



**Ethics and Anti-Corruption Commission v Otieno & 2 others (Civil Suit E014 of 2024)  
[2025] KEHC 16026 (KLR) (Anti-Corruption and Economic Crimes) (7 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16026 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
CIVIL SUIT E014 OF 2024  
BM MUSYOKI, J  
NOVEMBER 7, 2025**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**BOB KEPHAS OTIENO ..... 1<sup>ST</sup> DEFENDANT**

**EVELINE AWINO OGUTU AKA EVELYNE AWINO OGUTU T/A NYANGUME  
ENTERPRISES ..... 2<sup>ND</sup> DEFENDANT**

**GALIWA COMPANY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By way of plaint dated 3<sup>rd</sup> June 2021, the plaintiff brought this suit against the defendants praying for the following orders;
  - a. A declaration that payment of the sum of Ksh 26,272,460/= from the Homabay County Assembly account to the defendants for services not rendered was unlawful, fraudulent and illegal.
  - b. A declaration that the defendants illegally enriched themselves by receiving a total sum of Ksh. 26,272,460/= from the Homa Bay County Assembly for services not rendered.
  - c. An order for payment of the sum of Ksh. 26,272,460/= paid to the 1<sup>st</sup> and 2<sup>nd</sup> defendants pursuant to the illegal payments and receipts against the defendants jointly and severally.
  - d. A declaration that Kisumu Municipality/Block 10/585 was acquired using public funds embezzled from Homa Bay County Assembly and is therefore liable to forfeiture to the government.



- e. An order for forfeiture of Kisumu Municipality/Block 10/585 to the Government of Kenya.
  - f. Costs of and incidental to this suit.
  - g. Interest on (a) to (c) above at court rates from the date of receipt to the date of payment in full.
  - h. Any other or further relief that the court may deem fit to grant.
2. The defendants filed a joint defence dated 7<sup>th</sup> June 2022 in which among others, it was pleaded at paragraph 20 that the suit arose from the same set of facts and circumstances as in this court's civil suit number 4 of 2018 which was still pending in court. Later, the defendants went on to file a notice of motion dated 18<sup>th</sup> September 2023 which was seeking that this suit be struck out for being res judicata this court's civil suit number 4 of 2018 (hereinafter referred to as 'the former suit'). Giving ruling on the said application on 19-10-2023, Honourable Justice Prof (Dr) Sifuna directed that the issue of res judicata shall be determined at the conclusion of the hearing. Following that ruling, this court went on to hear the parties' witnesses and directed the parties do address it on the issue if res judicata first. This ruling relates to that issue.
  3. The 1<sup>st</sup> defendant was the Clerk for County Assembly of Homabay County (hereinafter referred to as 'the Assembly') during the period of interested in this matter which is between 18<sup>th</sup> August 2016 and 26<sup>th</sup> January 2017. During the said period, he is said to have embezzled Kshs 26,272,460.00 from the Assembly through the 2<sup>nd</sup> defendant's bank account with which the defendants purchased property known as Kisumu Municipality/Block 10/585 which was registered to the 3<sup>rd</sup> defendant. It is pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are husband and wife and beneficial owners of the 3<sup>rd</sup> defendant.
  4. In the former suit, the plaintiff had prayed for judgment against the defendants for;
    1. Ksh. 26,272,460.00/= (Kenya Shillings Twenty-six Million Two Hundred and Seventy-Two Thousand, Four Hundred and Sixty).
    2. Costs of and incidental to this suit.
    3. Interest on (a) and (b) at Court rates.
    4. Any other or further relief that the court may deem fit to grant.
  5. The pleadings and proceedings in the former suit, had the defendants as the 1<sup>st</sup> and 2<sup>nd</sup> defendant herein while the plaintiff was the same as in this suit. It was averred in that suit that the plaintiff had established that within a period of six months running from 18<sup>th</sup> August 2016 and 14<sup>th</sup> February 2017, the 2<sup>nd</sup> defendant's account was credited with Kshs 26,272,460/= from the Assembly for no work done which was withdrawn and utilised. It was the case of the plaintiff that the amount was fraudulently credited to the 2<sup>nd</sup> defendant's account resulting to unjust enrichment and loss of public funds.
  6. The former suit was heard by Honourable Lady Justice E.N. Maina where both parties called witnesses, made submissions and a final judgment entered in favour of the plaintiff on 2-03-2023 as follows;
 

