



**Mbugua v Mbugua & 2 others; Mutwol (Proposed Interested Party) (Environment & Land Case 169 of 2007) [2024] KEELC 1645 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1645 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 169 OF 2007  
FO NYAGAKA, J  
MARCH 19, 2024**

**BETWEEN**

**MARY MUTHONI MBUGUA ..... PLAINTIFF**

**AND**

**LILIAN WANGARE MBUGUA ..... 1<sup>ST</sup> DEFENDANT**

**SARAH JEPTEPKENY BUSIENEI ..... 2<sup>ND</sup> DEFENDANT**

**EMILY JEPKEMBOI MUTWOL ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**PHYLIS JEROTICH MUTWOL ..... PROPOSED INTERESTED PARTY**

**RULING**

1. Before me is an Application dated 24/02/2023. It is brought by the proposed 4<sup>th</sup> Defendant, one Phyllis Jerotich Mutwol. It is brought under Articles 40, 48, 51(1) and 159 of the Constitution of Kenya, Sections 1A, 1B, 3A, 3B and 63 E of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 51, Rule 1 of the Civil Procedure Rules, 2010 and all in enabling provisions of the law. The applicant sought the following orders:-
  1. ...spent.
  2. ...spent.
  3. The proposed 4<sup>th</sup> Defendant/Applicant herein, Phyllis Jerotich Mutwol is hereby enjoined into the suit as a defendant.
  4. The Plaintiff/ Respondent to amend the Plaint to reflect the joinder of the 4th proposed defendant/ Applicant herein



5. The costs of the application are awarded to the proposed for the defendant.
2. The application was based on a number of grounds. That the subject matter of this suit is a parcel of land known as Chepsiro/Kibuswa Block 1/Kelchinet/137; the 4<sup>th</sup> proposed Defendant/Applicant herein purchased the above-mentioned parcel of land from the 2<sup>nd</sup> Defendant/Respondent herein on 17/04/2007 and paid the entire purchase price, hence acquiring a beneficial interest over the entire parcel of land. The 4<sup>th</sup> defendant took possession, occupation and use of the parcel of land in December, 2007 and has retained the same to date. The 4<sup>th</sup> proposed Defendant was not aware of the instant suit until when some people came to the land with the intention to carrying out survey. She learned from the above-mentioned persons that this case had been in court since the year 2007, whereas she always enjoyed her interest over the land. She now learned that this honorable court gave an order on 27/01/2021 for survey to be carried out, and which order is due for implementation soon. That her proprietary rights will be jeopardized if the implementation of the above-mentioned order proceeds without her participation. She is apprehensive that the parties in the instant suit could be colluding to steal a march against her as can be gleaned from the fact that they never notified the court that there is another suit before this court over the same parcel of land being Kitale ELC No. 37 of 2020.
3. That Kitale ELC No. 37 of 2020 seeks to challenge the transfers of the title to the suit land from the 2<sup>nd</sup> Defendant/Respondent, to the 3<sup>rd</sup> Respondent and subsequently to a third party one Meshach Kimutai Keter. This Honorable Court issued a ruling on 27/01/2021 in Kitale ELC No. 37 of 2020, restraining any dealings on the suit land. The implementation of the orders in the instant matter would be an affront to the above ruling. The 4<sup>th</sup> Defendant is a crucial and necessary party to the instant matter in view of her interest over the suit land. That failure to enjoin the 4<sup>th</sup> proposed Defendant herein precipitates a risk of being condemned, unheard and occasion injustice to her. That the County Surveyor issued a notice indicating that the implementation of the above order was to be carried out on 28/02/2023. That the 4<sup>th</sup> Proposed Defendant learnt of the notice through the Area Chief on 22/02/2023. That there is an imminent risk that the implementation of the quoted order might lead to interference with the boundary of the suit land and to the detriment of the 4<sup>th</sup> Proposed Defendant hence the need to stay the order to await the application of joinder to this suit. That the 4<sup>th</sup> defendant would suffer irreparably if the proceedings in this suit and the implementation of the impugned Court order continues to conclusion before its hearing and determination, and that therefore the defendant is a person to be affected most by the decision of this Honorable Court in the instant matter.
4. The application was supported by the affidavit of Phillis Jerotich Mutual, which was sworn on 24/02/2023. Besides repeating the contents of the grounds or in support of the application by way of deposition, she annexed in relation to the suit land herein a copy of the agreement of sale which he marked as PM1. It was dated 17/04/2007. She also annexed a copy of the court order and a letter from the plaintiff's advocates, which she marked as annexures PM2 and PM3. She also annexed as PM4 and P 5 copies of the Plaint in Kitale ELC No. 37 of 2020 and the title deed in respect of the suit land. She also annexed as PM6 a copy of the ruling issued in Kitale ELC No. 37 of 2020. Further, she annexed as PM7, a copy of the notice from the county surveyor dated 14/02/2023, which sought to implement the order of the Court. She prayed that the application be allowed and shipping and joined as the 4<sup>th</sup> defendant.
5. The plaintiff Mary Muthoni Mbugua opposed the application through a Replaying Affidavit dated 03/03/2023. She annexed to her affidavit and marked as MMM1 a copy of this Court's ruling of 26/10/2022 which dismissed the present applicant's application which sought her joinder to this suit. She deponed that the reason why the Court declined to enjoin her to the present suit were well explained at paragraphs 14 and 15 of the ruling. She annexed as MMM2 a copy of the notice of appeal



