Waso Building & Works Co. Ltd v Galgalo & 5 others (Environment & Land Case E004 of 2022) [2025] KEELC 4719 (KLR) (23 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4719 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT & LAND CASE E004 OF 2022

JO MBOYA, J

JUNE 23, 2025

BETWEEN

WASO BUILDING & WORKS CO. LTD ..... PLAINTIFF

AND

FAYO GALGALO ..... 1ST DEFENDANT

ABDULLAHI DALACHA ..... 2ND DEFENDANT

ASLI ROBA ON BEHALF OF ALI ROBA ..... 3RD DEFENDANT

ABDI KADIR ..... 4TH DEFENDANT

MAALIM MALLOW ..... 5TH DEFENDANT

ABDI HUSSEIN ..... 6TH DEFENDANT

RULING

1. The facts underpinning the instant matter/suit, reminds me of the observation of the Court of Appeal in the case of Kahoro & 2 others (Suing on their Behalf and on Behalf of Members of Twendane Company Limited) v Kanyamwi Trading Company Limited [2025] KECA 941 (KLR) where the Court stated thus:

> " In the contemporary world, one animal known for changing its colour to camouflage with its surrounding environment is the chameleon. It will be green in the morning, brown in the afternoon and yellow in the evening, depending on where its majestic walk has taken it. In the legal world, it is known that parties may attempt to approach the court in different shades, while remaining the same parties. To prevent this mischievous way of litigation, the doctrine of res judicata was developed to bar parties from bringing a litigious action once a final determination has been made on the merits of a similar previous suit."

2. Having taken cognizance of the observation by the Court of Appeal in the decision supra, it is now appropriate to revert to the facts of the matter beforehand. The details of the Application are highlighted as hereunder:

3. The Defendants/Applicants have approached the Court vide the Notice of Motion Application dated the 4th March 2025 brought pursuant to the provisions of Sections 1A, 1B, 3A, 7 and 8 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya and wherein the Applicants have sought the following reliefs:

   i. That the Honourable Court be pleased to find the suit herein to be Res-judicata

   ii. That the Plaintiff/Respondent herein be barred from filing any other similar suit concerning any claim on the suit land against the Defendants herein.

   iii. That the Costs of this Application be provided for in the cause.

4. The instant Application is premised on various grounds which have been enumerated in the body thereof. In addition, the Application is supported by the Supporting Affidavit sworn by Dr. Fayo Galgalo on the 4th March 2025 and a further Affidavit sworn by the same deponent on the 4th April 2025. Furthermore, the two Affidavits contain assorted/diverse Annexures.

5. The Plaintiff/Respondent responded to the Application by way of a Replying affidavit sworn on the 21st March 2025 and wherein the Deponent [Osman Maalim Daudi] has averred that the subject suit is not prohibited by the Doctrine of Res-judicata. Additionally, it has been contended that the current suit touches on and concerns LR NO. 7918/783 [ISIOLO] whereas the previous suit was in respect of Land Departmental reference Number [No]. 117/91/16.

6. Flowing from the foregoing, the Plaintiff/Respondent has therefore contended that the subject Application is not only misconceived but also legally untenable. To this end, the Plaintiff/Respondent has implored the Court to dismiss the Application.

7. The subject Application came up for Hearing o the 6th March 2025 whereupon the Advocates for the parties intimated to the Court that same were keen to canvass the Application by way of written submissions. In this regard, the Court ventured forward and directed that both parties do file and exchange their written submissions. Moreover, the Court also circumscribed the timelines for the filing of the written submissions.

8. The Defendants/Applicants filed written submissions dated the 2nd May 2025 and wherein the Applicants have raised and canvassed two issues, namely: the suit is res-judicata; and the Plaintiff herein ought to be barred from filing any further suits as pertains to the suit property.

9. Regarding the first issue, namely; whether the instant suit is res-judicata, learned Counsel for the Applicants has submitted that the Plaintiff/Respondent herein had previously filed Civil proceedings vide Meru ELC No. 92 of 2008, which suit touched on and concerned the same suit property. In particular, it has been submitted that the previous suit related to and concerned a claim in respect of Department land reference no. 117/91/16.

10. Furthermore, Learned Counsel for the Applicants has submitted that the said suit was heard and disposed of vide Judgment rendered on the 2nd day of October 2019, whereupon the Court found and held that the Respondent herein had not proven its claim to and in respect of the suit property, albeit differently referenced.

11. Additionally, it has been submitted that even though the current suit touches on and concerns a property that has since been Titled, namely, LR NO. 7918/783 [suit property] the property in question remains one and the same property which formed the basis of the previous suit.

