Ngari v Ireri (Environment and Land Case 75 of 2015)
[2025] KEELC 5735 (KLR) (30 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5735 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND CASE 75 OF 2015

A KANIARU, J

JULY 30, 2025

BETWEEN

HORINDA WANJUKI NGARI ..... PLAINTIFF

AND

EDWIN NJERU IRERI ..... DEFENDANT

RULING

1. Before me for determination is an application dated 23.5.2024 filed by way of motion on notice on even date. It is expressed to be brought under Section 63 (c) of the *Civil Procedure Act* (Cap 21), Order 40 Rules 1, 3 and 4 of the Civil Procedure Rules, 2010, Sections 13 (5), 14, and 19 of the *Environment and Land Court Act*, and all other enabling provisions of the law. Horinda Wanjuki Ngari as indicated as the Plaintiff/Applicant while Edwin Njeru Ireri is shown as the defendant/Respondent.

2. The application came with four (4) prayers but prayer 1 is now spent as it was for consideration at the exparte stage. The prayers for consideration now are three (3) and are set out as follows on the face of the application:

   Prayer 2: That the honourable court be pleased to review the orders made on 25.10.2018 to the extent that the orders for stay of execution were granted for a period of 24 months.

   Prayer 3: That the honourable court be consequently pleased to extend the orders of stay of execution of the judgement and decree of this court dated 1st March, 2018 till the determination of Nyeri Civil Appeal No. 235 of 2018 at the Court of Appeal at Nyeri.

   Prayer 4: That the honourable court be pleased to give such further and/or better relief as it may deem fit and just to.

3. The application is premised on the grounds, inter alia, that the applicant was aggrieved and dissatisfied with the judgement and decree of the court and filed Civil Appeal No. 235 of 2018; that the court made a ruling which, among other things, ordered that the judgement and decree to be stayed for a period

of 24 months; that the applicant's counsel moved with speed and prepared the record of appeal but the Court of Appeal manages its own diary and it was not possible to move it to determine the appeal within 24 months; that the appeal has however been heard and the parties are awaiting judgement; that the respondent is however intent on executing the judgement; that the applicant therefore filed an application for stay of execution; that the application was dismissed and the court observed that the applicant should have sought extension of the earlier orders of stay or filed an application for stay in the Court of Appeal; that the respondent attempted to execute; and that this court has discretion to allow the application herein so that the appeal before the Court of Appeal is not rendered nugatory.

4. The application came with a supporting affidavit which generally replicates the grounds on which it is premised.

5. The respondent filed grounds of opposition in response. He stated, inter alia, that the application is res judicata as the issues raised in it were determined in the applications dated 4.4.2018 and 20.9.2018; that this court lacks jurisdiction to hear and determine the application; that the application is a non-starter since the court cannot extend non-existent orders; and that the application is also an abuse of the court process and should be dismissed with costs to the respondent.

6. The application was canvassed way of written submissions. The applicant's submissions were filed on 8.7.2024. The first part of the submissions is essentially reiterating the substance of the application. The applicant then shifts focus to issues for determination. The issues are captured thus:

    a. Does the applicant have a sufficient reason for extension of stay orders?

    b. Will the applicant's appeal be rendered nugatory if the application herein is not allowed?

7. On the first issue, the applicant submitted that the land in dispute will be in danger of being alienated by the respondent or wrongfully sold in execution of the decree. If that happens, the applicant might be evicted and will suffer substantial loss.

8. The applicant then made reference to the applicable law, starting with Section 80 of the *Civil Procedure Act*, which provides the statutory basis for review. Then there was citing and quoting of case law. In this regard, two cases – Republic –v- Public Procurement Administrative Review Board and 2 others [2018] eKL and Shanzu Investments Limited –vs- Commissioner for lands: Civil Appeal No. 100 of 1993 – were proffered for guidance.