lodged by the Applicant against the court's ruling of 26/10/2022. She deponed further that in the present application and even in the supporting affidavit thereof, there is absolutely no mention of the Notice of Motion application dated 08/02/2022 and the Court's ruling of 26/10/2022, which clearly shows that there is dishonesty on the part of the Applicant. Further that since the court ruling of 26/10/2022 declined to enjoin the present Applicant as a Defendant in the suit, she has no *locus standi* to file their present application. Further, that the main prayer in the present application is Number 3 which seeks the enjoinder of the Applicant. That the Applicant is possibly hoping that the court would forget its ruling of 26/10/2022 and make a similar prayer as the one which was rejected. That the prayer that she be enjoined as the 4<sup>th</sup> defendant is clearly *res judicata* and for rejection. That the filing of the present application amounts to flagrant and deliberate abuse of the process of this Court and the application should be rejected.

6. *Res judicata* is a doctrine that is not difficult decipher. It is provided for under Section 7 of the [Civil Procedure Act](#) which stipulates that:-

“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.”

7. Therefore, a number of elements constitute *res judicata* and they are considered as a unitary package. If one is missing then the issue before the Court will not be *res judicata*. They are that the issue being tried the second time was previously tried and determined issue being tried was the same, directly or substantially in issue as in the former proceeding court that tried it had competent jurisdiction determination was on merits and not on a technicality hence conclusive on the issue parties in the former proceeding were the same or litigated therein under the same title.

8. Thus, in [Suleiman Said Shabbal v Independent Electoral & Boundaries Commission & 3 Others](#) [2014] eKLR the Court of Appeal stated as follows:

“To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”

9. Based on the above, is the instant application *res judicata*? The starting point is to know who the parties in the application dated 08/02/2022 were as compared to those in the instant one. I have carefully analyzed the application herein. I have also considered the replying affidavit that was sworn by Mary Muthoni Mbugua, and particularly, the annexure marked as MMM1 which is a copy of this Court's Ruling delivered on 26/10/2022. Further, I have looked at the Replying Affidavit on Emmy Jepkemoi Mutwol sworn on 20/03/2023. I have looked at the submissions of all the rival parties.

10. The main issue to determine in this case is whether the instant application is *res judicata* or not. The instant application seeks mainly substantive prayers which orders of which one is dependent on the grant of the first one. The first one is that this Court grants an order that the Applicant be enjoined as a fourth (4<sup>th</sup>) defendant in this suit. The second one is that upon the grant of that order of joinder the Plaintiff be amended accordingly.

11. In the application that was before this Court earlier and on which the Court delivered a ruling on the 26/10/2022, the applicant sought to be enjoined as an interested party in the instant suit. That application was dismissed.



12. It is instructive that the parties in the instant suit have not changes since the 08/02/2022 when the earlier application was made. What has changed is that whereas the Applicant herein moved the Court to be enjoined as an interested party in the earlier application, she has now moved the Court to be enjoined as a 4<sup>th</sup> Defendant. The reasons and basis for her earlier application are all similar as the ones she has given in the instant application.
13. The earlier application was heard and determined on merits and the Court rendered its ruling. Therefore the question is, is the instant application *res judicata*? The important thing in life to note is that a wolf is a wolf whether one clothes it with a sheep's skin (Mathew 7: 15, for those who believe in the Holy Bible). Similarly, an Ethiopian will remain to be one even if he does plastic surgery, and a leopard will not change its spots (compare that with Jeremiah 13:23).
14. This Court having been presented with the application of the proposed 4<sup>th</sup> Defendant in *vide* the application that was dated 08/02/2022 over the same issues, and which was subsequently dismissed, I find that the issues this Court cannot be permitted by law, being Section 7 of the [Civil Procedure Act](#) to try the same issues on merit. But one issue remains to be clarified: who is moving the Court in the instant application and over what prayer? The applicant intends this court to believe is that she is supposed to be enjoined not as an interested party this time round, but as a defendant. The Applicant herein has transformed herself from a Proposed Interested Party in the previous application to a Proposed Fourth Defendant in the instant application.
14. I find that the issue of joinder was determined by that application which was ruled upon. It does not accord with reason why the Applicant moved the Court to be enjoined as an Interested Party at the time and without anything having changed, she now moves the Court to be enjoined as a Defendant. This Court finds this an abuse of the process of the Court since the issues were considered earlier on and determined on merits. It is one way of the Applicant taking the Court in circles in order to achieve a certain goal which only herself knows and it not in the interest of justice. Therefore, instant application is *res judicata*. I find the application not merited and I dismiss it.
16. Orders accordingly

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 19<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. DR. IUR FRED NYAGAKA  
JUDGE, ELC, KITALE.**

