



Mungai (Suing as the personal representative of the Estate of Stephen Mungai Kamau) v National Land Commission & 6 others (Environment & Land Case 923 of 2014) [2024] KEELC 873 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 873 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 923 OF 2014
OA ANGOTE, J
FEBRUARY 15, 2024**

BETWEEN

**GEORGE MACHEHO MUNGAI PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
STEPHEN MUNGAI KAMAU**

AND

**NATIONAL LAND COMMISSION 1ST DEFENDANT
INTERNATIONAL PROPERTIES LIMITED 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
OCS (OFFICER COMMANDING) PARKLANDS POLICE STATION 4TH
DEFENDANT
LETSHEGO KENYA LIMITED 5TH DEFENDANT
NGARA ESTATE PROPERTY LIMITED 6TH DEFENDANT
KWANZA ESTATE LIMITED 7TH DEFENDANT**

RULING

1. This ruling is in respect of the 2nd Defendant’s Notice of Motion dated 23rd May, 2023 seeking for orders:
 - a. That this suit against the 2nd Defendant be struck out/dismissed.
 - b. That this Honourable Court grants any further, or other orders it may deem fit.
 - c. That the costs of this Application and the suit be borne by the Plaintiff.



2. The application is supported by the Affidavit of Rose Muthoni Kariuki sworn on 23rd May, 2023 where she deponed that this suit relates to L.R. No. 209/20054 and L.R. No. 209/20055 (the suit properties herein) registered in favour of the 2nd Defendant, is res judicata and that the issues herein were all raised/ or ought to have been raised in Judicial Review Misc. Application No. 173 of 2012, which was heard and determined on merit between the same parties, and a judgment delivered by Hon. Justice G.V. Odunga on 6th June, 2015;
3. The 2nd Defendant's director deponed that the said judgment was made by a court of competent jurisdiction and was never appealed against; that there is also ELC Case No. 963 of 2014 which was held to be res judicata; that this suit and the previous suits involve the same parties and the same subject properties being L.R. No. 209/1781 and 209/1782/2 along Limuru Road, now known as L.R. No. 209/20054 and L.R. No. 209/20055 under new leaseholds granted to the 2nd Defendant.
4. She further deponed that the 2nd Defendant has been in possession of the suit property since July, 2014 after judgment was rendered in Misc. Application No. 173 of 2012; that if this suit is allowed to proceed, there is a risk of reaching a different conclusion on matters already dealt with in the previous suits and that the Plaintiff admits in its Further Amended Plaintiff that Misc. Application 173 of 2012 was a suit instituted against the same parties over the same subject matter.
5. It is the 2nd Defendant's case that the suit should be dismissed to protect the 2nd Defendant from an inordinate cycle of litigation; that dismissing this suit would ensure prudent use of valuable judicial time in view of the overriding objective of the court to ensure expedient disposal of suits and that the instant suit is an abuse of the court process, meant to vex the Defendants and inflict unnecessary expenses on them.
6. The Plaintiff responded vide a Replying Affidavit in which he deponed that the application was without merit and intended to delay the disposal of the suit; that the suit property is L.R. No. 209/1782/1 (IR 97683) and not L.R. No. 209/20054 and L.R. No. 209/20055 as alleged by the 2nd Defendant; that L.R. No. 209/1782/1 is registered in his late father's name and is adjacent to L.R. No. 209/1782/2 and that his late father's ownership of L.R. No. 209/1782/1 was confirmed by the 2nd Defendant vide Affidavit sworn in this suit dated 30th September, 2014.
7. The Plaintiff deponed that his late father became proprietor of the said parcel by way of a lease commencing 1st October, 1999 and that the suit was instituted against the 1st - 4th Defendants after trespassers entered the suit property and demolished the developments thereon on instructions of the 2nd Defendant who claimed to be the registered owner.
8. It is the Plaintiff's case that he discovered that L.R. No. 209/20054 was illegally combined with L.R. No. 209/1782/1 which is adjacent to L.R. No. 209/1782//2; that the 2nd Defendant's acts dispossessed his late father of his suit property and that the 2nd Defendant has not filed any Defence to the suit despite directions by court to do so;
9. According to the Plaintiff, the allegation that the suit is res judicata by virtue of Nairobi ELC No. 963 of 2014 and JR Misc. 173 of 2012 is misconceived and has no legal basis because the subject matter of the said suits was L.R. No. 209/1781 and L.R. No. 209/1782/2 and that the suits were by Chess Properties Limited and Shelfco Ltd as the Plaintiffs and his late father was not a party thereto.
10. It was deponed by the Plaintiff that the allegation of res judicata is made in bad faith to have the matter determined on a technicality and deny him a hearing; that the fact that his late father was a shareholder of the two companies does not mean that the subject matter in those cases and in the suit herein are



