

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
KERUGOYA

ELCA NO. E049 OF 2024

HANNAH WANJERI GATHARA
APPELLANT

VERSUS

JOSPHAT MUSUMBU MUTUKU
RESPONDENT

(Being an appeal against the ruling of Hon. F. Mutuku, PM delivered on 19th August 2024 in Wang’uru MELC Case No. E069 of 2022)

JUDGMENT

1. This appeal arises from the ruling of **Hon F. Mutuku, PM**, delivered on **19th August 2024** in **Wang’uru MCELC No. E069 of 2022**, in which the learned trial magistrate allowed the respondent’s Notice of Motion dated 15th June 2023, and dismissed the appellant’s suit on the ground that it was res judicata and an abuse of the court process.
2. Aggrieved by the dismissal of her suit, the appellant preferred the present appeal, through the Memorandum of Appeal dated 30th August 2024, raising five (5) grounds, that:

1. The learned magistrate erred in law and in fact by finding the suit to be res judicata despite the fact that the previous suit being **Embu Chief Magistrate's Court Civil Case No. 211 of 2016** was dismissed on a preliminary and technical point.
2. The learned magistrate erred in law and in fact by failing to consider that the preliminary point on which **Embu Chief Magistrate's Court Civil Case No. 211 of 2016** was dismissed had been rectified by the time of filing **Wang'uru MCELC No. E069 of 2022**.
3. The learned magistrate erred in law and in fact by failing to consider that **Embu Chief Magistrate's Court Civil Case No. 211 of 2016** was never heard on merit and therefore could not qualify as res judicata.
4. The learned magistrate erred in law and in fact by failing to find that since title deeds for the land under Wachoro Adjudication Section had been issued and the adjudication process was complete at the time of filing **Wang'uru MCELC No. E069**

of 2022, the ruling issued in **Embu Chief Magistrate's Court Civil Case No. 211 of 2016** had been overtaken by events.

5. The learned magistrate erred in law and in fact by deciding the matter on a technical point, thereby failing to grant the appellant a fair hearing and reaching a decision that is erroneous in law, leading to a grave injustice.

The appellant sought for the appeal to be allowed; the decision of the lower court to be quashed; the dismissal of the respondent's application dated 15th June 2023; suit to be remitted back to the trial court for hearing and determination on merit; and costs in the appeal.

3. The appellant instituted **Wang'uru MCELC No. E069 of 2022** by way of a plaint dated 17th October 2022 seeking for inter alia, a permanent injunction restraining the respondent from entering, trespassing upon, constructing on, leasing out or in any other manner interfering with **Land Parcel No. Mwea/Wachoro/893**.

She also sought orders for demolition of temporary structures allegedly erected on the suit land, damages for trespass, and costs of the suit.

4. The respondent entered an appearance and filed a statement of defence. Contemporaneously, he lodged a Notice of Preliminary Objection contending that the suit was res judicata and that there existed a subsisting matter in Embu touching on the same subject. Before the preliminary objection could be determined, counsel for the respondent withdrew it on 14th August 2023, indicating that he had already filed a substantive application dated 15th June 2023 seeking similar relief.

5. The Notice of Motion dated 15th June 2023 was brought under **Section 7 of the Civil Procedure Act** together with **Sections 1A, 1B, 3 and 3A of the Act and Articles 50(2) and 159(2) of the Constitution**. In that application, the respondent sought orders that:

1) The plaintiff's suit dated 17th October 2022 be struck out and/or dismissed for want of jurisdiction pursuant to **Section 7 of the Civil Procedure Act**;

2) There be a stay of further proceedings and that the directions issued on 22nd May 2023 be set aside pending the hearing and determination of the application;

3) Costs of the application be in the cause.

The application was premised on grounds set out therein and supported by the respondent's affidavit. In summary, the respondent averred that the application and plaint dated 17th October 2022 were scandalous, frivolous, vexatious, and an abuse of the process of the court on the basis that there existed a previous suit between the same parties, namely **Embu Chief Magistrate's Civil Case No. 211 of 2016 - Hannah Wanjeri versus Josphat Musumbu Mutuku** in which similar claims had been raised and which had been dismissed on **17th October 2016 by Honourable M.N. Gicheru**.

