



Shah v Kitangila Limited & 2 others (Environment and Land Case Civil Suit E030 of 2024) [2025] KEELC 4517 (KLR) (17 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT E030 OF 2024**

AY KOROSS, J

JUNE 17, 2025

BETWEEN

NIRISH CHANDULAL SHAH PLAINTIFF

AND

KITANGILA LIMITED 1ST DEFENDANT

HENRY RUHIO 2ND DEFENDANT

SAMWEL K. WAWERU 3RD DEFENDANT

RULING

1. This is a ruling in respect of the notice of motion dated 7/08/2024 filed by the 2nd and 3rd defendants, where they seek the following orders from this court: -
 - a. Spent.
 - b. That there be and is hereby issued an order that the court lacks jurisdiction as the suit and the attendant motion filed by the plaintiff are res judicata.
 - c. That this suit be and is hereby struck out on account of prayer (a) above.
 - d. That the costs of this motion be provided for.
2. The motion is supported by the grounds set out in the body thereof and the 2nd defendant's affidavit sworn on the instant date. A summary of the grounds in support of the motion are that a) land parcel known as L.R 10426/7 (mother parcel) was subdivided into 4 portions in 2003 to create L.R nos. 10426/24, 10426/25, 10426/26 & 10426/27 (jointly referred to as "subdivisions") with the L.R 10426/26 being purchased by the 2nd defendant who has been in quiet possession; and,
3. B)In a judgment that was rendered in Machakos ELC 282 of 2012 (Consolidated with Machakos ELC NO 169 OF 2014) on 2/12/2021 [hereinafter after referred as "former case"] this court cancelled the



mother parcel's title and declared the purported transfer to the plaintiff fraudulent and unlawful as the records with the land registry on L.R NO 10426/26 were tampered with, c) an appeal was filed against this decision to the Court Appeal in Nairobi Civil Appeal No. E067 OF 2023, which is pending hearing; and lastly,

4. C) In consequence, the instant suit breached Section 7 of the *Civil Procedure Act* (CPA), it was an abuse of the court process, might embarrass the court if two conflicting decisions are made, and litigation must come to an end.
5. The motion is opposed vide a replying affidavit sworn by the plaintiff on 14/10/2024. In brief, he avers that: a) the principles of res judicata did not arise in the circumstances of this case as the parties in Machakos ELC 282 of 2012 were himself as the plaintiff and the 1st defendant herein and Wisdom Property Agencies Ltd as the defendants; whereas in Machakos ELC No.169 of 2014 the parties were Forward Agencies Limited and Wisdom Property Agencies Ltd as the plaintiffs and the 1st defendant herein, himself, the chief registrar of titles and the director of survey as the defendants; and
6. B) Clearly, the parties in the former suits are different, and in contrast, the parties in this matter are Kitangila Limited, Henry Ruhio and Samwel K. Waweru as the defendants and himself as the plaintiff, c) the issues in the 2 former suits were distinct as Machakos ELC 282 of 2012 as consolidated with Machakos ELC No.169 of 2014 was on ownership, while in the instant claim, the plaintiff had pleaded trespass, lastly, d) the previous case addressed the question of ownership.
7. This court has considered the arguments contained in the enriching submissions received respectively from the law firms of Mss. KMK Africa Advocates LLP and Otwal & Partners LLP, dated 18/02/2025 and 27/01/2025 and is indebted to the counsels.
8. Having considered the motion, its grounds, affidavits, well-articulated rival submissions and legal framework and jurisprudence, the singular issue that arises for determination is whether the suit is res judicata.
9. As rightfully submitted by both counsels, the legal framework for res judicata is found in our Section 7 of the CPA in the following terms: -

“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.”
10. In illuminating on this doctrine, the learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012, page 293 explained the purpose of the doctrine and its exceptions in the following words: -

“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.”
11. As held in the Supreme Court of Kenya decision of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR that was relied upon by the 2nd and 3rd defendants' counsel, the doctrine of res judicata is a fundamental principle of



law that relates to the jurisdiction of the court and may be raised as a valid defence or even by the court's inherent power to prevent abuse of process.