9. On the second issue, it was submitted that if the application is not allowed, the appeal, if successful, will be rendered nugatory. The case of Reliance Bank Limited –vs- Norlake Investments Ltd. [2002] 1 EA 227 was cited and quoted for guidance.

10. The respondent's submissions are dated 4.10.2024. It was pointed out that this is the third time the applicant is seeking orders of stay of execution. He first sought the orders via an application dated 1.4.2018. He got the orders and it was clear that the maximum period the orders could be in force was 24 months. Then the applicant approached the court again for similar orders vide an application dated 21.9.2024. He filed this second application because the period of 24 moths had lapsed yet the appeal was still pending. This second application was dismissed. The application now under consideration is the third one. The legal concept of RES-JUDICATA is said to stand in the way of allowing the current application.

11. I have considered the application, the response made to it, and the rival submissions. The applicant has had occasion to get orders of stay of execution from this court. He let or allowed the period he was meant to enjoy the orders expire without seeking an extension. When that period expired, the orders lapsed. Then the applicant came back with a second application seeking the same orders. In that second

application, what the applicant is seeking in this third application now under consideration should have been sought. It was a serious omission or oversight on the applicant's part not to seek for the orders in the second application. I am in agreement with respondent that the application before me now is caught up by the doctrine of RES JUDICATA.

12. The applicant cannot be allowed to keep on coming to court after blundering. The doctrine of res judicata does not allow a party to have a second bite at the cherry. If a party fails to do the right thing at the right time, a second attempt to do the same thing is deemed to be a legal futility. That is why I am saying that the applicant should have made all the appropriate prayers in the second application. I think I need to justify this by looking at the law.

13. Section 7 of the *Civil Procedure Act* (Cap 21) states as follows;

> " No court shall try any suit or issue in which a matter directly or substantially in issue has been directly and substantially in 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 heard and finally decided by such court."
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> Section 7 (supra) then makes several explanations to clarify the concept of res judicata. Of importance here is explanation 4 which states thus:
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> Explanation (4) – "Any matter which might and ought to have been a ground of defence or attack in such former suit shall be deemed to have been a matter directly or substantially in issue in such suit."

14. This same position is to be found in the old English case of Henderson –vs- Henderson [1843 – 60] ALL E.R 378 where the court expressed itself thus:

> " ... where a given matter becomes the subject of litigation in, and 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 case, not only to points upon which the court was required by the parties to form an opinion and pronounce judgement, 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."

15. In a non-judicial context, Kuloba Richard in his seminal book: Judicial Hints on Civil Procedure: Law Africa Publishing (K) LTD: 2nd Edition, at page 475, stated the same test as follows:

> " The test whether a suit is barred by res judicata is this: Is the plaintiff in the 2nd suit trying to bring before the court, in another way and in form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which had been adjudicated upon? If so, the plea of res judicata applies not only to the points upon which the court was actually required to adjudicate 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."

16. The doctrine of res judicata applies as much to applications as to the suits themselves. I think it is now clear that the courts of law will not allow a party to conduct piecemeal litigation. What the applicant is telling this court to consider now belonged in the second application. The court cannot entertain it now.

17. When the applicant failed to seek extension of stay orders before the expiry of the period stated in the first application, he was making a blunder. When he filed the second application and failed to pray for the appropriate orders in that application, he was making a blunder. When he now comes to court in this third application to ask for orders that he should have asked for in the second application, he is again making a blunder. In simple terms, the applicants endeavor in this matter has been a tale of blunder upon blunder upon blunder.

18. The upshot, in light of the foregoing is that the application is misplaced, a non-starter, pessimi exempli, and therefore suitable for dismissal. I hereby dismiss it with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED ONLINE AT KITUI THIS 30TH DAY OF JULY, 2025.

In the presence of;

Kimanzi for defendant/respondent - present

Ms. Wachira for applicant – absent

Plaintiff – absent

Defendant - absent

A. KANIARU

JUDGE