'Having found that the Plaintiff has proved its case against the Defendants on a balance of probabilities and having found the Defendants liable to compensate the County Assembly of Homa Bay for the loss occasioned to it, I enter judgment for the Plaintiff against the Defendants joint and severally in the sum of Kshs. 26,272,460/= together with interest as calculated in Regulation 3 set out above and costs of the suit. It is so ordered'
  7. When this court enquired about the status of the judgment in the former suit, the plaintiff informed me and the defendants confirmed that there was a stay of execution pending hearing and determination



of civil appeal number E416 of 2023 at the Court of Appeal. The plaintiff added that it was unable to execute the decree against the property as the same is registered to a person who was not a party to the former suit. That is the 3<sup>rd</sup> defendant.

8. The principle of res judicata is anchored in Section 7 of the [Civil Procedure Act](#) which states that;

‘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.’
9. For the principle to apply in a suit the following ingredients must be evident;
  - a. The issues in the former suit must have been the same as in the current suit.
  - b. The parties in the former suit must have been the same as in the current suit or litigating under the same title.
  - c. The former suit must have been heard on merits and meritorious judgement issues by a competent court.
10. In its submissions dated 28<sup>th</sup> July 2025, the plaintiff urges that the current suit was inadvertently filed three years after the former suit and without knowledge of existence of the former suit. According to it, this suit was filed after completion of investigations and adds that the former suit which was first filed in Kisumu did not take into consideration its complete investigations. It submits further that after it was discovered that there were two suits, this one was stayed to await the outcome of the former suit and after the former suit was finalized, the parties adopted the judgment on liquidated sum thereby dealing with prayer (a), (b) and (c) of the plaint in this matter leaving prayers (d), (e), (f), (g) and (h) for court’s decision.
11. No doubt that the two suits involved the same parties save for the 3<sup>rd</sup> defendant who was not a party in the former suit. There is no doubt that a final judgment was rendered by a competent court in the former suit. The only contention is whether the issues in the former suit were the same as those in this matter.
12. I have carefully read through the judgment of her Ladyship in the former suit and I take position that she exhaustively dealt with the issues of whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants defrauded the Assembly which she answered in the affirmative. Although the memorandum in the appeal said to be pending before the Court of Appeal has not been exhibited, it is obvious to me that the Court of Appeal will be interrogating the question of whether there was proof of embezzlement of the funds by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Even if that will not be the case, the fact would remain that there is a judgment of a competent court in place on the issue which this court being a court of concurrent jurisdiction cannot overturn.
13. For the plaintiff to succeed in this matter, it must proof the same facts on the movements of the funds from the Assembly’s coffers to the 2<sup>nd</sup> defendant and utilisation of the same in purchasing the property sought to be forfeited. The only issue that would be different in my view would be whether the same money was used to purchase the property but I find that to be an ancillary issue which cannot be separated from the primary ones. Section 7 covers such cases by stating that an issue which was substantially in issue in the former suit should not be dealt with in the current suit. To me, an issue is substantially in question if the facts and evidence required or necessary to prove it have been laid



before the court, discussed, analysed and a conclusion on the same reached whether some part of the intertwining or intervening evidence has been produced or not.

