



Magondu v Chavda Educational Holding Ltd; Chavda Educational Holding Ltd (Plaintiff to the Counterclaim); Ite Farmers Co-Op Society Ltd & 4 others (Defendant to the Counterclaim) (Environment & Land Case E0301 of 2022) [2025] KEELC 4955 (KLR) (30 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4955 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E0301 OF 2022**

**AA OMOLLO, J
JUNE 30, 2025**

BETWEEN

JANE WANGUI MAGONDU PLAINTIFF

AND

CHAVDA EDUCATIONAL HOLDING LTD DEFENDANT

AND

CHAVDA EDUCATIONAL HOLDING LTD PLAINTIFF TO THE COUNTERCLAIM

AND

ITE FARMERS CO-OP SOCIETY LTD DEFENDANT TO THE COUNTERCLAIM

NAIROBI CITY COUNTY DEFENDANT TO THE COUNTERCLAIM

WAKAM ENTERPRISES COMPANY LTD DEFENDANT TO THE COUNTERCLAIM

CHIEF LAND REGISTRAR DEFENDANT TO THE COUNTERCLAIM

ATTORNEY GENERAL DEFENDANT TO THE COUNTERCLAIM

RULING

1. The 3rd Defendant to the Counterclaim filed a notice of motion application dated 25th November 2024 supported by the affidavit sworn on the same date 2024 by Geoffrey Makana Asanyo seeking for the following orders;

- 1. Spent



2. The Counterclaim incorporated the Defendants defence dated 30th March 2023 be struck out as against Wakam Enterprises Company Limited.
 3. In the alternative the Counterclaim raised by Chavda Educational Holdings Limited against the 1st to 5th defendants be excluded from this case and do proceed as an independent suit.
 4. The Defendant be ordered to furnish security for the 3rd defendant costs in the sum of Kshs. 2,000,000/- in any event.
 5. Costs of this application be provided for
2. The motion was based on the grounds that the Counterclaim does not disclose any cause of action against the 3rd defendant and the matters pleaded in the defence and counterclaim are contradictory hence will embarrass a fair hearing of this suit. The Applicant stated that the defence at paragraph 3 & 4 denies all the plaintiff's averments yet involves the plaintiff's averments at paragraphs 38 of the Counterclaim as the basis for its claim against the defendants.
 3. Further, that the Counterclaim excludes the principal plaintiff and there is no claim by the defendant against the Principal plaintiff and the defendant in common. The Applicant stated that matters relied on by the defendant (in original suit) to support the Counterclaim at Paragraph 38 are res judicata having been in issue in Nairobi Milimani ELC No. 387 OF 2007 (formerly Nairobi HCCC No. 1214 of 2001) ITE Farmers Co-operative Society Limited v The Commissioner of Lands, City Council of Nairobi, Wakam Enterprises Company Limited, Jane Magondu T/A High View Merchants and Co-operative Bank of Kenya Limited which suit was dismissed on 30th May 2012 on the application of Wakam Enterprises Company Limited and the Attorney General.
 4. That the 3rd defendant is a stranger to the Defendant and ITE Farmers Cooperative Society and has never dealt with them at all therefore there is no basis for the claim against them. They contend that the doctrine of legitimate expectation as pleaded at paragraph 39 and 40 of the Counterclaim can only be sustained if the Defendant admits the plaintiffs claim or upon the Conclusion of this suit if the plaintiff is successful.
 5. In opposition to the motion, the Defendant filed grounds of opposition dated 28th April 2025 stating that their counterclaim is not res judicata as this court has already delivered a Ruling dated 23rd March 2023 where it made findings to the effect that this suit is not res judicata.
 6. That there was no evidence of existence of any dismissal order in HCC No. 1214 of 2001 to justify the reliance on the doctrine of res judicata and also the issues on the change of user, the resurvey and whether the said transactions can be done on the Plaintiffs suit without her involvement were not directly and substantially in issue in HCC No. 1214 of 2001.
 7. The Defendant stated that the counterclaim raises substantial triable issues which include whether one parcel of land can have two parallel set of titles, whether the title in the name of the Plaintiff still exists, whether the 3rd Defendant transferred to the Plaintiff a valid title now being claimed by both the Plaintiff and Defendant and whose title between the Defendant and the Plaintiff is fraudulent.

