveyor.
15. DW2 was Alice Wanjiku Muchiri, the Defendant's wife. She adopted as her evidence-in-chief the witness statement sworn by the Defendant (now deceased) on 5th June 2017. She also produced the bundle of documents dated 29th June, 2015 and 5th June, 2017 as DEXHB1 and 2.
 16. According to the Defendant's statement, in 1990, he was searching for a plot to purchase when his cousin, Wilfred M. Murioga, informed him that David Chemei Manyenyi was selling a plot in Soweto Scheme; that he entered into a sale agreement with Mr. Chemei in respect to Plot No. 3/339 on the 24th January 1991, with payment made via a banker's cheque on the same date and that the plot was officially transferred to the him by the City Council on the 16th September, 1999.
 17. According to the Defendant, the Plaintiff unlawfully occupied the property, prompting him (the Defendant) to file CMCC No. 5682 of 11 at the Magistrates Court at Milimani, which resulted in the Plaintiff's eviction and that in 2014, he was served with summons by the Plaintiff, who was claiming ownership of Plot No. 3/339 alleging it to be Plot No. 3/480.
 18. DW1 asserted that the issue of ownership of the suit property had already been litigated upon in CMCC No 5682 of 11 and noted that the Plaintiff was a minor at the time he claimed to have been allocated the land and lacked knowledge of its actual location.
 19. In her oral testimony, DW1 stated that construction is currently ongoing on the suit property and that she possesses all the necessary documents proving that the Defendant is the rightful owner.

Submissions

20. The Plaintiff's counsel filed submissions on 13th March, 2025. Counsel argued that a careful examination of the evidence establishes that the Plaintiff is the rightful owner of the suit property, with his claim predating the Defendant's title.
21. Counsel contended that the matter is not one of double allocation, but rather, an illegal allocation, as the suit property was not available for allocation or alienation to the Defendant. Additionally, he noted that the Plaintiff's documents remained unchallenged and that the Defendant failed to directly address the Plaintiff's claim. Counsel submitted that the Plaintiff's attempts to have a surveyor establish the status of Plot No. 3/339 and 3/480 were unsuccessful.
22. Counsel further submitted that the Plaintiff had proven his case on a balance of probabilities and urged the court to rule in his favor. In support of this position, he relied on the decisions in *Benia Properties Limited vs H.H. Dr. Syedna Mohamed Burhannudin Sahed & 4 Others* [2015] eKLR and *Republic v City Council of Nairobi & 3 Others* [2014] eKLR.
23. As regards the contention on *res judicata*, Counsel urged that the same having not been raised earlier as a Preliminary Objection, the same is not open to the Defendant at this stage.
24. The Defendant's advocate submitted that the Plaintiff is claiming for a different plot from the one the Defendant is occupying; that the two parcels of land are distinct; that the Plaintiff's Identity card shows he was born in 1998 and could not have been allocated a plot in the year 2001 when he was only 13 years and that in any event, the suit is *res judicata*.



Analysis and Determination

25. Having considered the pleadings, testimonies and submissions, the following arise as the issues for determination:
- i. Whether this suit is res judicata? and if not?
 - ii. Whether the Plaintiff has established a case for trespass and permanent injunction against the Defendant?
26. The Defendant, in his Defence, raised the issue of res judicata, contending that this court is divested of jurisdiction to determine the issues herein, the same having been adjudicated upon in CMCC No. 5682 of 2011 before the Milimani Chief Magistrates Court.
27. The Plaintiff, however, argues that the Defendant cannot rely on this plea, having failed to raise it by way of a Preliminary Objection. This argument, however, is without merit. The doctrine of res judicata is a jurisdictional issue that may be raised at any stage of proceedings, whether by way of a Preliminary Objection, a Notice of Motion or in pleadings as has been done.
28. Given that the issue has been properly raised in the Defence and remains undetermined, the court finds it necessary to address it before delving into the substantive claims.
29. The law on res judicata is found in Section 7 of the *Civil Procedure Act*, 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.”
30. This doctrine applies to bar subsequent proceedings when there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy.
31. In the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus:
- “....The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.
-whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in



issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision...”

