Flora Mwenja, Miriam Mwenja, Janet Mwenja (Suing as the Representative to the Estate of Ezekiel Ngure) v Land Settlement Fund Board Trustees & 3 others (Environment and Land Constitutional Petition E001 of 2023) [2025] KEELC 3793 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3793 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E001 OF 2023

JM KAMAU, J

MAY 8, 2025

IN THE MATTER OF: ARTICLES 22(1) 23(3),47(1) 35(1) AND 60(1) OF THE CONSTITUTION OF KENYA., 2010

AND

IN THE MATTER OF: AN APPLICATION TO APPLY FOR JUDICIAL ORDERS OF CERTIORARI

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10,27,28 AND 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS 3, 4, 7, 9, AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, ACT NO. 4 OF 2015

AND

IN THE MATTER OF: SECTIONS 7, 14, 134(6) 134(7) 134(8) AND 135(1C) OF THE LAND ACT, ACT NO. 6 OF 2012

AND

IN THE MATTER OF: RULES 3, 11, 12, 13, 14, 15, 16, 17, 18, AND 27 OF THE LAND (ALLOCATION OF PUBLIC LAND) REGULATIONS, 2017

BETWEEN

FLORA MWENJA MIRIAM MWENJA JANET MWENJA (SUING AS THE REPRESENTATIVE TO THE ESTATE OF EZEKIEL NGURE) ..... APPLICANT

AND

LAND SETTLEMENT FUND BOARD TRUSTEES ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 2ND RESPONDENT

DISTRICT LAND ADJUDICATION SETTLEMENT OFFICER NYANDARUA COUNTY ..... 3RD RESPONDENT

THE HON ATTORNEY GENERAL ..... 4TH RESPONDENT

JUDGMENT

1. This is a Constitutional Petition where the Petitioners seek prayers against the Land Settlement Fund Board of Trustees, Director of Land Adjudication and Settlement, District Land Adjudication Settlement Officer, Nyandarua County and The Honourable Attorney General for prayers that:

> " An order of certiorari to quash the decision of the Respondents of illegally allotting the suit property as the same was not free for allotment.
>
> An order of prohibition barring the Respondents from allotting the suit property as the same is not free for allotment.
>
> An order of mandamus be issued to compel the Respondents to complete the process of allotment and registration of the land parcel No./Plot No. 713 Mawingo Salient Settlement Scheme in the name of the deceased, the rightful allottee.
>
> A declaration that the deceased, Mwenja Ngure, is the lawful allottee of the Suit Land and thus the Respondents be compelled to accept the Petitioners' registration documents.
>
> The costs of the Petition be awarded to the Petitioners .

1. The Petitioners urge this court to determine:

   i. The legality of the further and/or allotment of the suit land to third parties;

   ii. Whether the procedure followed by the 1st, 2nd and 3rd Respondents in conducting a further allotment is lawful;

   iii. Whether the actions of the Respondents infringe on the Petitioners' rights to; a. Own property; b. Human dignity; c. Equal enjoyment of fundamental rights and freedoms; and d. Access to information

   iv. Whether the respondents should be compelled to provide the Petitioners with proper documentation and allotment letters to facilitate them to acquire title to suit land.

   v. Whether the Respondents should be compelled to accept the registration documents of the Petitioners and register the Deceased as the original allottee.

   vi. Where the Respondents have abused their offices by engaging in illegalities violating the rights of the Petitioners.

3. The Petitioners claim to be the Administrators of the Estate of Ezekiel Mwenje Ngure who was given and alloted L.R. No. Plot No. 713, MAWINGO SALIENT SETTLEMENT SCHEME in 1985 upon payment of an initial deposit of Kshs. 325/= which he paid on 28.2.1985 vide receipt number 2455202. The Petitioners claim that having fulfilled the above conditions, the Respondents have failed to process the requisite Title documents in favour of the Deceased or his Estate. Articles 10, 22, (1), 23 (3), 29,

28, 35, 40, 47 and 60(1) of *the Constitution* of Kenya, 2010 and also Sections 14, 134 (6), (7) and (8) and SECTION 135(1) (c) of the *Land Act*, No. 6 of 2012.

4. The Petitioners also aver that in August 2023 they visited the Land's Office at Ardhi House, Nairobi and were shocked to learn that part of the Suit Land had been divided and allotted to third (3) parties and that the said Officers refused to give any further information of the same and that the Petitioners were able to access the new Survey Maps over the whole salient settlement scheme section which indicated that the Suit land has five (5) sub-divisions. This was done without any Notice being given to the Petitioners who have been in occupation of the Suit Land since 1985. They claim this is inconsistent with

