

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA

ELC CASE NO. 35 OF 2022

ROSE MUMOHOLA SHIMANYULA
.....PLAINTIFF

-VERSUS-

DIANA MUSAKALA KULUSIEYI (Sued as
Administrator of the estate of

CAROLYNE SABASABA MUSAKALA.....
DEFENDANT

RULING

Introduction

1. Before court is a Notice of Motion application dated 16th April 2025 filed by the defendant seeking the following orders:

- a) That this Honourable Court be pleased to strike out the plaintiff's suit for being *res judicata* within the meaning of section 7 of the Civil Procedure Act.**
- b) That the costs of this application be in provided for.**

2.The application is anchored on the supporting affidavit of the applicant sworn on 15th April 2025. The applicant's case is that the issues herein were determined conclusively on merit in Kakamega MC ELC No. 996 of 2018 between the same parties as those in the current suit and hence this suit is *res judicata* and ought to be struck out. He attached pleadings and judgment in the former suit.

3.The application was opposed. The respondent filed replying affidavit dated 14th July 2025. She stated that *res judicata* was not applicable in the circumstances of this case because this suit is founded on different facts, legal issues and capacity of the parties. That the prayers sought in the former suit are different from the instant suit. That the court in the former suit did not deal with the issue of whether the transfer of the suit property from the plaintiff's late father to the defendant's husband was fraudulent and unlawful; whether the plaintiff as administrator of her father's estate is entitled to the suit property and whether there was fraudulent intermeddling with the estate of the

plaintiff's father. That the said issues were not directly or substantially in issue in the previous suit. That the plaintiff previously litigated as the owner of the suit property but is now litigating as administrator of her father's estate, asserting that her late father was owner of the suit property and that the alleged sale to the defendant's husband was illegal and fraudulent. That she is entitled to a fair hearing on matters that were not conclusively resolved in the former suit. That the current suit is founded on fraud. That in the previous suit, the court only focused on parallel titles.

4. Parties filed submissions in regard to the application. On record are the applicant's submissions dated 4th October 2025 and those of the respondents dated 14th July 2025; both of which this court has duly considered.

Submissions

5. Counsel for the defendant relied on section 7 of the Civil Procedure Act and submitted that Kakamega MC L&E CASE NO. 996 OF 2018 was in respect of the same parties and the same issues as those in the instant suit,

hence this suit is *res judicata*. The court was further referred to provisions of Order 3 Rule 4 of the Civil Procedure Rules for the argument that a party ought to bring forward the whole of their claim in a suit. Counsel argued that the fact that the current claim was not included in the previous suit does not mean that the suit is not *res judicata*.

6. Reliance was placed on the cases of **Kenya Commercial Bank Limited & Another v Muiri Coffee Estate Limited & 3 Others [2016] KESC 6** and **John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others [2021] KESC 39 (KLR)** for the proposition that a party ought not be allowed to have a second bite at the cherry.

7. In response, counsel for the plaintiff submitted that the issues in the former suit are different from the issues in the current suit. Counsel argued that there should be a distinction between the plaintiff's capacity in the former suit and the current suit. Reference was made to the

case of **Benjoh Amalgamated Ltd 7 Another v Kenya Commercial Bank Limited [2014] e KLR.**

8. It was further submitted for the plaintiff that the current suit was based on fraud, which was not the issue before court in the previous suit. Counsel cited the cases of **Karia & Another v The Attorney General & Others [2005] 1 EA 83** and **Uhuru Highway Development Ltd v Central Bank of Kenya [1996] e KLR** for the proposition that where the cause of action in the subsequent suit is not the same and arise from different factual matrix, a plea of *res judicata* cannot succeed.

Analysis and determination

9. The court has carefully considered the application, the response thereto as well as submissions and authorities cited. In my considered view, the issue that arises for this court's determination is whether this suit is *res judicata* in view of the judgment in Kakamega CM ELC Case No. 996 of 2018
10. The doctrine of *res judicata* is provided for in section 7 of the Civil Procedure Act 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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

11.The doctrine of *res judicata* bars a court from trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit, where a competent court has already determined such suit or issue on merit and with finality.

12.The elements of *res judicata* are;

(a) The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.

(b) There is a judgment or order in a former suit which is final.

(c) The judgment or order in the former suit was on merit.

