



**M'Itonga v Stephen & 3 others (Environment & Land Case  
E002 of 2023) [2024] KEELC 982 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 982 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E002 OF 2023  
CK NZILI, J  
FEBRUARY 21, 2024**

**BETWEEN**

**MISCHECK MUTHAMIA M'ITONGA ..... PLAINTIFF**

**AND**

**CEASER IKUNDA STEPHEN ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT SURVEYOR MERU ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR MERU ..... 3<sup>RD</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before the court is the preliminary objection dated 2.8.2023. The 1<sup>st</sup> defendant states this suit was filed during the pendency of Meru ELC OS No. 46 of 2018. That in the two suits, the subject matter is the same, between the same parties; the former suit was determined to finality, and therefore, this suit offends the doctrine of res judicata and sub judice.
2. The 1<sup>st</sup> defendant in the previous suit had taken out an originating summons dated 22.11.2018, praying to be declared entitled to half an acre of L.R No. Abogeta/Lower Kathangari/1691, a resultant subdivision of L.R No. Abogeta/L. Kathangari/1232, previously carved out of L.R No. Abogeta/Lower Kathangari/616, by virtue of adverse possession. He had also sought prescriptive rights over ½ an acre and entitlement to use of an access road designated as L.R Abogeta/Lower Kathangari/1691, lying between L.R No. Abogeta/Lower Kathangari/1231 and the defendants L.R No. Abogeta/Lower Kathangari/1692, or in the alternative, a declaration that he had acquired easement rights over the access road that passes or crosses through the plaintiff's L.R No. Abogeta/Lower Kithangari/1692, and that the same be declared to be a public access road, and an order be made for the surveyor to visit the said land to create and demarcate the same and file mutation forms thereof. He also sought a permanent injunction against the defendants from blocking or in any way interfering with the said road



- of access. The originating summons was supported by an affidavit sworn by Ceaser Ikunda Stephen on 22.11.2018.
3. The plaintiff in the current suit, as the defendant, opposed the suit through a replying affidavit sworn on 8.1.2019, denying the occupation user and developments on the land alleged was open, peaceful, and or uninterrupted. He termed the access road illegal, unlawful, and unnecessary, for there was a main road readily available to the 1<sup>st</sup> defendant. The plaintiff also admitted selling 0.50 acres of L.R No.1232 to the 1<sup>st</sup> defendant, after which they petitioned for land control board consent, though he had declined to sign the mutation forms due to the illegal creation by the land surveyor of an access road on his land. The former suit was heard and determined on 19.7.2023.
  4. In this suit, by a plaint dated 6.2.2023, the plaintiff sued the defendants, claiming that they jointly and fraudulently subdivided his L.R No. Abogeta/Lower Kithangari/1232, into L.R No's. 1691 & 1692, using a forged mutation form, purportedly signed by him on 13.3.2014, and registered L.R No. 1691 and 1692 in the 1<sup>st</sup> defendant's name. He sought the cancellation of submissions, mutations, cadastral maps, title deeds, and reversion of the land to its original status. He also sought a permanent injunction.
  5. In paragraph 24 of the plaint, the plaintiff failed to disclose any pending or previous suit over the subject matter with the 1<sup>st</sup> defendant. He only mentioned it in the witness statement accompanying the plaint.
  6. The 1<sup>st</sup> defendant entered an appearance and filed a statement of defense dated 24.4.2023. He admitted that there was a sale of land with the plaintiff, leading to a land control board consent for subdivision into L.R No's.1691 and 1692, but after which, the plaintiff refused to provide completion documents to facilitate the transfers of L.R No.1691. He termed the suit as res judicata and sub judice as there was a pending Meru ELC No. 46 of 2018 (O.S.).
  7. To properly invoke the doctrine of sub-judice and res-judicata, an applicant must demonstrate:
    - a. The subject matter is directly and substantially the same in the two suits.
    - b. The former suit was between the same parties or proxies claiming under them.
    - c. The parties were litigating on the same title in the former suit.
    - d. The former suit was determined by a competent court to try such subsequent suit.
    - e. The matter in issue was heard and determined fully by such court.
  8. In *Maina Kiai & 2 others vs IEBC & 2 others* (2017) eKLR, the court observed the purpose of res-judicata is to guard against a multiplicity of suits, put finality to litigation, preserve the integrity and dignity of courts, ensure a party who has lost does not vex the other by re-opening matters or issues already litigated and determined and to guard courts from endless litigation. Further, the court cited *William Koross vs Hezekiah Kiptoo Komen & others* (2015) eKLR that the doctrine is meant to provide rest and closure for endless litigation so that a successful litigant can reap the fruits of his success and the unsuccessful one can learn to let go. The court said the practical effort is to act as a complete estoppel against any suit that runs afoul of it.
  9. On the other hand, the doctrine of sub judice bars a court from trying a matter that is in one way or the other before another court of competent jurisdiction by way of a previously instituted suit against the same parties canvassing under the same title. In *Republic vs. Paul Kihara Kariuki Attorney General and others ex parte Law Society Kenya* (2020) eKLR, the court said the doctrine denotes that a court is considering a matter. In *Kenya National Commission of Human Rights vs Attorney General & Independent Electoral & Boundary Commission & 16 others (I.Ps)* (2020) eKLR, the court observed that the purpose of res subjudice is to stop the filing of a multiplicity of suits between the same parties or



