



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**CIVIL SUIT NO. 293 OF 2019**

**PAUL KIINGATI GATU.....PLAINTIFF/ RESPONDENT**

**-VERSUS -**

**SUSAN NDUTA KIMANI.....DEFENDANT/APPLICANT**

**R U L I N G**

**Introduction**

1. The Application by the Defendant is the Notice of Motion dated 15/10/2021 in response to the Suit filed by way of plaint by the Plaintiff dated 03/09/2019 filed on 10/09/2019. The Application is brought under Section 1A, 1B and 3A of the Civil Procedure Act, Section 7 of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and it seeks for the following reliefs.

**a. That the Suit filed herein in the Honorable Court on 10/09/201 and dated 3/09/2019 be dismissed for reasons of res judicata.**

**b. The costs of the Application to be provided for.**

**Defendant's case**

2. The Application is premised on the grounds that the Defendant/Applicant had filed an Environment and Land Cause No. 450 of 2017 in the Honorable Court, over the same issue and subject matter of this suit.

3. That the ELC Cause 450 of 2017 was heard and determined conclusively and judgment delivered therein on 14/05/2019 by Honorable Justice K. Bor.

4. That the present suit between the same parties, Paul Kiingati Gatiu vs Susan Nduta Kimani raises the very issues that were dealt with conclusively in the ELC 450 of 2017 being land Reference No. NAIROBI BLOCK 83/14/436.

5. That since the matter was heard and determined conclusively, the Plaintiff/Respondent should have either commenced execution, proceedings or an appeal rather than initiating another suit.

6. That the Defendant/Applicant did prefer an appeal at the Court of Appeal which is yet to be determined.

7. That the pendency of the suit herein continues to prejudice the Defendant/Applicant with unnecessary costs in terms of costs and time.

8. That in the interest of justice the said order for dismissal ought to be granted for reasons of res judicata.

**Plaintiff's/Respondent's Case**

9. The Plaintiff/Respondent did not file any response despite being served through his advocates on record Kairu Kimani and Company Advocates on 15/10/2021.

10. Despite the non-appearance of the Plaintiff/Respondent and failure to file a response the suit must be considered on its own merit.

**Submissions**

11. The Defendant Applicant did not file any submissions to the application dated 15/10/2021 they chose to rely filed their pleadings and supporting affidavit dated 15/10/2021.

12. The Plaintiff/Respondent did not attend court all the time the matter was in court and neither did they file a response to the Application dated 15/10/2021. The only pleadings for the Plaintiff/Respondent is the plaint for the main suit dated 3/09/2019 and filed on 10/09/2019 which is what the current application by the Defendant/Applicant contends is *res judicata*.

13. In the Plaint the Plaintiff/Respondent seeks to have the Defendant/Applicant compelled to open a joint bank account with the plaintiff/respondent and to deposit proceeds from the suit property Nairobi/Block 83/14/436 or in the alternative an order directing that all rents be forthwith deposited in a fixed deposit account pending the disposal of the suit property.

14. That the Defendant/Applicant be compelled to deposit the Original Title Deed of all that Nairobi Block 83/14/436 into the safe custody of the Honorable Court.

15. An order directing the Defendant/Applicant to sign all necessary transfer documents and forms in regard to property Nairobi Block 83/14/436 and in the alternative the Deputy Registrar of the Honorable Court.

### **Analysis and Determination**

16. The only issue that I am supposed to determine in this Application is whether the current suit is *res judicata* in view of the judgment in ELC Cause 450 of 2017 and whether the Plaintiff/Respondent is precluded under Section 8 of the Civil Procedure Act from instituting this suit.

17. The law pertaining to the doctrine of *res judicata* is captured under the provision of Section 7 of the Civil Procedure Act 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 by such court.”**

18. It is not in dispute that the parties in ELC Cause 450 of 2017 are the same parties in the current suit.

19. It is also not in dispute that the issue in ELC Cause 450 of 2017 that is the ownership and sharing of proceeds from the suit property, is the same issue in the current suit.