one and the same thing and that the Application herein should be dismissed with costs and the matter proceed for hearing and determination.

11. Both parties filed written submissions and authorities which I have considered.

Analysis and Determination

12. The only issue for determination is whether the suit herein is res judicata. The Black's law Dictionary 10th Edition defines "res judicata" as:-

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

13. The doctrine of res judicata prohibits a court from dealing with a similar issue already dealt with finality by a court of competent jurisdiction. To this end, Courts must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions. The substantive law on Res Judicata is found in Section 7 of the [*Civil Procedure Act*](#) 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.”

14. Section 7 of the [*Civil Procedure Act*](#) also provides explanations with respect to the application of res judicata in the following terms:

“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.”

15. The doctrine thus implies that for a matter to be res judicata, the questions in issue in the latter case must be similar to those that were in dispute between the same parties in the previous suit, and they



must have been determined on merit by a court of competent jurisdiction. The court in the English case of *Henderson vs Henderson* (1843-60) All ER 378, observed thus:

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

16. A reading of the explanations issued under Section 7 and the above extract shows that a court will invoke the doctrine even in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised them in the previous suit as between the same parties.
17. The Supreme Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2021) eKLR explained the rationale behind the doctrine of *res judicata* in the following words:-

“See also *Kamunye & others v Pioneer General Assurance Society Ltd* (1971) EA 263. Simply put *res judicata* is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, *res judicata* being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature.”

18. The Supreme Court of Kenya in the above case further set out the test that needs to be satisfied in order for the court to determine whether a suit is *res judicata* or not as follows:

“For *res judicata* to be invoked in a civil matter, the following elements must be demonstrated:”

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and



d) There must be between the first and the second action identical parties, subject matter and cause of action.”

19. In the instant suit, it goes without saying that the judgement or order made in the J.R. Misc. Application No. 173 of 2012 is final and binding on the parties. It is also not disputed that the said decision was made on merit by a court of competent jurisdiction, after it considered the pleadings and evidence placed before it, thus satisfying the first three elements of the test.
20. What remains is to determine whether the last limb of the test has been satisfied. This limb requires that there must be between the first and the second action identical parties, subject matter and cause of action.
21. The Black’s Law Dictionary (9th Edition) at Page 251 defines a cause of action as:

“...A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”. It goes further to explain:-