12. On the other hand, Learned Counsel for the Applicants has also submitted that the parties to the previous suit are the same parties at the foot of the current suit. In this regard, it has been contended that the Respondent herein cannot therefore revert to Court and seek to regurgitate the same issues. Simply put, Learned Counsel has submitted that the suit beforehand is barred by the Doctrine of res-judicata.

13. In support of the foregoing submissions, Learned Counsel for the Applicants has cited various decisions including Kero v the Chief Land Registrar and 2 others [2024] KEELC 7529; and john Florence Maritime services limited and 2 others v the Cabinet Secretary, transport and Infrastructure [2021] KESC 39.

14. As pertains to the second issue, Learned Counsel for the Applicant has submitted that insofar as the dispute beforehand has since been heard and determined by a Court of competent jurisdiction, the Respondent herein ought not to be allowed to re-litigate the same matter over and over again. To this end, it has been posited that the subject dispute ought to be left to rest.

15. It was the further submissions by Learned Counsel for the Applicants that the Respondent herein cannot be allowed to have a second bite on the cherry. In any event, it has been posited that having not appealed the previous decision, namely, the Judgment vide Meru ELC No. 92 of 2008, the Respondent herein ought to be barred from reverting to Court. To this end, Learned Counsel for the Applicants has invoked the provisions of Section 8 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

16. Premised on the foregoing, Learned Counsel for the Applicants has therefore invited the Court to find and hold that the Application before the Court is meritorious. In this regard, the Court has been implored to allow the Application and strike out the suit.

17. The Respondent filed written submissions dated the 16th May 2025 and wherein same has canvased two [2] salient issues, namely; that the preliminary Objection filed by the Applicants and touching on the question of res-judicata does not constitute a pure point of law.; and that the suit property is different from the previous property and thus the Doctrine of res-judicata does not apply.

18. Regarding the first issue, Learned Counsel for the Respondent has submitted that though the Applicants have filed a Notice of Preliminary Objection raising the issue of res-judicata, the said Preliminary Objection does not highlight pure points of law. In particular, it has been contended that the Applicants are seeking to invite the Court to undertake investigations and thereafter discern whether the two properties are one and the same. In this regard, it has been contended that the Court is divested of the Jurisdiction to undertake investigations as pertains to the facts underpinning the case.

19. In support of the submissions that a Preliminary Objection can only be raised and canvassed when the facts raised by the adverse party are deemed to be correct, Learned Counsel for the Respondent has cited and referenced various decisions including Gitau v Thuo & 2 Others [2009] 1KLR 86 and Mwinzi & another v Kimanzi & 40 others [2024] KEHC 9005, respectively.

20. As pertains to the second issue, Learned Counsel for the Respondent has submitted that the instant suit is not barred and/or prohibited by the Doctrine of res-judicata. In this respect, it has been submitted that the previous suit touched on and concerned land referenced as Departmental Land Reference No. 117/91/16 whereas the instant suit touches on and concerns a Titled parcel of land namely LR NO. 7918/783.

21. Arising from the foregoing, Learned Counsel for the Respondent has therefore contended that the subject suit touches on and concerns a different property. To this end, the Court has been invited to find and hold that the Application is devoid of merits and thus same ought to be dismissed.

22. Having appraised the subject Application and the response thereto, having taken into account the pleadings and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the instant matter turns on one singular [solitary] issue, namely, whether the current suit is barred by the Doctrine of res-judicata or otherwise.

23. It is common ground that the Plaintiff/Respondent herein had previously filed Civil proceedings vide Meru ELC No. 92 of 2008 and wherein the Respondent impleaded the current Applicants pertaining to and concerning (sic) trespass onto Land known as departmental LR NO. 117/91/16. Suffice it to state that the Respondent herein contended that same had been duly allocated the said parcel of land following the approval of the County Council of Isiolo [now defunct].

24. Additionally, the Respondent herein contended that despite having been allocated the parcel of land namely, departmental LR NO. 117/91/16, the Applicants herein had entered upon and trespassed thereon. To this end, the Respondent sought diverse reliefs including declaration of ownership pertaining to the said parcel of land together with an Order of Eviction.

25. Following the filing of the previous suit, the Applicants herein who were the Defendants in the said suit, duly entered appearance and thereafter filed a Statement of Defence. Subsequently, the previous suit was heard and determined by the Environment and Land Court vide Judgment rendered on the 2nd day of October 2019. For good measure, the Learned Judge found and held that the Respondent herein had failed prove its entitlement to the parcel of land which was being claimed.

