



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MILIMANI LAW COURTS, NAIROBI
ELC CASE NO E189 OF 2025

DAVID MUCHIRI GIKONYO..... 1ST

PLAINTIFF/RESPONDENT

SARAH NAMAYANJA GATONYE

(Administrator of the Estate of JOSEPH GATONYE ...2ND

PLAINTIFF/RESPONDENT

-VERSUS-

JENNIFER WANGARI KAMAU.....

DEFENDANT/APPLICANT

RULING

Background

1. This matter is in relation to Plots no B01 KOMAROCK PHASE II(HCFK) SHOPPING CENTRE B and Plot NO C9 KOMAROCK (HCFK) herein referred to as the suit properties.
2. The applicant has filed a notice of motion application dated 24th September 2025 in which she depones that the matter is res judicata to ELC NO 579 OF 2009 as consolidated with ELC 489 OF 2009 Joseph Gatonye and another Vs Jennifer Wangari Kamau and the City Council of Nairobi.
3. That application was supported by the affidavit sworn by the applicant on the following grounds interalia
 - a) The court has no jurisdiction to entertain the matter as it is res judicata

b) That from evidence adduced in ELC N0 579 OF 2009 as consolidated with ELC 489 OF 2009 the defendant's parcel of land B01 KOMAROCK PHASE II(HCFK) SHOPPING CENTRE B is different from the plaintiffs' and the defendant has never occupied or had interest in the plaintiffs' parcel LR Nairobi/block 133/291 and plot No C9 Komarock phase II(HFCK)shopping centre

c) That the plaintiffs failed to disclose these facts to the court and are guilty of material non-disclosure

4. The notice of motion application sought for the following orders;

a) The plaintiffs' suit be struck out in its entirety as it is incompetent

b) The matter is res judicata in respect to the suit properties to ELC N0 579 OF 2009 as consolidated with ELC 489 OF 2009 Joseph Gatonye and another Vs Jennifer Wangari Kamau and the City Council of Nairobi

c) That the court declares it lacks jurisdiction to hear the matter

d) Costs of the application

Respondents reply

5. The application was opposed via the replying affidavit sworn on by Sarah Namayanja Gatonye the 2nd respondent herein. She deponed that she was the registered owner of suit property plot No C9 Komarock phase II(HFCK)shopping centre whereas the 1st respondent was the registered owner of LR Nairobi/block 133/291 which parcel she plaintiff had encroached on

That she sought redress in court together with the 1st respondent where they filed separate suits and the two matters ELC NO 579 OF 2009 and ELC 489 OF 2009 were consolidated and judgement was entered to in her favour which judgement has not been appealed to date. That the plaintiff is still in occupation of the two parcels of land.

6. She further deponed that the prayers and issue sought in the present suit are different from the prayers and issues in ELC NO 579 OF 2009 as consolidated with ELC 489 OF 2009 hence the doctrine of res judicata cannot be invoked

The applicant in response filed a supplementary affidavit dated 19th December 2015 reiterating the contents in the supporting affidavit
Applicant 'submissions

7. The applicant submitted on
 - i. Whether suit is res judicata

To back the averments as in the supporting affidavit of the suit being res judicata she relied on the case of **Maina Kiai Vs IEBC(2017)eklr** and section 7 of the civil procedure Act.

Counsel also submitted that the plaintiffs had no equitable rights over her suit property that was different from the one claimed in the application

- ii. Whether the suit should be struck out

On this issue, the applicant submitted that having established the matter was re judicata, then the same ought to be struck out as court lacks jurisdiction. He also relied on the provisions of order 5 rule 15 of the civil procedure rules.

As at the time of drafting this ruling, the plaintiffs /respondents had not put in any submissions

8. Analysis and Determination

Having looked at the application, the rebuttal from the respondents and the submissions the only issue for determination before the court is whether the matter is res judicata.

Res judicata is anchored Section 7 of the Civil Procedure Act which reads ; -

“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.”

The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. In considering whether an issue is Res Judicata the court considers;

- a) Whether the issue was directly and substantially in issue in the former Suit
- b) Whether suit was between the same parties or parties claiming under them.
- c) The parties were litigating under the same title.

- d) The issues were heard and finally determined in the former suit.
 - e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised
9. The applicant evidence to back the claim of res judicata is based on the judgement attached herein that was given in ELC N0 579 OF 2009 as consolidated with ELC 489 OF 2009 which judgement she asserts differentiated the two parcels of land as being distinct and hence she was not interested in the plaintiff's parcel but was legally occupying a different parcel being B01 KOMAROCK PHASE II(HCFK) SHOPPING CENTRE .A perusal through the same judgment at paragraph 28 clearly indicated that the plot the applicant was claiming to be B01 KOMAROCK PHASE 11(HCFK) ceased to exist when the survey of the area was done and it was converted to Nairobi/block 133/191 which property then belonged to Nairobi city council who went ahead to offer the lease to the plaintiffs and indication that the property belonged to no one and was available for allocation to the plaintiffs and hence the court attributed ownership of the suit property to the plaintiff. Based on this judgement the court awarded general damages to the plaintiff in ELC 597 OF 2009 being the deceased in whom the 2nd plaintiff suing under .In ELC 489 of 2009 the 2nd plaintiff was declared the owner of the suit property land reference no Nairobi/block 133/191.From the above the prayers as in both plaints were capturing the issue of damages but only the estate of the 2nd plaintiff herein was awarded

general damages and the 1st plaintiff was not which he seeks in this instant suit.

The plaintiffs in this instant suit are seeking for general damages for loss of income being that the applicant never gave possession despite there being a judgement in place and also for continued trespass. They also seek for special damages, exemplary and punitive damages.

These prayers in this instant suit are different from the prayers in ELC N0 579 OF 2009 as consolidated with ELC 489 OF 2009 as evidenced by the pleadings in the said matters. This then brings the court to answer the question whether the issue that are to be addressed in this suit were addressed in the former suit and the answer is no it fails on the limb that the issues raised ought to have been heard and finally determined in the former suit.

- a) Despite the parties litigating under the same title, the issue in question being directly and substantially in issue in the former Suit and being tried by a competent court, it fails on the fact that the prayers sought in here are to address issues that were not raised and addressed in the former suit and such plea of res judicata, is inapplicable.

Final disposition

For the foregoing reasons, I make the following orders

- i. The application dated 24th September 2025 is without merit and hereby dismissed
- ii. The court is vested with jurisdiction to entertain the plaint dated 14th April 2025

iii. Costs of the application to be in the main suit

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **23rd** day
of

March, 2026.

MOHAMMED N. KULLOW
JUDGE

Ruling delivered in the presence of: -

Mr. Onyango..... for the Defendant/Applicant

N/A..... for the Plaintiff/Respondents

Philomena W...... Court Assistant