“What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction...”
22. From the above definition then, it would appear that the cause of action in the J.R. misc. App. No. 173 of 2012 was the allotment and subsequent issuance of title of L.R. No. 209/20054 to the 2nd Defendant herein. Upon learning that the 2nd Defendant was claiming the land, the ex parte Applicant therein filed the Judicial Review Application seeking cancellation of the title.
23. The citation of the Judicial Review matter shows that it was a matter relating to L.R. No. 209/1781 and L.R. 209/ and 1782 renamed L.R. No. 209/20054 and L.R. No. 209/20055.
24. From a reading of the decision of Justice Odunga, the facts appear to be that the ex parte Applicant claimed to have purchased L.R. No. 209/1782/2; that the Lease of the said property expired and they applied for renewal of the same and that before that could be done, certain persons went to the property claiming to have been allocated the same land by the Commissioner of Lands.
25. The ex parte Applicant claimed that it discovered that the files thereto had been closed and new ones opened with the new L.R. No. 209/20054 and L.R. No 209/20055. It sought orders cancelling the two new titles and re-opening of the files for LR Nos 209/1781 and 209/1782/2 and granting of the extension of leases.
26. In the second suit, ELC Case No. 963 of 2014, the 1st Plaintiff claimed ownership of L.R. No. 209/1782/2 whereas the 2nd Plaintiff sought ownership of L.R. No. 209/1781. The Plaintiffs reiterated the cause of action in the same words as in the JR application outlined above. Alleging fraud, the Plaintiff sought for the rectification of the register by deleting the 2nd Defendant’s proprietorship of L.R. No. 209/20054 and L.R. No. 209/20055.
27. In the instant suit, the Plaintiff claims ownership over L.R. No. 209/1782/1, and in words eerily similar to those used in the two previous cases, he reiterated the cause of action in the suit. The Plaintiff herein also raised the issue of fraud. The Plaintiff, amongst other prayers, has sought for a declaration that the



- title to L.R. No. 209/20054 was illegal, null and void, and for cancellation of the title thereof as well as restoration of the property to the Plaintiff.
28. As properly pointed out by the 2nd Defendant, the Plaintiff is also now claiming that L.R. No. 209/1782/2 was illegally combined with L.R. No. 209/1782/1. The creation of L.R. No. 209/20054 is not a new matter arising after the suit. The said L.R. No. 209/20054 had already been created and title thereto already issued to the 2nd Defendant and thus this cause of action, as well as the alleged fraud, should have been raised in the first suit.
 29. Therefore, no matter how the Plaintiff wants to refer to the suit properties in the different suits, the fact remains that eventually, the common factor in all these cases is L.R. No. 209/20054.
 30. Furthermore, despite the different ways of framing the prayers in all these suits, the commonality is a prayer for the cancellation of the title of the two properties, to wit, L.R. No. 20/20054 and/or L.R. No. 209/20055. The proposed rectification of the register would mean that the suit properties in all these suits would revert back to the Plaintiff or his companies, which were Plaintiffs in the two earlier suits.
 31. The allegation by the Plaintiff that the suit property is L.R. No. 209/1782/1 (IR 97683) and not L.R. No. 209/20054 and L.R. No. 209/20055 as averred by the 2nd Defendant is just that, an allegation.
 32. To be sure, the Plaintiff does seek for cancellation of the title issued over L.R. No. 209/20054, so he cannot deny that this is not the suit property herein. It is therefore dishonest for the Plaintiff to make such an allegation because his Plaintiff seeks cancellation of a title that he alleges is not the subject matter of this suit. This confirms that there is a commonality in the subject matter of the suits.
 33. With respect to the similarity of issues, it is noteworthy that the previous suits and the instant suit are all premised on the allegation that the Plaintiff is the owner of the suit properties, or companies associated with him. However, as pointed out above, the courts in the previous cases both agreed that there was no evidence that the Plaintiffs had any interest in the suit properties to entitle them to the prayers sought.
 34. Since the reliefs in all the three cases centre on the cancellation of the title of L.R. No. 209/20054, the limb of commonality of issues is also satisfied. Further, the court already having determined that the Plaintiffs had no interest therein to entitle them to orders for cancellation of title, that decision remains binding on them.
 35. In any event, the Transfer of the suit property herein was registered on 28th December, 2005. By the time J.R. Misc. Application 173 of 2012 was filed, the Plaintiff's alleged interest in the suit property had already arisen. Furthermore, as mentioned above, the Plaintiff, being a director of the two companies who filed the previous suits knew of the existence of the suit property, yet he refused to advance his claim therein.
 36. In *Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited* [2017] eKLR the Court held that:

“To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of



rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits.”

