



**Riungu v Chief Land Registrar & 4 others (Environment and Land Judicial Review Case E010 of 2023) [2024] KEELC 3244 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 3244 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E010 OF 2023  
CK YANO, J  
FEBRUARY 15, 2024**

**BETWEEN**

**ASHFORD GERRALD RIUNGU ..... EXPARTE APPLICANT**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT ..... 3<sup>RD</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MERU ..... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. Pursuant to leave granted by the court on the 14<sup>th</sup> June, 2023, Ashford Gerrald Riungu the ex-parte applicant herein filed the substantive Notice of motion application dated 19<sup>th</sup> June, 2023 seeking the following orders: -
  1. THAT this Honourable court be pleased to issue a declaratory order that the ex-pate applicant Ashford Gerrald Riungu is the bona fide and absolute proprietor of that piece or parcel of land described as Meru Municipality/Block T487 situated at Milimani within Meru Municipality.
  2. THAT this Honourable court be leased to issue an order of mandamus to compel the 1<sup>st</sup> respondent, the chief Land Registrar or any other officer concerned to issue and deliver a certificate of lease to ex-parte applicant in respect of land parcel Number Meru Municipality/BlockT487.
  3. THAT costs of this application be borne by the respondents.



4. Any other or better relief that this Honourable court may deem fit, just and expedient to grant.
2. The application is supported by the affidavit of the ex-parte applicant, the annexures thereto, the statutory statement of facts and the verifying affidavit dated 12<sup>th</sup> June, 2023 filed together with the application for leave and the order granting leave to file the motion dated 14<sup>th</sup> June, 2023. The ex-parte applicant also filed rejoinders to the responses by the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents and the 4<sup>th</sup> respondent.
3. In opposing the motion, the 4<sup>th</sup> respondent filed a replying affidavit sworn by Dr. Kiambi J.T Atheru, the County Secretary and Head of Public Service of the 4<sup>th</sup> respondent on 20<sup>th</sup> September, 2023 while the Honourable Attorney General filed grounds of opposition dated 5<sup>th</sup> October, 2023 on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents.
4. Pursuant to directions given by the court, the application was canvassed by way of written submissions. The ex-parte applicant filed his submissions dated 14<sup>th</sup> August, 2023 and filed on even date and supplementary submissions and rejoinder to the submissions by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents dated 17<sup>th</sup> November, 2023.

#### **EX-PARTE APPLICANT'S CASE.**

5. The ex-parte applicant avers that on 24/6/1997, he made an application to the County Council of Meru based on Section 177(f) and (g) of the retired Local Government Act Cap 265 Laws of Kenya seeking to be allocated a plot for building a residential house. That on 16<sup>th</sup> January, 1998, the clerk to the County Council wrote a letter to him confirming that the ex-parte applicant had been allocated plot number Meru Municipality/BlockT487 and he was expected to pay a sum of Kshs.1000/= being registration fees. A copy of that letter was attached and marked "AGR2". That on the same date, the ex-parte applicant proceeded to pay the demanded sum of Ksh. 1000/= to the County council and was issued with a receipt Serial Number 60913 dated 16/1/1998. The receipt was attached and marked "AGR3".
6. The ex-parte applicant avers that on 8<sup>th</sup> May 1999, the Commissioner of Lands issued him a letter of allotment of residential Plot No. Meru Municipality/BlockT487. A copy of the letter of allotment reference 7696/XVII together with a copy of the part development plan (PDP) and special conditions were attached and marked "AGR4", "AGR5" and "AGR6" respectively. That after the issuance of the letter of allotment, the ex-parte applicant went ahead to fulfill all the conditions stipulated thereon, including the payment of stand premium and ground rents. That ever since, the ex-parte applicant has been holistically paying ground rent and rates for the said plot including for 2023. A copy of the receipt for rent and rates for the year 2023 was attached and marked "AGR7".
7. The ex-parte applicant avers that on 1/10//2002, the suit premises were surveyed by Tooyato Surveyors and the survey document forwarded to the Director of Surveys. A copy of the forwarding letter marked "AGR8" has been attached. That a beacon certificate attached and marked "AGR9" was issued by Z.K. Wanyeki Surveyors on 14/3/2002. The ex-parte applicant also attached a copy of receipt marked "AGR 10" for payment of conveyancing fees, registration fees, stamp duty, survey fees, approval fees and planning fees.
8. The ex-parte applicant further avers that on 19/4/2000, the Municipal Council of Meru (now the 4<sup>th</sup> respondent herein) approved two building plans attached and marked "AGR11" and "AGR12" respectively intended for the suit premises. That for a period of 25 years the 4<sup>th</sup> respondent has been sending demand notices for ground rent and rates and which have holistically been paid and copies of the said demand notices and payment receipts marked "AGR14" to "AGR33Y" have been attached. That on 2/11/2016, the County Director Meru County Government, ICT and Planning Department



