



**Mwirigi (Legal Representative of the Estate of Mwamba Kiara) v M’Mugambi
(Environment & Land Case E019 of 2023) [2024] KEMC 99 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEMC 99 (KLR)

**REPUBLIC OF KENYA
IN THE GITHONGO LAW COURTS
ENVIRONMENT & LAND CASE E019 OF 2023
AT SITATI, SPM
MAY 31, 2024**

BETWEEN

**JOHN MWIRIGI (LEGAL REPRESENTATIVE OF THE ESTATE OF MWAMBA
KIARA) PLAINTIFF**

AND

FELIX M’KINOTI M’MUGAMBI DEFENDANT

RULING

1. This ruling relates to the preliminary objection by the Defendant contained in paragraph 13 of his Statement of Defence dated 8th August, 2023 as follows:
 13. The defendant shall at the earliest opportunity and before this suit is heard raise a preliminary objection on point of law that this suit is res judicata and offends the mandatory provisions of sec. 7 of the *Civil Procedure Act* (cap 21 LoK) since there were MERU HCCC no. 287 of 1990 and MERU HCCC NO. 83 of 1992 between the same parties herein over the same subject matter.
2. The Plaintiff/Respondent opposed the objection by filing written submissions dated 29TH April, 2024 contending that the 2 cited previous suits MERU HCCC no. 287 of 1990 and MERU HCCC NO. 83 of 1992 were dismissed for want of prosecution and not heard and determined on merit. This contention was well supported by the Objector himself who concurred in paragraphs 2 and 4 of his written submissions dated 5th April, 2024. Reliance was placed on the authority of *Machache –versus- nyale & 8 Others* (environment And Land Case E058 OF 2022)(2024)(KEELC 1168 where it was held that filing a fresh suit after the dismissal of the previous one for want of prosecution does not trigger res judicata.
3. In the Objector’s submissions, reliance was placed on the authority of *Hi Plast Limited –vs- Cabinet Secretary, Ministry Of Environment And Natural Resources & 3 Others* (ELC NO. 487 OF 2018



NAIROBI) (Angote J.) where it was held that section 7 of the Civil Procedure Act prohibited a multiplicity of suits where previous suits had been determined.

4. The only issue for determination is whether or not the preliminary objection is merited.

Determination

5. It was common to the parties that the 2 previous suits MERU HCCC no. 287 of 1990 and MERU HCCC NO. 83 of 1992 were both dismissed for want of prosecution. It was also common to the parties herein that the subject matter, the questions in controversy arising and the parties litigating were substantially the same as the 2 former suits dismissed for want of prosecution.
6. That being so, the court finds that the dismissal for want of prosecution was not a determination on merit but termination of the case on a technicality. It was not a final determination because the dismissed suits could be reinstated for hearing on the merits so that the real question in controversy between the parties could be heard and determined by a court of competent jurisdiction. As was held in the respondent's cited authority of *Machache Vs Nyale & 8 Others* (supra) res judicata does not kick in for cases dismissed for want of prosecution because the dismissal was not on the substance of the case.
7. Consequently, the court dismisses the preliminary objection and directs that the matter goes for full hearing on the merits. Costs shall abide the outcome of the main suit. It is so ordered.

DATED, READ AND SIGNED AT GITHONGO THIS 31ST DAY OF MAY 2024

HON. T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

GITHONGO LAW COURTS

PRESENT

Mr Karanja for the plaintiff/respondent

Miss Mugo for the defendant/objector