Submissions

8. The parties submitted orally in open court on 19th June 2025. Counsel for the 3rd Defendant/Applicant (in the counter-claim) stated that the claim against them raises no cause of action and referred to the attached copy of ruling in HCC 1214/2001 which was dismissed for want of prosecution.



9. He added that the counter claim excludes the principal plaintiff hence the same is a mis-joinder and the claim should be heard as a separate suit. He submitted that if the name of the 3rd Defendant's name is not struck out; the claim be severed.
10. In agitating for security for costs, Counsel submitted that Chavda holdings, the Plaintiff in the Counter claim, does not have properties in Kenya hence they should directed to deposit security of costs in the sum of Ksh. 2 Million.
11. The Respondent on the other hand submitted that on security for costs, there is no evidence presented that they do not have property, business or abode in Kenya. That it is common knowledge that the Defendant has built an international school on the suit property thus prayer for the costs ought to be dismissed.
12. In further response, the Applicant submitted that the Plaintiff (in c-claim) is a foreign company and that assets on the suit property cannot guarantee their costs because in the event their counter claim is dismissed, their interest will not be covered.

Analysis and Determination:

13. Upon careful consideration of the pleadings and oral submissions, the issues for determination are three:
 - whether the counter claim is res judicata;
 - whether the two claims should be separated
 - whether an order for security for costs should be granted.
14. It is on record that this court has already delivered a ruling dated 23rd March 2023 where it made findings to the effect that this suit is not res judicata. However, for purposes of this application, the res judicata argument is premised on the existence of HCCC No. 1214 of 200. The Applicant did not annex a decree arising from that suit to confirm that the former suit was heard and determined on its merit. Instead, the Applicant through counsel admitted that the former suit was dismissed for want of prosecution. They argue that the current Defendant ought to have applied for the revival of the former suit instead of filing the counter-claim.
15. Section 7 of the Civil Procedure Act clearly set out the parameters that must be met before a suit can be rendered as res judicata. In this case, the former suit ought to have been heard and determined by a court of competent jurisdiction. A dismissal for want of prosecution is not hearing on merits since it gives room for re-instatement on application. Therefore, the argument that this suit is res judicata HCCC 1214 of 2001 which was concluded without hearing on merits is a non-starter.
16. The Applicants faulted the counter-claim because the Defendant in the original suit has not sued the Plaintiff in his counter-claim. This is semantics as there is already a dispute between the two. If the Plaintiff's suit succeeds, automatically the Defendant's right to the land fails and vice versa. On whether the counter-claim should be separated from the Plaintiff's suit, on the face of the pleadings the ground land being claimed by parties in the original claim and the counter-claim is one with the 3rd defendant's (c-claim) name featuring in both.
17. The claim is not severable because the land in dispute is the same but with two competing titles. The possibility that similar witnesses will testify in support of and against claim is also there especially those



from the Ministry of lands. Order 1 rule 3 of the Civil Procedure Rules on who may be joined as Defendants states thus:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise”

18. Thus, it is my considered opinion and I so hold that separating the two claims would amount to abuse of judicial time and it may also result in conflicting decisions which may end up embarrassing the court.
19. When the Plaintiff moved this court, it sought for injunction against the Defendant/Respondent from undertaking construction on the suit property until the case is concluded. A party that was already undertaking a development that is worth more than the Kshs two (2) million sort in the claim cannot be said to be incapable of paying costs to a successful party. Further, the Applicant did not present any evidence to support the averment that the Respondent is not registered in Kenya.
20. On the issue of security for costs, in *Patrick Ngetakimanzi v Marcus Mutuamuluvi & 2 Others- High Court Election Petition No. 8 of 2013* it was held that: -

“Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent’s right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.”

21. Further in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others, CA No. 38 of 2013* [2014] eKLR, the Supreme Court emphasized that: -

“In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable.”

22. Guided by the above precedents on the reasoning for security of costs, it is my view that the Applicant has no sufficient evidence of the incapability of the Respondent to pay its costs. In light of the foregoing, the application dated November 25, 2024 is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH JUNE, 2025.

A. OMOLLO.

JUDGE