presented all concerned government agencies an application for issuance of the certificate of lease. A copy of the same was attached and marked “AGR13”. That on 13/11/2014 and 10/1/2017 the 4<sup>th</sup> respondent issued the ex-parte applicant with rates clearance certificate serial. Copies of the same were also attached and marked “AGR34” and “AGR35” respectively.

9. The ex-parte applicant avers that on 10/1/2017, the 4<sup>th</sup> respondent gave him a letter of consent attached and marked “AGR36” agreeing to the procurement of the new certificate of lease.
10. The ex-parte applicant avers that there existed another Judicial Review No. 95 of 2010 between him as the ex-parte applicant and the 4<sup>th</sup> respondent herein as the 1<sup>st</sup> respondent, the Commissioner of lands as the 2<sup>nd</sup> respondent and Director of Physical Planning as the 3<sup>rd</sup> respondent and in which judgment was delivered by Hon. Justice E. C Cherono on 8<sup>th</sup> February, 2018. A copy of the said judgment was annexed and marked “AGR37”. That to date no appeal or review has been preferred by anyone and therefore the same stands.
11. The ex-parte applicant avers that the suit land was not among the parcels of land in the so called “The Ndungu Report” as illegal/ irregular allocation of public land. A copy of the said report marked “AGR38A- H” has also been annexed.
12. The ex-parte applicant avers that for 25 years he had together with his family, been in peaceful, quiet, exclusive and uninterrupted occupation of the said parcel of land and that it is clear that he is the doubtless bona fide absolute proprietor and owner of the plot and deserve and is entitled to be issued with a certificate of lease pursuant to Section 30(1) of the Land Registration Act No. 3 of 2012. That his right to fair administration actions that is expeditious, efficient, lawful reasonable and procedurally fair under Article 47 of the Constitution of Kenya, 2010 and Section 4 of the Fair Administrative Actions Act have been breached by the respondents by their refusal to issue and deliver a certificate of lease for the plot to him. That no reason has been given to the ex-parte applicant for the delay and/or refusal to grant him with certificate of lease for the said plot and that the delay and/or refusal is an infringement of his Constitutional right to information under Article 35 of the Constitution as well as his right to possession of land under Article 40 of the Constitution. The ex-parte applicant believes that he deserves the orders of Mandamus to compel the respondents and particularly the 1<sup>st</sup> respondent to issue him with a certificate of lease for the suit property in the exercise of the powers conferred on the 1<sup>st</sup> respondent by Section 30(1) of the Land Registration Act No. 3 of 2012.