5. On 5.3.2024 this court noted that there were five (5) sub-divisions where registered or allotted owners ought to be joined as third parties and ordered that they be so joined for a proper adjudication of the dispute. This was to be done upon the Director of Land Adjudication and Settlement providing the particulars of the sub-divisions and the names and addresses of all the allottees of the said sub-divisions and on the 6.11.2024 the 2nd Respondent was reprimanded for not complying with the said order. Service of the same through the Standard Newspaper was later effected on 23/12/2024. However, the Notice on the Newspaper was a Mention Notice. By this time the Respondents had filed their Replying Affidavit sworn on 4.11.2224 by one Eliab Kamaru, Deputy Director Land Adjudication and Settlement who said that the Petitioners have never been given allotment letters for the suit land but that the same was initially allocated to one Michael W. Gichuki on 6.11.1984 but that it was reprocessed and that the Petitioners had filed Nyahururu ELC J.R. No. 7 of 2018 for orders to compel the Honourable Attorney General to issue Flora Mwenje with an allotment letter for the Suit Land hence this suit is Res-judicata. They sued in their capacity as the representatives of the Estate of Ezekiel Ngure Mwenje (deceased). The orders sought therein were a Mandamus against the 1st and 2nd Respondents, (the same 1st and 2nd Respondent herein) to issue to the Ex parte Applicant the allotment letter and/or any Title documents to the Suit Property and also ancillary order for provision of costs. On 19.11.2019 her Ladyship Lady Justice M.C. Oundo issued the following Judgment:

> "…….The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is not necessary, or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative order it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized. See Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.
>
> In this case, there was no evidence that the Applicant was issued with the allotment letter which he now seeks the order of Mandamus to compel the Respondents to issue him with one. The question then arises as to what conditions he was basing his allegations of compliance on so as to be issued with the letter of allotment. Accordingly, it is not possible to find that the Applicant had met the conditions specified in the letter of allotment with respect to the said property. In the premises, there is no basis upon which I can find that the Applicant has shown that he has a legal right, or substantial interest the performance of which must be done by the Respondents. It becomes clear upon consideration of the entire scope of the order of Mandamus that it is not meant to allow the courts to micro-manage the affairs of other government agencies or thereof tribunals. Accordingly, in the exercise of

my discretion I decline to grant the orders sought in the Notice of Motion dated 1st April 2019 which application is dismissed with no order as to costs".

6. This being the case is the Petition herein Res judicata or not. Are the Petitioners deserving of the Reliefs they claim?

7. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 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"

8. 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..."

9. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. In order therefore to decide as to whether an issue in a subsequent Suit is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Suit and the instant Suit to ascertain;

   i. what issues were really determined in the previous Suit;

   ii. whether they are the same in the subsequent Suit and were covered by the Decision.

   iii. whether the parties are the same or are litigating under the same Title and that the previous Suit was determined by a court of competent jurisdiction.

10. Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

> " If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

11. In the Court of Appeal case of Siri Ram Kaura – Vs – 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."

12. Hon. Justice G.V. Odunga in Republic – Vs – Attorney General and Another Exparte James Alfred Koroso, expressed himself thus on the issue of access to justice: -

> " Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others."

13. In Uhuru Highway Development Ltd – Vs – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni the court in an earlier Application ruled that the Application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined "thrice by the High Court and twice by the Court of Appeal", it could not be resuscitated by another Application. The Court of Appeal further stated that:

> " That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

14. A Decision of the court must be respected as fundamental to any civilised and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.

15. A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. This principle would be substantially undermined if the Court were to revisit the issue every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.

16. Whether a claim is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each instance. The need for finality is the reason why such a Suit as was before Court must be refused. In determining whether res judicata had arisen, there was no purpose to be served in inquiring into the reasons given or not given in the earlier Suit prior to the Suit being rejected.

To permit such a broad inquiry is effectively to require a trial on the correctness of the earlier Decision, directly undermining the principle of finality and allowing an Appeal on one's Decisions. To this end, it is helpful to refer back to the reasons for the principle of finality including that Decisions of the courts, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict. The Court reaches this conclusion on an orthodox application of principle. In the plea of res judicata only the actual record, that the issue has been decided upon, is relevant. Not what material was before the Court. Even if the reasoning given in the earlier Decision was wrong, the matter cannot be re-opened by way of a similar Application. There are only 2 other Avenues which I will address later. The binding force of such Orders depends upon the general principles of law. If it were not binding, there would be no end to litigation.". The principle of Res judicata applies to a matter decided in an earlier suit and upon its general principles it applies to proceedings in the same suit as well.

17. Article 159 (2) (b) of *the Constitution* mandates that justice ought not to be delayed. To take a successful litigant into a circular frolic expedition, when sufficient concessions have been availed to the Applicant to settle Decree would be to turn the legal process into a theatrical absurdity.

18. Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute that there exists a Judgment dated 19.11.2019 in Nyahururu ELC J.R. No. 7 of 2018 for orders to compel the Honourable Attorney General to issue Flora Mwenje with an allotment letter for the Suit Land. She sought these prayers in her capacity as the representative of the Estate of Ezekiel Ngure Mwenje (deceased). Her ladyship declined to grant the orders sought in the Notice of Motion dated 1st April 2019 and dismissed the Application.

19. The Applicant, by bringing Application after Application on the same issue at different times one after another is hell bent to frustrate the Respondent from realizing the judgment as awarded by the Court in the earlier suit and unless something is done, the Respondent will forever be left babysitting his barren Decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to justice for all persons.

20. I therefore hold that pursuant to sections 7 of the *Civil Procedure Act* Cap 21 this court lacks the jurisdiction to deal with a matter which had already been decided upon by the same court earlier. The latter Suit is therefore not only res judicata but also an abuse of the court process. It is hereby dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 8TH DAY OF MAY, 2025.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: .....

..... for the Plaintiff

..... for the Defendant