



**Gathuku & 21 others v Njenga & 2 others (Environment and Land Case 109 of 2024)
[2025] KEELC 6260 (KLR) (Environment and Land) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND CASE 109 OF 2024
MC OUNDO, J
SEPTEMBER 25, 2025
(FORMERLY NAKURU ELC LAND CASE NO. E42 OF 2022)**

BETWEEN

ELIJAH KARATU GATHUKU & 21 OTHERS PLAINTIFF

AND

DAVID NJOROGE NJENGA 1ST DEFENDANT

**JUDY WAIRIMU NJUGUNA (SUED AS THE ADMINISTRATORS OF THE
ESTATE OF DAVID NGANGA NJUGUNA) 2ND DEFENDANT**

JACQUELINE NJERI NJUGUNA 3RD DEFENDANT

RULING

1. Before me for determination is a Notice of Motion Application dated 28th March, 2025 brought under the provisions of Section 7 of the *Civil Procedure Act* and all enabling provisions and regulations of the law wherein the 1st and 2nd Defendants/Applicants seek for the court to find the instant suit Res Judicata and thereafter proceed to strike it out with costs.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by, Judy Wairimu Njuguna, the 2nd Defendant/Applicant herein who deponed that she together with her co-administrator had sued the Plaintiffs and the 3rd Defendant in Nakuru Environment and Land Court Civil Suit No. 390 of 2016 Jacqueline Njeri and Judy Njuguna (Suing as Administrators of the estate of the late David Nganga Njuguna-Deceased) versus Bishop Zablou Mbugua Karanja & 4 Others, vide an Amended Complaint of 5th November 2019, over property described as LR 1556/5 situate South-East of Naivasha town in Nakuru County Measuring 7.951 Ha or thereabouts.



3. That the same persons claiming under David Njoroge Njenga, the 3rd Defendant herein have now consorted and morphed to become the Plaintiffs in the current suit over the same subject parcel of land wherein the issues therein had been heard and determined by a court of competent jurisdiction vide a Judgment delivered on the 26th October 2023 and therefore the current suit be found to be 'res judicata' and the same be struck out.
4. In response and in opposition to the Application, the Plaintiffs/ Respondents in a Replying Affidavit dated 23rd April, 2025 sworn by Josephat Kuria Kaniaru, the 21st Plaintiff/Respondent deponed that the instant application was misconceived, baseless and was only meant to serve the selfish and myopic interests of the 1st and 2nd Defendants/Applicants wherein it had not disclosed all the material facts of the case.
5. That the former case in Nakuru being ELC Case No. 390 of 2016, had only proceeded against David Njoroge Njenga, the 3rd Defendant herein. That the cause of action had been based on the tort of trespass wherein the Applicants herein had alleged that the Defendants therein had trespassed and taken possession of the parcel of land known as LR 1556/5. They had thus sought for vacant possession. That in its Judgment, the court found that trespass had not been proved and dismissed the case.
6. That in the present suit they, as Plaintiffs, had sought for declaratory orders confirming them as legal proprietors of their respective plots as well as injunctive orders. That the 3rd Defendant did not participate in the instant Application hence it was evident that apart from the parties in the two suits being different, so was the cause of action.
7. That further the 1st and 2nd Defendants/Applicants had on 5th October, 2022 raised a Preliminary Objection on the same ground wherein they had argued that the suit was res judicata;
 - a. Nakuru HC ELC No. 390 of 2016 Jacqueline Njeri Njuguna & Judy Wairimu Njuguna -vs- Bishop Zablou Mbugua Karanja & 4 others
 - b. Naivasha CMCC No. 540 of 2008 David Njoroge -vs- Jemimah Njuguna
 - c. Nakuru HCCC No. 15 of 2010 David Njoroge Njenga -vs- Jemimah Njuguna
8. That 1st and 2nd Defendants/Applicants had sought for the court to find that the Plaintiffs' suit as being unavailable to them, was misconceived, incompetent and qualified to be struck out with costs. That further the Court lacked jurisdiction to entertain a res judicata application.
9. That the Plaintiffs/Respondents herein had opposed the Preliminary Objection wherein a ruling dated 16th February, 2023, the court had found that the matter was not res judicata as the parties and cause of action were different. The Preliminary Objection had been dismissed with costs.
10. That the 1st and 2nd Defendants/Applicants in another attempt meant to further derail the conclusion of the instant matter had now disguised themselves and filed the current application seeking for orders that the instant suit be struck out for being res judicata yet that issue had been conclusively dealt with in the Ruling of the court.
11. That whilst it was trite law that he who seeks equity must come with clean hands, the Applicants herein had brought their application on unsubstantiated and unproven allegations which were pegged on lies meant to persuade the honorable court to grant the orders.
12. That the suit herein being an old matter filed in the year 2022, that the court do balance the scales of justice, dismiss the application and order that the suit be heard on a priority basis so as to do justice



