



**Ndegwa v Waruiru & 2 others (Environment & Land Case  
E030 of 2023) [2024] KEELC 1364 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1364 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E030 OF 2023  
BM EBOSO, J  
MARCH 13, 2024**

**BETWEEN**

**ANNE WANJUNU WAITHAKA NDEGWA ..... PLAINTIFF**

**AND**

**ANNE MWIHAKI WARUIRU ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR RUIRU ..... 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff initiated this suit through a plaint dated 17/4/2023. The plaint was expressed as drawn by M/s P K Njoroge & Co Advocates. She sought the following verbatim reliefs against the defendants:
  1. An order for a declaration that the plaintiff is the legitimate owner of Ruiiri/Ruiru East Block 2/4785.
  2. That this honourable court be pleased to grant an order for an injunction and or an order for status quo ante restraining the 1st and 2nd defendant and their servants, agents, employees and in other means whatsoever from interfering with the suit premises and an order for restriction and all titles of the sub plots be cancelled.
  3. That the honourable court to make an order for provision of costs of this suit plus interest at the courts rate and an order for mesne profit.
  4. That this honourable court be pleased to make any other or further orders that to it may deem fit or expedient.
  5. That any title deeds issued be cancelled if it emanates from Ruiiri/Ruiru East Block 2/4785.
  6. That the honourable court do make an order for general and special damages.



7. That costs be provided for.
2. The plaintiff's case is that in 1986, she purchased land parcel number Ruiru/Ruiru East Block 2/4785 and was subsequently issued with a title relating to the said land on 26/8/1988. Her registration as proprietor was entered in the land register as entry number 4. She faulted the subsequent entries in the land register, namely entry numbers 5, 6 and 7, which she exhibited. She faulted the title held by the 1st defendant in relation to the suit land, adding that she had never subdivided the suit land.
3. Contemporaneous with the plaint, the plaintiff filed a notice of motion dated 17/4/2023, seeking: (i) an order "disallowing third parties" from interfering with her ownership of the suit land; and (ii) an order preserving the register relating to the suit land [Ruiru/Ruiru East Block 2/4785]. The said application is one of the two items that fall for determination in this ruling.
4. Upon being served with the court papers, the 1st defendant filed: (i) a notice of preliminary objection dated 23/5/2023; and (ii) a notice of motion dated 23/5/2023. Both the notice of preliminary objection and the notice of motion challenged the jurisdiction of this court to entertain the plaintiff's suit on the ground that the suit is *res judicata*.
5. On 20/6/2023, this court made the following verbatim orders relating to the preliminary objection dated 23/5/2023 and the subsisting order that had been obtained by the plaintiff *ex-parte*:
  - “ 1. The point raised in the preliminary objection cannot be effectually adjudicated on the platform of a preliminary objection. Let the objector bring a formal application supported with an affidavit and necessary exhibits.
  2. In the absence of a formal application raising the issue of *res judicata*, the court will hear the two already filed parallel applications on 21/9/2023.
  3. Given the materials that have been exhibited by the 1st defendant suggesting that the dispute in this suit has been the subject of litigation in the High Court and in the Court of Appeal, the *ex-parte* orders that were procured on 18/4/2023 will not be extended. Any plea for interlocutory orders will be deferred to the determination of the formal application by the plaintiff.
  4. Parties to file and exchange brief written submissions before 21/9/2023.”
6. It is clear from the above order that the court directed that the point raised in the preliminary objection could not be ventilated on the platform of a preliminary objection. It was therefore misleading when counsel for the 1st defendant [Ms Amutavi] informed the court that the preliminary objection dated 23/5/2023 was one of the items that fell for determination. The court will, in the circumstances, proceed to determine the plaintiff's application dated 17/4/2023 and the 1st defendant's application.
7. The 1st defendant's application dated 23/5/2023 raises the question as to whether this court has jurisdiction to entertain this suit. It also raises the question as to whether, by filing this suit, the plaintiff acted in contempt of this court.
8. The 1st defendant contends that this suit is *res judicata*. The prevailing jurisprudence is that, whenever a question of jurisdiction is raised, it should be disposed by the court before undertaking any other proceedings in the case [See *Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR]. I will, for the above reason, first dispose the 1st defendant's application dated 23/5/2023.
9. The case of the 1st defendant [the applicant] in the application dated 23/5/2023 is that, on 19/4/2023, the plaintiff fraudulently obtained temporary injunctive orders from this Court barring dealings in the