12. In the circumstances of this case, the 2nd defendant proffered to this court its decision in *Forward Agencies Limited & another v Kitangila Limited & 3 others* [2021] KEELC 561 (KLR) (former case) as proof that this matter was *res judicata*. Nevertheless, the plaintiff's counsel, who does not dispute the jurisdiction of this court or its competency to hear and determine the former case and this case, argues that the parties are different and the issues were different.
13. When the doctrine of *res judicata* arises in a suit, the court is called to scrutinize the decision and pleadings and record of the former case that is claimed to have settled the issues in question, ascertain the issues determined in the former case, and whether these are the same in the subsequent case, establish if the parties are the same, or are litigating under the same title, and whether the former case was determined by a court of competent jurisdiction.
14. Since the competence of this court in this suit and former suit are unquestioned, this court is left to assess the other tests which are *inter alia*; (a) the parties in the suits are the same (b) the matter in issue is identical in both suits and (c) parties are litigating under the same title/claim.
15. As regards test (a), this court has had an opportunity to scrutinise the previous decision against the current suit and concludes that some of the parties therein are the same since in ELC NO. 282 OF 2012, as consolidated with ELC 162 OF 2015 (formerly Nairobi HCCC No. 2316 of 2007) and as the plaintiff herein has informed this court, he was the plaintiff in ELC NO. 282 OF 2012, and the 1st defendant was a defendant therein.
16. The only persons not parties to the former case are the 2nd and 3rd defendants. What can the court make of these new parties who have been introduced to this suit? Does their introduction to the suit pass the test of *res judicata*?
17. The answer to these questions is found in explanation 6 of Section 7 of the CPA which states that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, be deemed to claim under the persons so litigating if they show they had an interest in the suit premises and are deemed as persons litigating in the former suit.
18. This court has considered the decision in the former suit whereby the title of the mother parcel was cancelled and reverted to the subdivisions. As evident from the former suit's judgment and this suit, the 2nd defendant herein and the plaintiff herein, respectively, claim ownership of 10426/26 and the mother parcel, all ostensibly derived from the 1st defendant. This is significant as it means that and as posited in explanation 6 of Section 7 of the CPA, they are deemed as persons who had an interest in the former suit as they all derived their alleged ownership of their properties from the 1st defendant, who was the original owner of the mother parcel.
19. It is not lost to this court that the plaintiff in this case has by craft conjured new parties for purposes of circumventing *res judicata*, which cannot stand as litigation must come to an end. Therefore, this court finds the 2nd and 3rd defendants are persons who are deemed to claim and litigate under the defendant in the former suit (who is also the 1st defendant herein).
20. As concerns test (b), this court has no difficulty in finding that the issue in the former suit was the mother parcel and some subdivisions thereof, while this suit is similarly on the mother parcel. Put another way, the issue of the mother parcel is the same in both suits. Further, the argument by the



plaintiff that the threshold of test (c) has not been met because the claims were different fails as explanation 4 of Section 7 of the Civil Procedure Rules requires parties to bring forth their entire claim.

21. Guidance on this drawn from Henderson -v- Henderson 1843 67 E.R. 313 that is cited with approval in Onyango v Ochieno (Environment & Land Case E008 of 2022) [2023] KEELC 18938 (KLR) (18 July 2023) (Ruling) which held thus: -

“... where a given matter becomes the subject of litigation in, and of 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 a 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 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...”

In the end, this court concludes and finds the suit is res judicata.

22. Utmost and for the reasons and findings stated above, the notice of motion dated 7/08/2024 is hereby allowed, and since its trite law costs follow the event, costs are awarded to the 2nd and 3rd defendants. Since the 1st defendant did not participate in the proceedings, no costs are awarded to it. This court hereby issues the following orders: -
- a. The plaintiff's suit is hereby struck out with costs of the motion and suit to the 2nd and 3rd defendants.
 - b. The file is hereby effectively marked as closed.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 17TH DAY OF JUNE, 2025.

HON. A. Y. KOROSS

JUDGE

17. 06.2025

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
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In the presence of;

Mr. Edwin Otieno holding brief for Mr. Anzala for 1st defendant.

M/s Thande for Mr. Kosgei for 2nd and 3rd defendants.

Mr Otwal for plaintiff.

Ms Kanja- Court Assistant