32. The Defendant contends that the issues in the present case were conclusively determined in CMCC No. 5682 of 2011. In support of this assertion, pleadings from the said case were adduced, including the plaint, orders issued on 23rd February 2012, application dated 6th March 2013, and the corresponding ruling.
33. Considering the lower court matter vis a vis the present matter, the aforesaid suit was instituted by the Defendant as against Samuel Njoroge Muchiri, claiming ownership of Plot No. 3/339. The parties in the lower court are the same as herein. Indeed, this court [Obaga J] in its Ruling of 6th February, 2017 found that the Plaintiff herein and Samuel Macharia, as sued in the Magistrates Court make reference to the same person.
34. As regards the subject matter in the lower court, it is the same as the subject matter herein, being a dispute over parcels 3/339 and 3/480. However apart from the Rulings on interlocutory applications, it has not been demonstrated that the dispute over parcels 3/339 and 3/480 has been fully and finally determined by the lower court so as to invoke the doctrine of res judicata.
35. Consequently, in the absence of a final judgment conclusively settling the question of ownership, the doctrine of res judicata cannot be invoked to bar the present suit.
36. The Plaintiff has instituted the present suit against the Defendant seeking, among other reliefs, an order for eviction and a permanent injunction restraining the Defendant, his agents, or servants from interfering with the suit property. Additionally, the Plaintiff seeks general damages for trespass, contending that the Defendant has unlawfully occupied his land, depriving him of its use and enjoyment.
37. The crux of the Plaintiff's case is that he is the legitimate and rightful proprietor of the suit property, identified as Plot No. 3/480 in Soweto, Nairobi. He asserts that the Defendant unlawfully encroached upon this property, demolished structures he had lawfully erected, and proceeded to construct his own, thereby interfering with his proprietary rights. He adduced into evidence a copy of the plot ownership card, map of the property and photographs.
38. The Defendant, on the other hand, disputes these claims. DW1 maintained that the Defendant is the lawful owner of, and is in possession of Plot No. 3/339 which is a distinct parcel from the parcel claimed by the Plaintiff.
39. She adduced into evidence the certificate of plot ownership of Plot 3/339; transfer letter dated the 20th September, 1990; correspondence from the Nairobi City Council, Chief, Savannah Location and Elders dated 10th May, 2011, 15th May, 2011 and 9th May, 2011 respectively and payment receipts in respect to Plot No. 3/339.
40. She also adduced into evidence the Plaint, application and ruling in CMCC 5862 of 2011; court orders of 23rd February, 2012 and 15th May, 2012 in CMCC 5862 of 2011; sale agreement in respect of Plot No. 3/339 and extract of cheque payment.
41. As previously noted, the Plaintiff contends that the Defendant has unlawfully encroached onto his property. To succeed in this claim, the Plaintiff bears the legal burden of proving the alleged encroachment through credible and admissible evidence.



42. This requirement is anchored in a fundamental principle of law that he who alleges must prove. This legal maxim is enshrined in Section 107 (1) and (2) of the *Evidence Act*, which provides as follows:
- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
43. And Sections 109 and 112 of the same Act which state:
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
- “112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
44. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.”
45. The Plaintiff’s claim is founded on the alleged trespass by the Defendant onto his property. Trespass has been defined in the 10th edition of Black’s Law Dictionary as:
- “an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”
46. Similarly, Section 3 of the *Trespass Act* provides that:
- “(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.(2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
47. In support of his claim to ownership of Plot No. 3/480, the Plaintiff produced a certificate of plot ownership, a map, and several photographs. These documents were admitted into evidence as Exhibits 1 to 3 during the testimony of PW1.
48. Notably, although Counsel for the Plaintiff referenced approximately ten exhibits in his written submissions, a careful review of the Plaintiff’s pleadings, particularly the list of documents dated 9th October 2014, reveals that only three documents were formally listed and subsequently produced in court. The plot card, the map, and the photographs.



49. The Defendant, on his part, sought to challenge the Plaintiff's title by suggesting that the acquisition of Plot No. 3/480 may have involved elements of fraud. However, this assertion was not specifically pleaded nor was it substantiated by concrete evidence. The legal position on fraud is clear, allegations of fraud must be specifically pleaded and strictly proved to the required standard.
50. In the absence of such proof, the Court finds that the Plaintiff has, on a balance of probabilities, sufficiently established his ownership of Plot No. 3/480.
51. On his part, the Defendant tendered evidence tracing his acquisition of Plot No. 3/339. This evidence included a sale agreement, transfer documents, and letters from the Nairobi City Council, the area Chief, and local elders, all affirming his ownership and occupation of Plot No. 3/339. While the Plaintiff too inferred fraud in this respect, the same was not pleaded nor indeed proved.
52. The existence of two distinct plot numbers, owned by two different persons raises a strong presumption that these are separate and independently allocated parcels of land. In such circumstances, the legal and evidentiary burden squarely rested on the Plaintiff to establish that the two plots are either one and the same or that the Defendant's Plot No. 3/339 overlaps and or encroaches upon Plot No. 3/480. Proof of ownership without demonstrating the alleged intersection or overlap between the parcels is insufficient to support a claim of trespass.
53. The Plaintiff failed to produce any survey report, cadastral map, or authoritative documentation from the relevant land or survey office to verify the exact location, boundaries, or spatial relationship between the two plots. Such evidence would have been crucial in demonstrating whether the Defendant's occupation falls within the boundaries of the Plaintiff's property. Accordingly, the Plaintiff's claim of trespass remains unsubstantiated.
54. In recognition of the uncertainty surrounding the actual location and boundaries of the two plots, this court, on 11th October 2019, issued directions that a qualified surveyor visits the site to determine the ground positions of Plot Nos. 3/480 and 3/339. Unfortunately, this directive was never acted upon, leaving the court without critical expert evidence that could have conclusively resolved this issue.
55. In the end, the court finds that the Plaintiff has failed to establish his case on a balance of probabilities. The Plaintiff's suit is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MAY, 2025.

O. A. Angote

Judge

In the presence of;

Ms Nyaga for Mr. Oketch for Plaintiff

Mr. Momanyi for Defendant

Court Assistant: Tracy