26. Simply put, the Court proceeded to and dismissed the Respondent's suit with Costs to the current Applicants. Suffice it to posit, that the Judgment rendered vide Meru ELC No. 92 of 2008 was a Judgment in rem. To this end, the Judgment under reference determined the rights and interests of the disputants [the Respondent and the Applicants] as pertains to ownership of the landed property which was being claimed.

27. To my mind, the Judgment of the Environment and Land Court vide Meru ELC No. 92 of 2008, declared that the Respondent herein held no rights and/or interests to the landed property which was being disputed upon. The said Judgment being a Judgment in rem holds sway as against the whole world. In particular, the Judgment under reference bind[s] the Plaintiff herein for posterity. [see Sections 44 (2) of the *Evidence Act* Chapter 80, Laws of Kenya.

28. It then means that insofar as the previous Court had pronounced itself on ownership of land reference departmental LR NO. 117/91/16, then no subsequent suit can arise and/or be agitated over and in respect of the same suit property. It matters not whether the suit property changes character by virtue of issuance of Certificate of Title or Certificate of Lease [whichever is appropriate].

29. The bottom line is whether or not the dispute being addressed touches on and concerns the same suit property. For good measure, it is immaterial whether the suit property has since mutated or metamorphosed from being a departmental land reference no. departmental LR NO. 117/91/16 to a Title issued under the *Land Registration Act*, 2012.

30. With the foregoing in mind, I must now descend on to the facts of the matter beforehand and to discern whether the suit property, even though now bearing a Certificate of Title, relates to the same ground [Geo-referenced as The departmental LR NO. 117/91/16].

31. To start with, I have examined the Plaint that was filed by and on behalf of the Respondent herein. Suffice to underscore that the Plaint under reference is skeleton in nature insofar as same does not provide the background leading to the issuance of the Certificate of Title/Certificate of Lease. Notably, the Plaint merely references the Title of the suit property without disclosing the background documents that birthed the impugned Title.

32. However, the Plaintiff filed a further List and Bundle of documents dated the 22nd April 2022 and wherein same availed to Court a copy of the letter dated the 18th August 2016 and the Part Development Plan both of which referenced the same departmental LR NO. 117/91/16. For coherence, the departmental LR NO. 117/91/16 is tracked from the Part Development plan, which (sic) underpins the allotment of the suit property.

33. Other than the documentation filed at the foot of the further list and bundle of documents dated the 22nd April 2022, it is also important to take cognizance of the evidence of PW2, [Osman Maalim Daudi]. Instructively, the said Witness testified before this Court [Differently constituted on the 12th February 2024].

34. In the course of cross examination, the witness is on record stating as hereunder

> " Yes, I had sued the Defendants at ELC Meru vide ELC NO. 92 OF 2008. The case was dismissed. I had sued regarding the same land as in this case. I did not Appeal. Yes, I filed this case after the case was dismissed. My Certificate of Lease was issued on [sic] 1st January 1999. My Certificate of Title was issued on [sic] 1st January 1999. Both were issued on the same date. The case at Meru ended on 2nd of October 2019. I did not produce the Lease at Meru Court. It was in the process of being prepared. It was in Nairobi. I did not produce the Lease."

35. What becomes apparent is that even though the Respondent herein was trying to be smart and disingenuous by not referencing the background documents leading to the issuance of a Certificate of Title, there is no gainsaying that the Certificate of Title beforehand traces its birth and/or origin to the documentations which the Respondent had hitherto deployed to claim the same suit ground in the previous suit.

36. At any rate, the doubt if any, that could have surrounded the identity of the suit property was clarified by Osman Maalim Daudi in his testimony while under cross examination. Suffice it to reiterate that the witness [who testified as PW2] confirmed that the suit property relates to the same land that formed the basis of the previous suit [see the except captured elsewhere herein before].

37. My understanding of the background facts drives me to the conclusion that the suit property herein, which is now underpinned by a Certificate of Title relates to the same Geo-referenced [landed property] which was disputed and addressed vide the Judgment in Meru ELC No. 92 of 2008.

38. Moreover, I hold the humble position that even though the Respondent proceeded to and procured a Certificate of Title/Lease, subsequent to the determination of the dispute at the foot of MeruELC No.92 of2008, the subsequent acquisition of Title does not negate and/or defeat the Judgment of the Court. For the umpteenth time, I beg to observe that the Judgment rendered in the previous suit was a Judgment in rem.