It was the respondent's position that the cause of action in the Wang'uru suit was the same as that in the Embu matter and was therefore barred by **Section 7 of the Civil Procedure Act**.

6. The appellant did not file a specific replying affidavit in response to the Notice of Motion dated 15th June 2023. However, she filed a document titled "Replying Affidavit to Preliminary Objection." The trial court declined to consider that affidavit on the basis that the preliminary objection to which it responded to had already been withdrawn and was no longer for determination.

It was upon consideration of the Notice of Motion dated 15th June 2023 and the submissions of counsel that the trial court delivered the impugned ruling on 19th August

2024, dismissing the suit on the ground that it was res judicata and an abuse of the court process.

7. In the impugned ruling, the learned trial magistrate that it was not in dispute that there existed a previous suit between the same parties over the same subject matter before the Embu Law Courts, which had been dismissed, as evidenced by the order issued on 15th February 2017. The court noted that the dismissal followed a preliminary objection based on non-compliance with **Section 30 of the Land Adjudication Act and Sections 7 and 8 of the Land Consolidation Act**. The trial court rejected the appellant's submission that the earlier dismissal was on a technicality, holding that the stage at which the suit was dismissed was immaterial. It reasoned that once the preliminary objection was heard and the suit dismissed, there was a determination by a court of competent jurisdiction. The court therefore concluded that the appellant could not file a fresh suit over the same subject matter and that the proper recourse, if aggrieved, was to appeal the Embu decision. The suit was consequently dismissed as res judicata and an abuse of the court process.

8. This court issued directions on 14th November 2024 and 12th March 2025 on filing and exchanging submissions. The learned counsel for the appellant and respondent filed

their submissions dated 27th January 2025 and 26th May 2025 respectively, which the court has considered.

9. This appeal raises a singular issue of whether **Wang'uru MCELC No. E069 of 2022** was barred by the doctrine of res judicata by reason of **Embu CMCC No. 211 of 2016**.

10. The court has considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel for the parties, superior court decisions cited thereon, and come to the following conclusions:

a. This being a first appeal, the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the **Court of Appeal** held:

“This Court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of retrial... this Court must reconsider the evidence, evaluate it itself and draw its

own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

- b. The doctrine of res judicata is embodied under **Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya**, which provides as follows:

“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.”

- c. In the case of **Qayrat Foods Limited versus Safiya Ahmed Mohamed & 6 Others (2020) eKLR** the Court cited the case of **James Karanja alias James Kioi (Deceased) (2014) eKLR**, where the Court outlined the conditions under which the doctrine of res judicata would be applicable as follows:-

“For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated; (b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c) that a Court competent to try it had heard and finally decided the matters in controversy between the parties.”

- d. In the Case of **C. K. Bett Traders Ltd & 2 Others - vs- Kennedy Mwangi & Another (2021) eKLR** Chacha Mwita, J, observed as follows in regard to the application of the doctrine of res judicata;

“Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier Judgment, which may have determined the questions of law as well as of fact between the parties.

In other words, Res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous

litigation or suit were between the same parties as those in the current suit; the issues were directly on substantially in issue in the previous suit as in the current suit and they were conclusively determined by a Court of competent jurisdiction". (emphasis added).

e. From the record, there is no dispute that the parties in **Embu CMCC No. 211 of 2016 and Wang'uru MCELC No. E069 of 2022** are the same. There is equally no dispute that both suits concern **Land Parcel No. Mwea/Wachoro/893**. The Embu court was a court of competent jurisdiction in the matter before it. The central question, however, is whether the Embu suit was "*heard and finally decided*" within the meaning of **Section 7 of the Civil Procedure Act**. The order produced from **Embu CMCC No. 211 of 2016** shows that the suit was dismissed with costs for failure to comply with **Section 30 of the Land Adjudication Act and Sections 7 and 8 of the Land Consolidation Act**. The dismissal followed the hearing of a preliminary objection.

f. **Section 30(1) of the Land Adjudication Act** provides in mandatory terms that no person shall institute civil proceedings concerning an interest in land within an adjudication section except with the consent of the Adjudication Officer. The provision is

prohibitory in character and operates as a jurisdictional bar. In the absence of such consent, a court is precluded from entertaining the dispute.