### **The 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents’ Case**

13. It is the 1<sup>st</sup>, 3<sup>rd</sup>, and 5<sup>th</sup> respondents’ case that the orders sought in the application require this court to undertake a merit review beyond the remit of this court as a judicial review court; that an allotment letter does not confer interest in land unless there is proof of acceptance of the offer and payment of the standard premium and ground rent as set out in the letter of allotment within the prescribed period and that the ex-parte applicant has not attached any evidence to show acceptance of the offer and/or attendant receipts to confirm payment of standard premium and ground rent. The 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents stated that once all conditions for grant of lease are met and a survey report forwarded to the Director of Survey, the Director of Survey forwards the report to the Director of Land Administration who then processes the lease and forwards a copy to the 1<sup>st</sup> respondent for registration purposes. That the 1<sup>st</sup> respondent is only mandated to effect registration of lease not issuance of lease as claimed by the ex-parte applicant. It is their contention that the ex-parte applicant herein does not raise any triable cause of action against the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents’ herein.



### **The 4<sup>th</sup> Respondents Case.**

14. The respondent contends that the entire suit is defective, incompetent, and is liable for dismissal in limine on the grounds that the declaratory orders sought in the substantive motion are not Judicial Review orders under Order 53 of the Civil Procedure Rules and the *Judicature Act* and cannot issue, that the ex-parte applicant seeks to enforce by way of mandamus that which had already been revoked and that the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> respondents were not parties to Meru High Court Miscellaneous Civil Application No. 95 of 2010 and the orders of Judgment thereof, if any, cannot be enforced against them. That even if the court was to find that the 1<sup>st</sup> and 3<sup>rd</sup> respondents were parties in that former suit, no orders were issued against them capable of being enforced by way of mandamus or in the manner whatsoever sought by the ex-parte applicant in the application herein.
15. It is also their contention that the ex-parte applicant had in the former suit, sought orders of mandamus which were declined, and therefore the suit herein is res judicata and in any event, an appeal through the backdoor. That there is no prayer in the substantive motion as against the 4<sup>th</sup> respondent, and consequently, the suit is defective for mis-joinder, and that in any case the prayers sought cannot issue.
16. By way of response to the suit, the 4<sup>th</sup> respondent states that sometime in November, 2010, the then defunct Municipal Council of Meru was informed of illegal dumping of construction material on a public utility land reference number T/487 Meru Town (the suit property). That by a letter dated 30<sup>th</sup> November, 2010, the defunct Council issued, or caused to be issued a notice to the ex-parte applicant informing him that it had been established that the suit property was a public utility land and was allocated to him irregularly and demanded the ex-parte applicant to submit inter alia, a PDP duly approved for the suit property, a letter of allotment, minutes of the plot allocation committee, council minutes allocating the property to the ex-parte applicant, and a survey report accompanied by a beacon certificate. That the ex-parte applicant did not avail the information requested except a letter of allotment, demands for payments of rates, rates clearance certificates and letters allegedly from the Town Clerk of the defunct Council copies of which were annexed to the affidavit of Dr, Kiambi J.T Atheru and marked exhibits 1, 2, 3 and 4 respectively. That in the absence of the documents requested for, and upon further investigations, it was established that the ex-parte applicant letter of allotment was irregularly acquired and the defunct council recommended its revocation. That being aggrieved, the ex-parte applicant filed Judicial Review Case No. 95 of 2010 seeking orders of certiorari, prohibition and mandamus. Copies of the substantive motion and judgment in Case No. 95 of 2010 were exhibited and marked exhibits 5 and 8 respectively. The deponent has also exhibited copies of letters dated 25<sup>th</sup> January, 2011 and 17<sup>th</sup> January, 2011 marked Exhibits 6 and 7 respectively. It is the 4<sup>th</sup> respondent's contention that the learned Judge in the former suit intentionally declined to make an order of mandamus to compel the commissioner of Lands to issue a certificate of lease for the suit property to the ex-parte applicant. That considering no determination was made as to the ownership of the suit property by the court, the 4<sup>th</sup> respondent did not appeal the decision of the court and that in any case, a dispute relating to the ownership of the suit property is better resolved by way of an ordinary suit where viva voce evidence is adduced. It is the 4<sup>th</sup> respondent's position that the suit property is public land irregularly allocated to the ex-parte applicant.
17. It is also contended that the mere fact that a parcel of land is not in the Ndungu Report is not evidence that the land was properly acquired. That there is a clear-cut procedure for allocating public land to private individuals which was not followed in respect to the suit property.
18. The 4<sup>th</sup> respondent reiterated that the prayer for mandamus was declined in the former suit and allowing it now is tantamount to this court sitting on appeal of its own judgment, adding that the