(d) The judgment or order was rendered by a competent court with jurisdiction.

13. In the case of **The Independent Electrical and Boundaries Commission v. Maina Kiai & 5 Others [2017] eKLR** the Court of Appeal stated the purpose of the doctrine of *res judicata* as follows;

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by multiplicity of suits and for a, to obtain at last outcomes favourable to themselves. Without it there would be no end to litigation, and the judicial process would be rendered noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* this rest in the public interest for swift, sure and certain justice.”

14. A bar of *res judicata* applies in circumstances where a party who ought to have raised an issue in a former suit failed to do so, either by mistake or negligence or otherwise, hence they cannot file a fresh suit on an issue which they failed to raise in the former suit. In the case of **John Florence Maritime Services Limited & Another v. Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 KLR (CIV) (6 August 2021) Judgment**, the Supreme Court of Kenya cited with approval the reasoning in the case of ***Hinderson v. Henderson [1843] 3 Hare 100 at page 115***, where it was held as follows;

“Where a given matter becomes the subject of 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 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 cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which property belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time....”**

15. I have considered pleadings in the former suit. The plaintiff was the plaintiff herein and the defendant was Carolyne Sabasaba Musakali. The plaintiff filed the claim as beneficiary of the estate of her father essentially arguing that the suit property previously belonged to her father and on his demise and upon succession she became the beneficiary thereof.

16. Therefore, the plaintiff's argument that there is a difference in capacity of the plaintiff in the two suits is not plausible. The parties in the former suit and the current suit are the same. The subject matter in both suits is parcel No. Isukha/Lukose/1550.

17. The judgment in the former suit is a judgment on merit. In the former suit, the plaintiff herein alleged that she was owner of the suit property which she inherited from

her late father Marko Luchembeleli Chisabosi. She alleged that the defendant had trespassed on the suit property and sought a permanent injunction to restrain her from trespassing thereon. In her defence and counterclaim, the defendant stated that the suit property belonged to her husband Ferdinand Musakala Achanga who was the registered owner up to 2008 when he passed on.

18. She also maintained that the registration of the plaintiff was a forgery and referred to the findings in Criminal Case No. 1555 of 2012. She further stated that the succession proceedings filed by the plaintiff were erroneous as the suit property was no longer in the names of Marko Luchembeleli Chisabosi and the suit property did not form part of the deceased's estate. That the plaintiff acquired title illegally fraudulently and unprocedurally and sought for cancellation of the same.

19. In the instant case, the plaintiff's complaint was that the suit property belonged to the estate of her late father. That one Samuel Atenya Museve filed succession proceedings got registered as owner of the suit property

and transferred it to Ferdinand Musakala Achanga fraudulently.

20. In short, in the former suit the defendant alleged that the plaintiff's title was as a result of fraud and that it rightly belonged to her father's estate. The plaintiff in the instant suit is challenging the legality of registration of the suit property in defendant's husband's name.

21. I take the view that the issues raised by the plaintiff belonged to the previous suit and if the plaintiff failed to raise them due to ignorance, mistake or negligence it is too late in the day for her to raise them now. Just because they are purportedly different issues, that cannot assist the plaintiff evade the doctrine of *res judicata*. The plaintiff cannot relitigate the matter just because she found new issues. What happens if after this suit is heard, she finds yet again new issues? Will she file a third suit?

22. The plaintiff ought to have raised the issues she is raising now in the previous suit because they belonged there.

23. For the above reasons, it is clear to me that this suit is an attempt by the applicant to get a second bite at the cherry. Court's time is precious, and all issues in regard to a specific subject matter ought to be determined at once. It is upon parties in a dispute to ensure that all their claims on one subject matter are addressed when the subject matter is being litigated upon, otherwise, there will be no end to litigation.

24. In the premises, I find and hold that this suit is *res judicata* and I hereby strike out the same with costs to the defendant.

25. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
IN OPEN COURT/VIRTUALLY THROUGH
MICROSOFT TEAMS VIDEO CONFERENCING
PLATFORM THIS 4TH DAY OF MARCH 2026**

A. NYUKURI
JUDGE

In the presence of;

Ms Adeya holding brief for Mr. Amasakha for the plaintiff
Ms Kadenyi for the defendant
Court Assistant: Delphine