20. I have perused the judgement rendered by my sister Judge Kossy Bor in ELC Cause 450 of 2017 annexed on the Defendant's/Applicant's application

21. The Defendant/Applicant's Application in this court seeks to have the matter declared *res judicata* with costs. The main ground for the said prayer is that the suit filed in this court on 10/09/2019 and dated 3/09/2019 be dismissed for reasons of *res judicata*.

22. It is true, as argued by the Defendant/Applicant that when a suit is dismissed, one might not be allowed to file a fresh suit unlike in a situation where a suit has been struck out.

23. It is therefore incumbent that when the court is called upon, to deny an unfair reconsideration of a matter already addressed in finality it must examine the issues that are said to have been rested. The authorities on the question whether a decision on a question of law operates as *res-judicata* disclose widely differing views. In some cases it was decided that a decision on a question of law can never be *res judicata* in a subsequent proceeding between the same parties.

24. In the case at hand the issue for determination is not a question of law but a question of fact touching on the issue of ownership of Nairobi Block 83/14/436 and the sharing of the proceeds therefrom. Which is a matter that was determined in ELC 450 OF 2017.

25. Therefore in determining if the current suit is *res judicata*, the only question that I have to ask myself is whether the issues which were litigated in ELC 450 of 2017 between the Plaintiff/Respondent and the Defendant/Applicant herein were determined by the court.

26. The issue of ownership of parcel of land number Nairobi Block 83/14/436 was litigated, heard and determined in ELC 450 OF 2017 by the Court. The Learned Judge considered the best solution to the problem of ownership and found for equal sharing of the suit property between the Defendant/Applicant and the Plaintiff/ Respondent.

27. The court also made a proposal for the suit property to be valued and sold and the proceeds shared out equally between the Defendant/Applicant and the Plaintiff/Respondent.

28. The law pertaining to the doctrine of *res judicata* is captured under the provisions of Section 7 of the Civil Procedure Act which I have already referred to above. Section 28 of the Environment Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

29. The doctrine of *res judicata* as stated has been explained in a plethora of decided cases. In the recent case of the **Independent Electoral**

and **Boundaries Commission-v- Maina Kiai & 5 Others (2017) eKLR**, the Court of Appeal held as follows:

**“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:**

- a) The suit or issue was directly and subsequently 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.”**

30. The court explained the role of the doctrine thus:

**“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”**

31. In my understanding the res judicata principle is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the Defendant/Applicant’s application and objection raised has satisfied the conditions for the principle of res judicata in view of the facts of this case.

32. From the pleadings it is not in dispute that the subject matter in the previous litigation and the current suit is the same. Both the former suit and the present suit are between the same parties. The Defendant/Applicant’s argument is that the issues in the instant suit were adjudicated and/or determined in the previous litigation.

33. In the case of **E.T.V –v- Attorney General & Another (2012) eKLR Majanja J** stated that:

**“The courts must be vigilant to guard against litigants evading the doctrine of res judicata 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 a new cause of action which has been resolved by a court of competent jurisdiction.”**

34. In **Gurbachau –v- Yowani Ekori (1958) EA 450**, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the **Vice Chancellor in Henderson –v- Henderson (1) 67 ER 313** at page 319 wherein it was stated that:

**“In trying this question I believe I state the rule of the court correctly when I say that 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 litigation in respect of 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 plea 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”**

35. Applying the stated law to the facts before me, it is clear that the Plaintiff/Respondent seeks to open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the court in that case. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this suit, the Plaintiff/Respondent is trying to litigate a concluded matter by bringing issues or causes of action which rightly could have been raised in the former suit.

36. In the result I find and hold that the Defendant/Applicant’s motion has merit and the same is allowed with costs and this suit is dismissed. The Plaintiff/Respondent shall bear the costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI IN OPEN COURT ON 19<sup>TH</sup> DAY OF OCTOBER, 2021**

**MOGENI J**

**JUDGE**

**IN THE PRESENCE OF:**

..... Defendant/Applicant

.....Plaintiff/Respondent

**MOGENI J**

**JUDGE**