- to the parties, protect all litigants' rights and ensure neither was unnecessarily prejudiced, duped or tricked which would be achieved through dismissing the present application.
13. The Application was disposed of by way of written submissions wherein the 1st and 2nd Defendant/Applicants vide their submissions dated 30th May 2025 in support of their Application dated 28th March 2025, summarized the factual background of the matter and then framed one (1) issue for determination to wit; whether the instant suit was 'res Judicata'.
 14. They placed reliance on the provisions of Section 7 of the Civil Procedure Act and the decided case in John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), to submit that the current matter was directly and substantially in issue with the former suit where ownership and occupation of the parcel of land described as LR 1556/5 Situate South-East of Naivasha town in Nakuru County Measuring 7.951 Ha or thereabouts was the issue for determination in both suits.
 15. That the parties in both the suits were similar and or under the same parties whom they claimed and litigated. That the reliefs that had been sought by the Applicants in Nakuru ELC Civil Suit 390 of 2016 vide an amended Plaint of 5th November 2019 were against all the Defendants, including David Njoroge Njenga, the 3rd Defendant herein, and all persons claiming under him. That in the present suit vide a Plaint dated 6th July 2022, the Plaintiffs admitted to be claiming their rights under David Njoroge Njenga, the 3rd Defendant as in the previous suit.
 16. That both Courts were of similar jurisdiction and were equally competent to hear and determine each of the suits wherein the issues of ownership over the subject parcel of land, that had been raised in the former suit, was heard and determined by a Court of competent jurisdiction.
 17. In conclusion, he submitted that the subject matter in issue was identical in both suits and that the parties in the current suit were the same since the previous suit had covered all persons claiming under the 3rd Defendant. That further, there was the sameness of the title over the subject matter, and concurrence of jurisdiction of the Courts that had conducted both suits and therefore the court ought to find the instant suit 'res judicata' and strike it out with costs to them.
 18. The Plaintiffs/Respondents on the other hand, vide their Written Submissions dated 3rd June 2025 in opposition to the 1st and 2nd Defendants/Applicants' Application, also framed one (1) issue for determination to wit; Whether the instant suit was res judicata.
 19. They also placed reliance on the provisions of Section 7 of the Civil Procedure Act to submit that the Plaintiffs in the instant suit-Elijah Kiratu Gathuku and 21 others-were not parties in the previous suit wherein the cause of action had been based on the tort of trespass and unlawful occupation over LR No. 1556/5 which was a different cause of action from the present suit wherein the Plaintiffs herein now sought for a declaratory relief affirming their proprietary rights as bona fide purchasers for value of various subplots derived through valid sale transactions from the Defendants herein or their predecessors in title.
 20. That the doctrine of res judicata required parties or those claiming under them in the two suits be the same or substantially the same wherein in the instant case, the Plaintiffs herein had not been shown to be privies of the parties in the former suits, nor were they acting through those parties hence the res judicata plea could not be sustained.
 21. That they were not parties in the previous cases being Nakuru ELC No. 390 of 2016 (involving LR No. 1556/5), Naivasha CMCC No. 540 of 2008, and Nakuru HCCC No. 15 of 2010 which cases had dealt with different factual and legal issues relating mostly to trespass and ownership disputes



among different set of parties. Reliance was placed in the decided case of *Cosmas Mrombo Moka v Co-operative Bank of Kenya Limited & Another* [2018] eKLR where the court had cited the Supreme Court of India' case of *State of Maharashtra & Another vs National Construction Company, Bombay* Supreme Court civil appeal no1497 of 1996