matter is res judicata. The 4<sup>th</sup> Respondent argued that the case by the ex-parte applicant against it has failed to meet the required evidential burden and is for dismissal.

### **The Ex-parte Applicant's Rejoinder**

19. By way of a joinder the ex-parte applicant contended that contrary to the averments made by the respondents, this court is seized with powers to grant the orders sought herein. He cited Articles 23(3) (a – f), 4, 47 and 159(2) (d) of *the Constitution* and Section 7(a) of the *Land Act* as well as part III of the Administrative Action Act and pointed out that the respondents herein are State agencies and are exercising administrative authority and are therefore bound by those provisions of the law that the administrative actions and omissions of the respondents jointly and severally have made this matter to be absolutely necessary. The ex-parte applicant further contended that there is now a judicial notice to the effect that Judicial Review has evolved from the common Law Foundation to a Constitutional Principle as enunciated by the authority of the Supreme Court in the case of CCK Versus Royal Media Limited [2014]eKLR.
20. The ex-parte applicant avers that the averment that the suit property was revoked is not true as the 4<sup>th</sup> respondent is still seeking and receiving ground rent and rates from the ex-parte applicant. The ex-parte applicant reiterated that the allocation of the suit property to him was made by no other than the 4<sup>th</sup> respondent's predecessor, the Municipal Council of Meru and issuance of the Letter of allotment made by the Government of Kenya through the Commissioner of lands. He challenged the deponent to name the "rogue staffs" of the defunct council that the deponent in the 4<sup>th</sup> respondent replying affidavit refers to and the administrative action that the Government took against them. The ex-parte applied relied on the authority of Hon. Justice G.V. Odunga in the High Court Application Number 78 of 2015 reported as Republic Versus Director of Public Prosecution & Another ex-parte Chamaniel Vragcal Kimani & 2 Others, Meru High Court Misc. Civil. Suit No. 69 of 2010, Ex-parte Nelly G. Solomon.
21. The ex-parte applicant reiterated that he met all the conditions that are required for issuance of the lease for the suit property and referred to annexures marked "AGR37" and "AGR7". He also cited Sections 177 of the Local Government Act (repealed), Section 9, 10, and 11 of the Government Lands Act (repealed) and Sections 7 and 9 of the *Land Act* No. 6 of 2012, and relied on the case of Adan Abdiraham Hassan & 2 others versus Registrar of Titles Ministry of Lands & 2 others [2013]eKLR as quoted by Cherono J. in JR NO. 95 of 2010.

### **Applicants Submissions**

22. The ex-parte applicant submitted that he made a written application to the Meru Municipality Council pursuant to Section 177 (1) (f) and (9) of the Local Government Act Cap 265 (now repealed) requesting to be allocated a plot to put up a residential house. That the clerk of the Municipal Council of Meru replied to the said application confirming the council had approved the application and allocated the ex-parte applicant the suit plot subject to payment of registration fees of Ksh. 1000/=. The applicant submitted that, that was the genesis of procurement of the suit premises. He stated that he had accidentally misplaced or lost a copy of the said application letter, but pointed out that same may be found in Meru High Court No. 95 of 2010 which was decided and a copy of the Judgment is attached herein and marked "AGR 37". That the said application by way of Judicial Review was over the same subject matter as the one in this application, but the reliefs sought were different. It is therefore the applicant's submissions that the matter now before court is not res judicata. The applicant reiterated the averments in his affidavits in support of the application and submitted that he has holistically complied with the requirements set out in Article 66 of *the constitution* of Kenya 2010, Section 29 of