14. In tackling the issues raised in this suit, the court will not only be dealing with the issue of the source of the money and its movement ending with the purchase of the property. That issue has indisputably been dealt with and a decision on them rendered by a competent court. The two suits are so similar that the plaintiff's own submissions make references to issues settled in the former suit. In engaging in discussion along those lines, this court will not only be trying an issue which has been dealt with in the judgement delivered by Justice E.N. Maina on 2-03-2023 but will also be interrogating an issue which is before the Court of Appeal a jurisdiction I do not have.
15. The plaintiff has advanced an argument that the current suit was inadvertently filed before investigations were completed. However, it is interesting that after the discovery, the plaintiff decided to proceed with the same suit to conclusion where it got a favourable judgment. When the discovery was made, the remedy that was available to the plaintiff was to amend one of the suits to consolidate all the issues in it then withdraw or abandon the other suit. Sustaining parallel suits based on the same facts, parties and issues is an abuse of the court process and the law should frown on such conduct. It is in my opinion, litigation in installments.
16. In my analysis, the only difference between the two suits is addition of the 3<sup>rd</sup> defendant in the current suit and the pursuit of the landed property. The position in law is that the doctrine of res judicata applies not only to cases where the issues were actually placed for the court to decide but also to every point which should have or belonged to the subject of litigation. The Court of Appeal held in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) KECA 472 (KLR) that;

The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged.'

17. The plaintiff also argues that the issue for determination in this matter is a new cause of action relating to forfeiture of property acquired using stolen funds to the government. According to the plaintiff, although the issue of stolen funds was determined, the consequential use of the funds was not pleaded for determination and it is the subject of the current suit. I decline to buy that argument. What the plaintiff had set out to do in the former suit was recovery of public funds lost in the same circumstances as in the current suit. It chose to go for the liquidated claim while aware that the landed property was likely acquired through proceeds of the same acts of embezzlement. I say so because the former suit proceeded with the full knowledge of the existence of this suit and the circumstances under which the property in issue was acquired.
18. This court finds it clear that the chain of facts is the same in the two matters right from the position the 1<sup>st</sup> defendant held in the Assembly, his relationship with the 2<sup>nd</sup> defendant, the source and trail of the funds, the period within which the embezzlement is said to have occurred and the amount involved.
19. The plaintiff has a judgement for the liquidated sum after it opted to sue the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the former suit. In my view, addition of the 3<sup>rd</sup> defendant and plea of forfeiture does not make the current suit different from the former suit. Addition of parties to a subsequent suit does not make



it different from the former suit if the issues are the same in both suits. In *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* (2022) KEHC 2227 (KLR), it was held that;

‘However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.’

20. What the plaintiff is seeking is to have, is two judgments in respect of the same chain of events and based on the same facts and evidence. If I were to find in favour of the plaintiff in this suit, there would be two judgments meaning that the plaintiff will have recovered the suit property and at the same time have monetary decree with liberty to execute both. In my considered opinion, this cannot be the purpose which the asset recovery process was meant to achieve.
21. Similarly, if this court were to find against the plaintiff in this matter, there will definitely be two conflicting judgments of courts of concurrent jurisdiction in respect of the same subject matter. If the two scenarios were to occur, it would be an affront to justice and embarrassment to the rule of law. Such are what the principle of *res judicata* is meant to avoid. I am persuaded by the holding of Honourable Justice John M. Mativo as he then was, in *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* (2018) KEHC 6100 (KLR) where he stated that;

‘It’s settled law that a litigant has no right to pursue two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the process or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks.’

22. The plaintiff avers that it is unable to execute the decree in the former suit by disposing the property as the same is registered to the 3<sup>rd</sup> defendant who is not a party to the said suit. This cannot be an explanation or reason for a party to file a fresh suit. The procedure for execution of decrees is provided for in Order 22 of the Civil Procedure Rules and filing of a fresh suit is not one of them.
23. The plaintiff also pleads with the court to consider the wider public interest and proceed to write meritorious judgment for this matter. Plea of public interest cannot be a cure to a suit which has been caught up in the web of the principle of *res judicata*. It would not be in public interest for a court of law to proceed against statutory provisions and established legal principles. Conversely, public interest demands that courts should not be bogged by multiple suits involving the same facts and issues. Litigation must come to an end and with certainty.
24. My conclusion is therefore that this suit is *res judicata* this court’s civil suit number 4 of 2018 and it is consequently struck out with costs to the defendants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**



Ruling delivered in presence of Miss Maina holding brief for Miss Kenduiwa for the plaintiff and Mr. Mr. Wanjala the respondent.