22. It was thus their submission that the issues raised in the present suit were not heard and conclusively adjudicated upon in the alleged former proceedings. That the application of judicial mind to the precise question now before the Court was whether the Plaintiffs held legitimate proprietary interests as purchasers for value had not been decided in the previous suit wherein without such adjudication on the merits, the threshold requirement under the provisions of Section 7 of the *Civil Procedure Act* that the matter in issue must have been "heard and finally decided"—had not been met and thus the plea of *res judicata* could not succeed on the said ground.
23. In conclusion, they submitted that the elements required to establish *res judicata* under the provisions of Section 7 of the *Civil Procedure Act* had not been met and subsequently, the bar of *res judicata* could not arise, for which the instant application must fail.

Determination.

24. I have considered the Notice of Motion Application dated 28th March, 2025 herein, the affidavit in opposition, the applicable law and the authorities cited by the parties herein. Pursuant to the filling of the Suit vide a Plaint dated the 6th July 2022, wherein the Plaintiffs sought for declaratory orders confirming them as legal proprietors of their respective plots as well as for orders of Specific performance and injunctive orders against the Defendant/Applicants, the 1st and 2nd Defendants/Applicants filed the current Notice of Motion dated 28th March, 2025 seeking to have the Plaintiffs suit struck out for being *Res judicata* a previous matter in Nakuru, ELC 390 of 2016, Jacqueline Njeri and Judy Njuguna (Suing as Administrators of the estate of the late David Nganga Njuguna-Deceased) versus Bishop Zablon Mbugua Karanja & 4 Others.
25. Their argument is that in the previous matter, the 2nd Defendant/Applicant herein together with her co-administrator had sued the Plaintiffs and the 3rd Defendant and all persons claiming under him over property described as LR 1556/5 situate South-East of Naivasha town in Nakuru County Measuring 7.951 Ha or thereabouts wherein judgement had been rendered on the 26th October 2023. That the same persons claiming under David Njoroge Njenga, the 3rd Defendant had now consorted and morphed to become the Plaintiffs in the current suit over the same subject parcel of land over issues that had been heard and determined by a court of competent jurisdiction.
26. In opposition to the Application, the Plaintiffs/ Respondents' contention was that matter in issue and cause of action in the past and current suit as well as the parties therein were different. That in the past suit the cause of action had been based on a Tort of Trespass wherein the Plaintiffs therein had sought for orders of vacant possession, eviction and permanent injunction in respect of land reference No. 1556/5 against the Defendants therein.
27. That in the current suit however they as Plaintiffs had sought for declaratory orders confirming them as legal proprietors of their respective plots as bona fide purchasers for value as well as injunctive orders against the Defendant/Applicants and specific performance against the Defendants, which issues were not directly or substantially the same. That further, the parties in the two suits were different and the finality of the decision in ELC 390 of 2016 or the fact of it having been rendered on merit did not affect their claims in the present suit. That the provisions of Section 7 of the *Civil Procedure Act* had not been met and subsequently, the bar of *res judicata* could not arise, for which the instant application ought to fail.



28. It is to be noted that 3rd Defendant did not participate in the Application.
29. I thus find the matters arising for my determination being;

i. Whether the Plaintiffs' suit is Res judicata.