the Physical Planning Act Cap 286 Laws of Kenya, the Local Government Act (repealed) and which led to the formation of County Government Act, 2012, [National Land Commission Act](#), the [Land Act](#) 2012, the Urban and Cities Act 2012, the National Land Policy (sessional Paper No. 3) and all other relevant registrations. The applicant urged the court to find that he acquired the suit premises and that the acquisition was procedural, legal, formal and free from any encumbrance. He stated that the suit property was not in the Ndungu Report which was a Commission of Inquiry into illegal/irregular allocations of public land. The ex-parte applicant who is also an advocate practicing in the name and style of M/s AG Riungu & Co. Advocates relied on the case of Omar Hamed Versus Swaleh Mohammed and 6 others – Malindi Environment & Land Court Case no. 41B of 2012 and urged the court to find that he acquired the suit premises lawfully pursuant to Article 65 of [the Constitution](#) and all other relevant provisions of the Law. It was his submissions that the application meets the threshold for issuing an order of mandamus and that he had proved his case on a balance of probabilities and therefore the application ought to be allowed in terms of prayers 1, 2, and 3 of the Notice of Motion dated 19<sup>th</sup> June, 2023.

### **The 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondent's Submissions.**

23. Briefly, it has been submitted on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents that the suit herein is res judicata and has been lodged in the guise of an appeal of Meru High Court Judicial Review No. 95 of 2010 and it is akin to asking this court to sit on appeal over its own judgment. The Hon. Attorney General through Learned Senior Litigation Counsel Ms. Mbaikyatta Darlive for 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents further submitted that the application herein seeks to determine issues of ownership via Judicial Review proceedings which falls within the purview of this court sitting as a judicial review. Learned counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> respondents cited Section 7 of the [Civil Procedure Act](#) and relied on the Case of Republic Versus National Transport & Safety Authority & 10 Others ex-parte James Maina Mugo [2015]eKLR, Republic Versus Jomo Kenyatta University of Agriculture & Technology ex-parte Elijah Kamau Mwangi [2021]eKLR; Torino Enterprises Limited Versus The Hon. Attorney General in SC Petition No. 5 (E006) of 2022, and Ali Mohammed Dagane (granted power of attorney by Abdullahi Muhumed Dugune Suing on behalf of the estate of Mohamed Haji Dagane Versus Hakar Abshir & 3 Others [2021]eKLR, and urged the court to dismiss these proceedings with costs to the respondents.

### **4<sup>th</sup> Respondents' Submissions**

24. The firm of John Bwire & Associates Advocates for the 4<sup>th</sup> Respondent submitted that declaring the ex-parte applicant as the bona fide owner of the suit parcel of land would require the court to conduct merit review of the case before granting the order. That the court would be required to pronounce itself on matter of ownership of the land because the 4<sup>th</sup> respondent contents that the suit property is public land which was irregularly acquired while the ex-parte applicant states that he is the bona fide owner. Learned counsel for the 4<sup>th</sup> respondent submitted that this falls outside the scope of this court sitting as a Judicial Review Court. It is their submissions that the issue of ownership is highly controversial and its examination falls outside the purview of this court as a Judicial Review Court. The 4<sup>th</sup> respondent's counsel relied on the supreme Court decision in Praxidies Namosi Saisi & Others Versus DPP & Others Petition No. 39 of 2019 which affirmed is decision in SGS Kenya Limited Versus Energy Regulatory Commission and 2 Others, SC Petition No. 2 of 2019 [2020]eKLR.
25. It was further submitted that the subject judicial review by the ex-parte applicant was not brought within the ambit of [the Constitution](#) but that of Sections 8 and 9 of the Law Reforms Act and Order 53 of the Civil Procedure Rules and therefore does not fit a merit review. The 4<sup>th</sup> respondent's counsel



relied on a judgment delivered by the Supreme Court in Petition No. 6 (E007) of 2022 Consolidated with Petition NO. 4 (E005 & 8 (E010) of 2020.