Sections 7 and 8 of the Land Consolidation Act establish and regulate adjudication sections under that statute. Once land is brought under consolidation, ascertainment of rights and interests is to be undertaken within the statutory framework provided therein. The combined effect of those provisions is that, during the subsistence of an adjudication or consolidation process, disputes relating to interests in land are to be resolved through the mechanisms created by the statute and not through ordinary civil proceedings. The jurisdiction of the court over such lands is therefore deferred until the statutory process is completed or the requisite consent is obtained.

g. It follows that where a suit is instituted in contravention of **Section 30 of the Land Adjudication Act** or in disregard of the consolidation framework under **Sections 7 and 8 of the Land Consolidation Act**, the defect is not one that goes to the merits of the claim. It goes to the competence of the court to assume jurisdiction at that stage. The dismissal in the Embu matter was therefore not predicated upon an evaluation of

evidence, nor upon a determination of ownership, trespass, or entitlement. It was founded on the court's conclusion that, at the time the suit was instituted, the statutory framework governing adjudication had not been complied with, and consequently the court lacked jurisdiction to entertain the claim.

- h. Jurisdiction is foundational, and a court that declines jurisdiction does not determine rights. Its pronouncement is confined to the competence of the proceedings before it. It does not amount to an adjudication of the substantive controversy between the parties. For the doctrine of *res judicata* to apply, the matter in issue must have been heard and finally decided in the former suit.

The Court of Appeal in the case of **Independent Electoral and Boundaries Commission versus Maina Kiai & 5 Others [2017] KECA 477 (KLR)** that was cited by both counsel in their submissions, made it clear that the elements of *res judicata* are conjunctive, and the issue must have been conclusively determined. The Supreme Court in the case of ***John Florence Maritime Services Limited versus Cabinet Secretary for Transport & 3 Others [2015] eKLR***, similarly underscored that the

former decision must amount to a final determination of the matter in controversy.

- i. In the case of **Mumira versus Attorney General (2022) KEHC 271 (KLR)** Mativo, J held that:

“From the jurisprudence discussed earlier, it is clear that the previous suit must have been determined conclusively and a final Judgment rendered on merits. Even in Njue Ngai -vs- Ephantus Njiru Ngai & Another, the Court in the above underlined sentence, the Court cited authorities/decisions stating that there must be a determination on the main questions.”

Where a suit is dismissed for want of jurisdiction arising from statutory non-compliance under the adjudication regime, the merits remain untouched. Such a dismissal cannot be equated to a substantive adjudication of the rights claimed. It follows that the essential element that the matter was “*heard and finally decided*” is absent. Accordingly, the dismissal of **Embu CMCC No. 211 of 2016** did not operate as a bar to the subsequent proceedings subject matter of this appeal, under **Section 7 of the Civil Procedure Act**. The appeal therefore has merit.

- a. **Section 27(1) of the Civil Procedure Act chapter 21 of Laws of Kenya** provides, in mandatory terms that:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall not bar the court for ordering that the costs be paid. Provided that the costs of any action shall follow the event unless the court or judge shall for good reason otherwise order.”

The general rule is that costs follow the event, save where good reason exists to depart from the rule. I do not find any basis to depart from the above edict and the appellant having been successful is awarded costs.

11. In view of the foregoing determinations in this appeal, the court finds and orders as follows:

a. The appeal is hereby allowed.

b. The ruling of the trial court upholding the plea of res judicata and striking out the suit is hereby set aside.

c. The suit is reinstated and shall proceed to hearing on its merits before the trial court.

d. The appellant shall have the costs of the appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS
4TH DAY OF MARCH 2026.**

**S. M. Kibunja
ELC**

JUDGE

In the presence of:

Appellant – Mr. Chacha

Respondent – M/s Onsembe

Kinyua - Court Assistant

S. M.

Kibunja

