



REPUBLIC OF KENYA



**Kimani & 18 others v Kwa Ndege Limited & 3 others (Environment & Land  
Case E089 of 2022) [2024] KEELC 373 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 373 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E089 OF 2022  
CA OCHIENG, J  
JANUARY 31, 2024**

**BETWEEN**

**JOSEPH MBUGUA KIMANI & 18 OTHERS ..... PLAINTIFF**

**AND**

**KWA NDEGE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KENYA COMMERCIAL BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**KENYA BANKERS ASSOCIATION ..... 3<sup>RD</sup> DEFENDANT**

**CENTRAL BANK OF KENYA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the 2<sup>nd</sup> Defendant's Notice of Preliminary Objection dated the 10<sup>th</sup> January, 2023 which is premised on the following grounds:-
  1. The Plaintiffs' suit is *res judicata*.
  2. The 2<sup>nd</sup> Defendant be struck off because the Plaintiffs have sued a non-existent party.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

**Submissions**

3. The 2<sup>nd</sup> Defendant in its submissions contend that the Plaintiffs' in this suit had previously instituted a similar suit being Machakos ELC No. 65 of 2012 wherein they sought the same orders, as in this current one. It insists that the previous suit was summarily determined by the Court on 16<sup>th</sup> November, 2018. Further, that the 2<sup>nd</sup> Defendant as sued does not exist since following the merger of Kenya Commercial Bank and National Bank of Kenya, the entity is now known as KCB Bank Kenya. Hence, the suit against the 2<sup>nd</sup> Defendant cannot stand. It contends that the instant suit is a continuation of



the previous suit which was dismissed for want of prosecution. To support its averments, it relied on Section 7 of the [Civil Procedure Act](#) as well as the following decisions: John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 others (2021) KESC 39 KLR; Kennedy Mokuwa Ongiri V John Nyasende Mosioma & Florence Nyamoita Nyasende (2022) eKLR; Siri Ram Kaura v MJ E Morgan (1961) EA 462; Maurice Ooko Otieno v Mater Misericordiae Hospital (2004) eKLR; Apex Finance International Limited & Another v Kenya Anti-Corruption Commission (2012) eKLR and Mediamax Network Ltd v William Momanyi & 2 others (2022) eKLR.

4. The Plaintiffs in their submissions insist that the issues raised in the Preliminary Objection should be clear points of law or fact that can be judicially noticed. They contend that the amended Plaint dated the 30<sup>th</sup> November, 2022 clearly states that the Defendants' have declined to avail the necessary contractual and other related documents which are in their possession and inaccessible to the Plaintiffs. They argue that this suit is not *res judicata* and made reference to the prayers in the previous suit and current one. They further submit that there has been no final Judgment on the previous suit except a Ruling dated the 11<sup>th</sup> March, 2015. On the issue of non-existence of the 2<sup>nd</sup> Defendant, they submit that no material has been placed before court to confirm the true nature of the relationship between the Kenya Commercial Bank and the now stated KCB Bank Limited. Further, that the 2<sup>nd</sup> Defendant is a legal entity capable of being sued despite change of name vide the aforementioned merger with National Bank of Kenya. To support their arguments, they relied on Section 7 of the [Civil Procedure Act](#), Section 66(3) of the [Companies Act](#) No. 17 of 2015 as well as the following decisions: [Moses Likoye Wanjala v Bernard Wekesa Sambu](#) (2013) eKLR; [Oraro v Mbaja](#) (2005) eKLR; [John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 others](#) (Petition 17 of 2015) (2021) KESC 39 (KLR)(Civ) (6<sup>th</sup> August 2021) (Judgement); [Kenya Scientific Research International Technical and Allied Institutions' Workers Union v Flame Tree Brands & 2 Others](#) (2013) eKLR; [John Kahiato Bari & 3 Others v New Kenya Cooperative Creameries Limited & Another](#) (2017) eKLR and Indian High Court in Delhi in the case of [Argha Sen v Interra Information](#) (2005).

### Analysis and Determination

5. Upon consideration of the instant Notice of Preliminary Objection including the affidavit and rivaling submissions, the following are the issues for determination:
  1. Whether this suit is *res judicata*.
  2. Whether the Suit against the 2<sup>nd</sup> Defendant should be struck out as it is non-existent.As to whether this suit is *res judicata*.
6. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at Section 7 which stipulates *inter alia*:

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 can 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.”
7. The [Civil Procedure Act](#) provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:
  1. 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.