26. Concerning, the issue of the Judicial Review writ of Mandamus, it was submitted on behalf of the 4<sup>th</sup> respondent that the threshold for the grant of this writ has not been reached. This is because the matter of ownership of the subject property is still alive and yet to be determined. The 4<sup>th</sup> respondent's counsel relied on the case of Republic Versus the Chief Land Registrar and ex-parte Dr. Josephine Wanjiru Kamau Judicial Review NO. 2 of 2022, ELC Malindi. It is further submitted that a lot of documentary evidence has been adduced by the ex-parte applicant and such can only be resolved through an ordinary suit by calling witnesses and oral evidence to determine ownership of the property.
27. Counsel for the 4<sup>th</sup> respondent also submitted that the matter is res judicata as the ex-parte applicant admitted that he previously instituted judicial review proceedings in Meru Judicial Review No. 95 of 2010 seeking orders of Certiorari, prohibition and mandamus over the same subject parcel of land. It is submitted that litigation over the same issue should be brought to an end and parties afforded closure and respite from the spectra of being vexed, haunted and hounded by issues and suits that have already been determined by competent court. That what the ex-parte applicant is doing is hoping, by a multiplicity of suits and fora to obtain at last, an outcome favourable to himself. That the order of mandamus is res judicata and should be struck out. The 4<sup>th</sup> respondents' counsel cited Section 7 of the *Civil Procedure Act* and relied on the case of Independent Electoral and Boundaries Commission Versus Maina Kiai & 5 others [2017]eKLR.
28. The 4<sup>th</sup> Respondent counsel pointed out that the ex-parte applicant relies on a letter of allotment and submitted that a letter of allotment does not confer any ownership rights on a party holding it and that for it to become operative, the allottee was required to comply with the conditions set therein, including the payment of stand premium and ground rent within the prescribed period Counsel relied on the case of Dr. Joseph N. K Arap Ng'ok Versus Justice Moiyo Ole Keiyua & 4 Others Court of Appeal 60 of 1997, Torino Enterprises Ltd Versus Hon. Attorney General (Supra), and Mbau Saw Mills Ltd Versus Attorney General for and on behalf of the Commissioner of lands & 2 others[2014]Eklr. It was also pointed out that no prayer has been sought against the 4<sup>th</sup> respondent in the substantive motion and it was submitted that it was unnecessary for it to have been brought within this cause.

### **Analysis And Determination**

29. I have considered the application, the responses made. I have also considered the legal and statutory authorities relied on. The issues that call for determination are:-
  - i. Whether the suit is res judicata.
  - ii. Whether the ex-parte applicant is entitled to the orders sought.
  - iii. Who bears the costs.

### **whether the suit is res judicata**

30. The respondents have submitted that this matter is res judicata. The ex-parte applicant, however, has urged the court to find that the doctrine of res judicata does not arise in this case.
31. The doctrine of res judicata is spelt out in Section 7 of the *Civil Procedure Act* which provides as follows:-



- Section.7. No court shall try any suit 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 suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
32. Section 28 of the *Environment and Land Court Act* also bars the court from adjudicating over disputes between the same parties and relating to the same issue previously and finally determined by any court of competent jurisdiction.
33. The essential ingredients of the doctrine of res judicata have been expounded in many cases. In *Independent Electoral & Boundaries Commission Versus Maina Kiai & 5 others* [2017]eKLR the Supreme Court of Kenya while considering the said provision held that all the elements outlined thereunder must be satisfied for the doctrine to be invoked. That is:
- a. “The suit or issue was directly and substantially in issue in the former suit.
  - b. The former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title.
  - d. The issue was 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”.
34. The ingredients therefore, are whether there was previous litigation in which identical claims were raised or in which identical claims could have been raised, whether the parties in the present suit are the same as those who litigated in the original claim, whether the court which determined the original claim had jurisdiction to determine the claim, and whether the original action received a final judgment on the merits.
35. In the case of *Attorney General & Another Versus ET* [2012] eKLR it was held that:-
- “That courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test of whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction”.
36. In the case of *Omondi Versus NBK & Others* [2001]EA 177, it was held that “ Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”.
37. In the case of *Herdson Versus Herdson* (1843) 67ER 313 it was stated that “where a given matter becomes subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case....”.