39. Having established and held that the suit property herein is the same landed ground that formed the previous suit, I am now disposed to revert to the Doctrine of Res-judicata and to discern whether the

ingredients that underpin the said Doctrine have been met and/or satisfied in respect of the instant Application.

40. To start with, it is common ground that the previous suit, namely, Meru ELC No. 92 of 2008, concerned the same parties as the ones beforehand. To this end, there is no gainsaying that the two suits touch on and concern the same parties.

41. Additionally, I have since established and authenticated that the subject property [suit land], is one and the same. In any event, this position was confirmed and conceded by Osman Maalim Daudi, when same testified before the Court albeit differently constituted. [See the excerpt elsewhere herein before].

42. Thirdly, the Court that heard and determined Meru ELC No. 92 of 2008, was a Court of coordinate Jurisdiction. Simply put, the Court was seized of the requisite Jurisdiction to entertain and adjudicate upon matters touching on ownership of land. In this regard, the previous suit was heard and determined by a Court of competent Jurisdiction.

43. Finally, it is not lost on me that the previous suit was heard and determined after a plenary hearing. For good measure, all the disputants tendered and adduced their evidence before the Judge and thereafter the Judge considered the legality, validity and propriety of the various documents. Thereafter, the Judge came to the conclusion that the Respondent herein did not prove their claim.

44. Arising from the foregoing, I find and hold that the Respondent herein cannot be allowed to undertake some semblance of cosmetic surgery or facelift to the current suit and thereafter seek to evade the snares of the Doctrine of res-judicata. Suffice it to underscore, that the mere fact that a Certificate of Title was subsequently, albeit, disingenuously procured by the Respondent does not take the dispute beforehand outside the purview of the Doctrine of res-judicata.

45. In any event, there is no gainsaying that with or without the Certificate of Title, the suit ground remains the same land which formed the basis of the Judgment rendered vide Meru ELC No. 92 of 2008. To this end, I come to the conclusion that despite the cosmetic surgery, the issue beforehand had previously been adjudicated upon and disposed of.

46. Furthermore, I also beg to state and underscore that it is high time that parties learned to accept the final conclusions of Courts of competent jurisdiction, more so, where no Appeal has been filed to challenge the findings or better still, where an Appeal has been heard and disposed of.

47. Before concluding on this issue, it is imperative to reference the holding of the Supreme Court [the apex Court] in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR, the Court stated thus;

> 52Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon Norbert Mao v Attorney-General, Constitutional Petition No 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under article 137 of the Uganda Constitution, and for redress under article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under article 50, seeking similar relief; and Judgment had been given in Hon Ronald Reagan Okumu v Attorney-General, Misc Application No0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on

a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

53. In Silas Make Otuke v Attorney-General & 3 others, [2014] eKLR, the High Court of Kenya agreed with the Privy Council decision in Thomas v The AG of Trinidad and Tobago [1991] LRC (Const) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".

54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.

56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):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." where the Court stated thus;

48. The ingredients that underpin the Application of the Doctrine of res-judicata were revisited and aptly elaborated by the Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) where the Court stated thus;

    59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, [2012] eKLR, thus:The courts must always be vigilant to guard 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 of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case

of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, '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...."

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former judgment or order which was final;

b) The judgment or order was on merit

c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action.(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 [2013] eKLR)

49. Bearing the analysis in the foregoing paragraphs in mind and taking into account the succinct exposition of the law by the Supreme Court, I come to the conclusion that the instant suit is indeed barred by the Doctrine of res-judicata. Instructively, no amount of cosmetic surgery; face lift or dishonesty in failure to make full disclosures can take the dispute outside the purview of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

Final Disposition:

50. For the reasons which have been highlighted in the body of the Ruling, I come to the conclusion that the instant Application is meritorious. Moreover, it is important to underscore that despite the disingenuous attempts by the Respondent to re-baptize the dispute beforehand, same is still prohibited by the Doctrine of res-judicata.

51. In the premises, the final orders of the Court are as hereunder:

i. The Application dated the 4th day of March 2025 be and is hereby allowed.

ii. The Plaintiff's suit be and is hereby struck out.

iii. Costs of the suit and the Application be and are hereby awarded to the Applicants/Defendants.

iv. The costs in terms of Clause [iii] shall be agreed upon and in default, same to be taxed by the Deputy Registrar in the usual manner.

52, It is so Ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 23RD DAY OF JUNE 2025.

OGUTTU MBOYA, FCIArb; [CPM-EA].

JUDGE

In the presence of:

Mukami/Mutuma – Court Assistants

Mr. Abubakar for the Defendants/Applicants

Mr. Wahome Gikonyo for the Plaintiff/Respondent.