37. It is common knowledge that where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case.
38. The court cannot permit the same parties, or parties litigating under the same title, open the same subject of litigation in respect of a 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.
39. The Plaintiff had ample opportunity to raise all the issues and pursue all causes of action including the alleged fraud by himself, whether individually or through his companies in the previous suits. Explanation 4 of Section 7 of the *Civil Procedure Act* is clear on that:

“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.”
40. The Plaintiff did not do so, or more appropriately, he chose not to do so. It has not escaped this court's mind that the Plaintiff herein, George Macheho, participated in ELC Case No. 963 of 2014 and even filed an affidavit therein, yet he still did not raise the matters he seeks to raise herein, even though he was aware of them at the time of filing that suit and the first suit.
41. Undoubtedly, therefore, this suit is clearly a veiled attempt to have a second bite at the cherry, yet the issue of ownership of the suit property has already been determined by a court of competent jurisdiction on merit. This is a clear case of panel beating or distorting facts to defeat the doctrine of res judicata.
42. Turning to the limb of common parties, the court notes that the ex parte Applicant in Judicial Review Misc. Application No. 173 of 2012 is Shelfco Limited. The Commissioner of Lands appears as the Respondent while International Properties Limited is the Interested Party.
43. Similarly, ELC Case No. 963 of 2014 was filed by Shelf Co. Ltd and Chess Properties Ltd as the 1st and 2nd Plaintiffs respectively against the Hon. Attorney General, International Properties Limited and the Chief Land Registrar as the 1st, 2nd and 3rd Defendants. The instant suit has been filed by George Macheho Mungai on behalf of the estate of Stephen Mungai Kamau in his individual capacity.
44. This suit was initially brought against the National Land Commission, International Properties Limited, the Chief Land Registrar and the OCS Parklands Police Station. Later, through amendment, Letshego Kenya Limited, Ngara Estate Property Limited and Kwanza Estate Limited were joined to the suit.
45. The 2nd Defendant alleged that the said Stephen Mungai Kamau, on whose behalf this suit is brought, was a director of both Shelfco Limited and Chess Properties Ltd, which has been admitted by the Plaintiff. This admission means that all the three suits were either brought by or on behalf of the said Stephen Mungai Kamau. Explanation 6 of section 7 of the *Civil Procedure Act* is clear that:

“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.”



46. On this limb, the court in John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (Supra) held that:

“The commonality is that the appellants herein and the applicants in JR 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore the raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such.”

47. It is trite that a company cannot institute court proceedings without the Board of Directors making such a resolution. Therefore, as a Director of the two Companies, Stephen Mungai Kamau was aware of the JR proceedings and the ELC Case. He was however, content to stand by and see the battle being waged by the Companies without joining in to advance or protect his interest in the suit property as the Plaintiff herein claim he was entitled to. The commonality of parties in the three suits is undeniable.

48. With regard to the addition of new parties in this suit who were not in the previous suits, in Satya Bhamu Gandhi vs Director of Public Prosecutions & 3 Others [2018] eKLR the court cited the case of Gurbachan Singh Kalsi vs Yowani Ekori Civil Appeal No. 62 of 1958, in which the former East African Court of Appeal stated as follows:-

“However, it is trite that the mere addition of parties in a subsequent suit or omission of a party or party's as has happened in this case does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.”

49. The addition of new parties herein was “for the sole purpose of decoration and dressing and nothing else.” Judicial Review Misc. Application No. 173 of 2012 was heard and determined on merit by a court of competent jurisdiction.

50. The decision in that suit has not been overturned on any Appeal and still stands as a final order of the court. To this end, the court can make only one finding, that the suit herein is indeed res judicata.

51. The suit is therefore dismissed with costs to the 2nd Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

O. A. Angote

Judge

In the presence of;

Ms Kwamboka for 2nd Defendant/Applicant

Mr. Burugu for Plaintiff

Mr. Motari for 3rd and 4th Respondent

Court Assistant - Tracy