38. Expounding further on the essence of the doctrine, the court in *John Florence Maritime Services Limited & Another Versus Cabinet Secretary for Transport and Infrastructure & 3 others* [2015]eKLR pronounced itself as follows:-

“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 unraveling uncontrollably”.

39. The court went further to reason that the essence of the principles of *res judicata* is to not only protect the courts from disputes but also to protect litigants from unending litigation. That the principles are so classic in that it includes points or issues that ought to have been brought before the court but which did not find their way there due to inadvertence of the parties or their counsel.

40. Having considered the pleadings and rival submissions by counsel for the parties, it is not in dispute that there exists High Court at Meru Judicial Review NO. 95 of 2010 between the ex-parte applicant herein and Municipal Council of Meru, the Commissioner of Lands and the Director of Physical Planning. In that matter, the ex-parte applicant herein applied for orders of Judicial review of certiorari prohibition and mandamus. The order for mandamus was to compel the Commissioner of lands to issue a certificate of lease for Plot No.T487 to the applicant herein. In the Judgment dated 8<sup>th</sup> February, 2018, the court (Cherono J) granted orders of certiorari and prohibition. Whereas it is evident that the court declined to issue the order of mandamus sought by the applicant, the ex-parte applicant should have invoked the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules and apply for review of that Judgment and not file this new suit. It is clear to me that the issue of mandamus was to compel the issuance of a certificate of lease to the applicant herein for the suit property herein. Judgment in JR NO. 95 of 2010 was made by a Judge of this court. I am therefore persuaded by the respondents’ submissions herein that this suit is *res judicata*. The ex-parte applicant ought to have appealed or apply for review if he was dissatisfied with the decision in Judicial Review No. 95 of 2010. I find that the present suit is barred by the doctrine of *res judicata* and it must fail.

41. Assuming, I am wrong on the finding that the matter is *res judicata*, the next issue is whether the ex-parte applicant is entitled to the orders sought. It is clear from the pleadings that the applicant seeks to be declared to be the bona fide and absolute proprietor of the suit premises. The position of the 4<sup>th</sup> respondent on the other hand is that the subject parcel is public land which was irregularly acquired by the ex-parte applicant. In essence, this court is being invited to pronounce itself on the matter of the ownership of the suit property. The issue of ownership is highly contested and therefore the court has to interrogate the merits of the case, and that can only best be by way of oral evidence in an ordinary suit. The nature of evidence in Judicial review proceedings is based on affidavit evidence which is not the best suited form of evidence to be used by this court in determining the issue of ownership of the suit property. In my humble view, the dispute in this case falls outside the scope of this court sitting as a Judicial Review court. From the record, it is clear that a lot of documentary evidence have been adduced by the parties and the matter can only be resolved through an ordinary suit where witnesses are called and oral evidence taken to determine the ownership of the property. In view of the fact that



the issue of ownership of the suit property is highly contested, unless and until such issue is determined with finality, this court is not persuaded that the orders sought should be granted.

42. In the result, I find that the Notice of Motion dated 14<sup>th</sup> June, 2023 is devoid of merit and the same is dismissed with costs to the Respondents.

43. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024.

**Hon. C. Yano**

**ELC – Judge**

**In the presence of:-**

Court Assistant: Kiragu

No appearance for advocate for the appellant,

but appellant present in court

No appearance for the respondent

4

ELC.JUD.REV E010.2023

JUDGMENT