2. 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.
  3. 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.
  4. 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.
  5. 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.
  6. 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.”
8. In Mulla, *Code of Civil Procedure*, 18<sup>th</sup> Ed 2012 at page 293, it describes the doctrine of *res judicata* as follows:-

The principle of finality or *res judicata* is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

9. In Machakos ELC 65 of 2012 the Plaintiffs’ through a Plaint dated the 29<sup>th</sup> March, 2012 and amended on 22<sup>nd</sup> March, 2017 sought for the following Order:-
- a. Immediate construction and delivery of fully built houses as originally agreed between the parties.
  - aa) A declaration that the 2<sup>nd</sup> Defendant is not entitled to charge the Plaintiffs any penalties together with the cumulative interest thereon that the 2<sup>nd</sup> Defendant has charged the Plaintiff in the past is in breach of the contract herein, is unconscionable, illegal, null and void.
  - b. Any costs, charges and/or expenses arising due to the unreasonable delay on the part of the Defendants for failure to do their part of the bargain be met by them.
  - bb) Loss of use of the suit premises and value thereof as may be assessed by this Honourable Court.
  - c. Delivery of the particulars of Plaintiffs parcels of land and/or registration documents direct and incidental.
  - Ca) A declaration that the 2<sup>nd</sup> Defendant has acted in contravention of the *Banking Act* (Cap 488 Laws of Kenya) and that the 2<sup>nd</sup> Defendant has applied interest rates on the Plaintiffs facility in breach of the specific terms of the contractual documents governing the facility.
  - Cb) That the honourable court be pleased to order that the 2<sup>nd</sup> Defendant do supply the Plaintiffs with a statement of account on the financial facilities the loan granted to the Plaintiff from the time when the charge against the Plaintiff property was registered to date.
  - cc) ...
    - (i) Specific performance of the agreement and



- (ii) Damages for non-completion
  - (iii) In default of Default specific performance of the agreement the Plaintiffs be declared as the legal owners of LR No. 12715/55) alternatively.
  - (iv) Damages for breach of contract.
  - cd) General and punitive charges for breach of contract and unreasonable or irrational resistance to mitigate losses both in court and out of court.
  - Ce) Interest from the time of breach of court rate, bank rate.
  - d. Cost of this suit.
  - e. Any other relief this Honourable Court deems fit to prevent miscarriage of justice.
10. While in the instant suit, the Plaintiffs *vide* a Plaint dated the 30<sup>th</sup> November, 2022 sought for the following Orders:-
- a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have infringed the Plaintiffs' right to the property in LR No. 12715/55.
  - b. An order directing the County Surveyor, Machakos County to resurvey LR No. 12715/55 for the purpose of subdivision.
  - c. An order directing the 1<sup>st</sup> Defendant to transfer all that parcel of land known as LR No. 12715/55 to the Plaintiffs to be held in common.
  - d. An order directing the Land Registrar, Machakos County to issue individual certificates of title to the Plaintiffs in equal proportions from the mother title LR No. 12715/55.
  - e. An order directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to refund the deposits paid by the Plaintiffs.
  - f. The Defendants be directed to pay mesne profits to the Plaintiffs.
  - g. An order of permanent injunction be issued barring the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, assignees or successors in title, from entering onto, trespassing, possessing, alienating or otherwise interfering with the suit premises, to wit 12715/55.
  - h. Interest on (e) and (f) above at court rates.
  - i. Costs of this suit.

11. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Company Limited* (1969) EA 696; the Court held that:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”



12. While in *Stephen Wanganga Njoroge vs Stanley Ngugi Njoroge & Another* (2017) eKLR which referred to case of *Uburu Highway Development Ltd v Central Bank & Others*, CA No. 36 of 1996 where the Court of Appeal stated that:-

In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

13. Further, the Supreme Court of Kenya 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), held that:-

Hence, whenever the question of *res judicata* is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”  
Emphasis mine

14. In relying on the legal provisions, I have cited above as well as associating myself with the decisions quoted while applying them to the circumstances at hand, even though I find that the fulcrum of the dispute herein and the previous suit was the same, other issues have been raised in the current suit. Further, the previous suit was dismissed for want of prosecution. Except for a Ruling, not all the issues raised in the instant suit were ever conclusively determined on merit. In the foregoing, I find that this suit cannot hence be deemed as *res judicata*.

15. As to whether the Suit against the 2<sup>nd</sup> Defendant should be struck out as it is non-existent.

16. The 2<sup>nd</sup> Defendant claims it no longer exists since the merger of Kenya Commercial Bank Limited with National Bank of Kenya Limited and it is now known as KCB Bank Ltd. According to the provisions of Section 66(3) of the *Companies Act*, 2015 which stipulates that:-

Any legal proceedings that might have been continued or commenced against it by its former name may be continued or started against it by its new name.”

17. In line with these legal provisions, I opine that the suit against the 2<sup>nd</sup> Defendant cannot be struck out on account of change of name. Further, I find that since the 2<sup>nd</sup> Defendant did not provide documentary proof in relation to change of name, these facts will require to be ascertained through evidentiary proof. In the foregoing, I will decline to strike out the 2<sup>nd</sup> Defendant from this suit.

18. It is against the foregoing that I find the instant Notice of Preliminary Objection unmerited and will dismiss it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2024**



**CHRISTINE OCHIENG**  
**JUDGE**