30. The all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA. 696 was clear as to the effect of raising an improper Preliminary Objection in that the court had held thus:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

31. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. The Supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 held as follows:

“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.”
32. Thus, in order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
 - i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
 33. The Applicants, in their Notice of Motion annexed the amended Plaint of 5th November 2019 and the impugned judgement in respect of Nakuru ELC Civil Suit 390 of 2016 so as to buttress their argument. I have considered the decision therein reported as Njuguna & another (Suing as the Administrators of the Estate of David Nganga Njuguna - Deceased) v Karanja & 4 others [2023] KEELC 21023 (KLR). In the Impugned suit the Parties therein were Jacqueline Njeri Njuguna and Judy Wairimu Njuguna Suing as the Administrators of the Estate of David Nganga Njuguna – Deceased vs David Njoroge Njenga (the Plaintiffs having withdrawn the suit against the other Defendants) wherein the subject



suit was Land Parcel LR 1556/5 situate South East of Naivasha town in Nakuru County measuring 7.951 ha or thereabouts.

34. The Plaintiffs' claim in the judgment had been referenced as follows:

“However, in August 2009 the defendants trespassed thereon took possession and constructed houses with an intention of permanently occupying it, yet the deceased had not at any time in his lifetime sold or transferred the suit land or part thereof to any of them or to any other person, and so by reason of that trespass the plaintiffs have been denied the use and enjoyment of the suit land and suffered loss and damage. The plaintiff sought vacant possession and in the alternative eviction orders and also a permanent injunction against the defendants jointly and severally to restrain them from interfering with the suit land.”

35. The court had framed its issues for Determination as follows:

- i. Whether the defendant trespassed onto all that land known as LR 1556/5;
- ii. Whether the defendant should be ordered to give vacant possession of the suit land;
- iii. Whether a permanent injunction ought to issue;
- iv. Whether damages should be awarded to the plaintiff against the defendant for trespass;
- v. Who ought to bear the costs of the present suit.

36. In its final decision, the court had held as follows:

“.....I therefore decline to hold that the 4th defendant is a trespasser on the suit land despite the judgment and decree of the lower court.

....The 4th defendant was therefore not sued on behalf of any other person in respect of the suit land in the present case. If he is personally occupying any land part of LR 1556/5 then that portion alone is the land to which this judgment applies....

.....Regarding general damages for trespass I find that no evidence was adduced to show that the plaintiffs sustained any damage or as to the quantum of damages expected and in any event the plaintiffs have failed to establish trespass. Pursuant to that observation and pursuant to the fact that the dispute arose from a transaction in which both parties were willing, I find that no damages are awardable.

.....The upshot of the foregoing is that I find that the plaintiffs have failed to establish their claim on a balance of probabilities and I hereby issue the following final orders:

- a. The plaintiffs' suit is hereby dismissed.
- b. Each party shall bear their own costs of the present suit.”

37. From the above snippets it is clear that whereas the court had found that the 4th Respondent therein, the 3rd Defendant in the current case had not been sued on behalf of any other person in respect of the suit land, it was clear that the cause of action was based on trespass and subsequently orders of vacant possession to issue, on the other hand, the Plaintiffs' cause of action in the current suit is that they seek declaratory orders of ownership to their respective plots of land, orders of Specific performance and injunctive orders against the Defendant/Applicants.



38. Trespass to land is a tort that protects the possessory right of a person over land. It doesn't necessarily concern ownership whereas a declaratory suit for proprietorship concerns the determination of a person's legal character or right to property. This is a matter of title, not just possession.
39. Res judicata will thus apply if the issue of proprietorship was a direct and substantial issue in the previous trespass suit wherein the court in order to resolve the trespass claim, would have made a conclusive finding on who had the better title to the land, that finding would then bar a subsequent suit for a formal declaration of proprietorship.
40. In the case before us, the issue of trespass was only decided on the basis of possession alone, wherein the court did not delve into the question of legal ownership. It is thus for this reason that the doctrine of res judicata was inapplicable in the subsequent suit for a declaration of proprietorship as the matter in issue were different.
41. I thus find that the cause of action and its remedy in the current suit being different from the cause of action and its remedy in the former suit, the issue of Res judicata was thus not properly raised in the circumstance.
42. I thus find that the Notice of Motion Application dated 28th March, 2025 herein raised on a point of Res judicata lacks merit and thus dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25TH DAY OF SEPTEMBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