- those claiming under them over the same matter, to avoid abuse of the court process and diminish the chances of courts of competent jurisdiction issuing conflicting decision over the same subject matter.
10. Applying the principles as distilled in the cited case law, there is no dispute that this suit was filed during the pendency of the previous suit. The cause of action in the current suit is on alleged fraud in the manner that the subdivisions, mutations, transfers and cadastral maps were amended and subsequent registration over LR No's. 1691 and 1692 made in favor of the 1<sup>st</sup> defendant by the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> defendants were not parties to the previous suit.
  11. In the former suit, the plaintiff herein had raised a defense based on the illegal, unlawful, and unnecessary creation of an access road on his parcel L.R No. 1692. The plaintiff herein had admitted the sale subdivision and the efforts to transfer the resultant parcel L.R No.1691 to the 1<sup>st</sup> defendant, which, however, aborted after the alleged creation of an access road which to him was necessary.
  12. The plaintiff herein had also raised the issue of collusion with the land surveyor's discovery of forgery and fraudulent creation of the access road, which he reported to the 2<sup>nd</sup> – 4<sup>th</sup> defendants by a letter dated 29.4.2015.
  13. The issues in the former suit, among other things, were if the 1<sup>st</sup> defendant was entitled to the land and an access road and if the land surveyor had created an unnecessary access road. The plaintiff herein failed to tender evidence in support of his defense in the previous suit despite an opportunity given to do so. He has not appealed against the said judgment. The court declared the 1<sup>st</sup> defendant entitled to L.R No.1691. A permanent injunction was issued restraining the plaintiff herein from blocking the access road until the same was implemented by the relevant land officers both on the ground and in the land records.
  14. The plaintiff herein seeks to undo the findings in the previous decree through a different suit instead of filing an appeal. The court determined the issues between him and the 1<sup>st</sup> defendant. The addition of more parties does not change the cause of cause of action. A cause of action refers to facts as would have been necessary for the plaintiff or defendant to prove if traversed to support his right to the judgment of the court. See Gurbachan Singh Kalsi vs Yowani Ekori C.A No. 62 of 1958.
  15. The plaintiff had an opportunity to join the 2<sup>nd</sup> – 4<sup>th</sup> defendants in the former suit and raise a counterclaim. He chose to forgo his defense & counterclaim. He cannot be allowed to litigate in installments. That will amount to an abuse of the court process. See Apondi vs Canvald Metal Packaging (2005) 1 EA 12. The issues raised herein were within his knowledge since 2015. He cannot use them to evade the doctrine of res judicata. He had raised the defense of illegality, fraud, and collusion but failed to offer evidence in his defense. See Siri Ram Kaura vs MJE Morgan (1961) E.A 482.
  16. The plaintiff cannot re-open litigation. Courts, as stated in E.T. vs. Attorney General & another (2012), eKLR must be vigilant to guard against litigants trying to evade the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The upshot is that I find the suit caught up by the doctrine of res judicata and res sub-judice. The same is dismissed with costs to the 1<sup>st</sup> defendant. Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON  
THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024**

In presence of

C.A Kananu

Miss Kendi for Mbaikyatta for 2<sup>nd</sup> – 4<sup>th</sup> Defendants



**HON. CK NZILI**  
**JUDGE**