land register relating to land parcel number Ruiru/Ruiru East Block 2/4785 [hereinafter referred to as “the suit property”] and its resultant sub-divisions, pending the hearing and determination of the plaintiff’s application dated 17/4/2023. The 1st defendant contends that the plaintiff failed to disclose to the court that the suit property was the subject of previous litigation in Thika ELC Case No 198 of 2017 (formerly Nairobi HCCC No. 5425 of 1992) and in Nairobi Court of Appeal Civil Appeal No. 145 of 2017, where both the 1st defendant and the plaintiff were parties. The 1st defendant adds that Nairobi HCCC No. 5425 of 1992 was determined on 19/7/2007 through a Judgment in which the High Court [Osiemo J] dismissed the plaintiff’s suit against the 1st defendant and others on merit after finding that the suit property belonged to the 1st defendant. It is her case that the court subsequently granted the plaintiff a stay of execution orders in Nairobi HCCC No 5425 of 1992 on 15/4/2008.

10. The 1st defendant further contends that the plaintiff proceeded to file Civil Appeal No. 145 of 2017 in the Court of Appeal against the Judgment of the High Court and also filed an application dated 23/6/2017 seeking leave to appeal out of time. The 1st defendant adds that the said application was dismissed by the Court of Appeal on 19/3/2018 with costs to the 1st defendant, adding that the stay orders given on 15/4/2008 were formally discharged on 16/12/2018. She contends that the injunctive orders issued by this Court on 19/4/2023 are infringing on her proprietary rights over the suit property.
11. The 1st defendant did not file a replying affidavit in response to the 1st defendant’s application dated 23/5/2023. She nonetheless filed written submissions dated 15/9/2023 in response to the application. The submissions were expressed as filed by M/s P K Njoroge & Co Advocates.
12. I have considered the notice of motion dated 23/5/2023. Two key issues emerge for determination in the application. The first issue is whether the suit is *res judicata* and therefore an abuse of the court process. The second issue is whether contempt by the plaintiff has been established.
13. The common law doctrine of *res judicata* has been legislated into statute law under 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. The rationale of the doctrine of *res judicata* was outlined by the Court of Appeal in [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR as follows:

“The rule or doctrine of *res judicata* serves the statutory aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

15. The Court of Appeal in [Kenya Commercial Bank Limited v Benjob Amalgamated Limited](#) [2017] eKLR reiterated that the elements of *res judicata* are conjunctive rather than disjunctive. This means



that for a suit to be deemed as *res judicata* on account of a former suit, the following five elements must be established:

- a. The suit or issue was directly or substantially in issue in the former suit.
  - b. That 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 hear and determined the issues was competent to try the subsequent suit or the suit in which the issue is raised.
16. Has the 1st defendant demonstrated elements of *res judicata* in the present suit? Through her supporting affidavit sworn on 23/5/2023, the 1st defendant placed before this court a Judgment rendered and a decree issued in Nairobi High Court Civil Case Number 5425 of 1992. A reading of the Judgment reveals that: (i) parties to the said suit were Ann Wanjunu [plaintiff] and Mwhaki Waruiru & 2 others [defendants]; (ii) the key issue in the said suit revolved around the question of ownership of land parcel number Ruiru/Ruiru East block 2/4785; and (iii) the High Court [Osiero J] made a finding in the Judgment of the court to the effect that land parcel number Ruiru/Ruiru East Block 2/4785 belonged to Mwhaki Waruiru [the defendant in Nairobi HCCC No 5425 of 1992 and the 1st defendant in the present suit].
15. In addition to the above Judgment, the applicant exhibited a ruling dated 19/3/2018 rendered by the Court of Appeal [R N Nambuye JA] on an application by Ann Wanjunu dated 23/6/2017 seeking orders enlarging the time for lodging an appeal and validating the record of appeal which Ann Wanjunu had filed in Nairobi Civil Appeal No 145 of 2017 challenging the Judgment of the High Court [Osiero J]. Through the ruling, the Court of Appeal rejected the application. The applicant exhibited an extract of the order.
16. It does clearly emerge from the above evidence that the issue relating to ownership of land parcel number Ruiru/Ruiru East Block 2/4785 was the subject of litigation and determination through a Judgment of the High Court in Nairobi HCCC No 5425 of 1992 and culminated in Court of Appeal [Nairobi] Civil Appeal No 145 of 2017. Ann Wanjunu [the plaintiff in the present suit] lost the case in the High Court and the subsequent appeal which she lodged in the Court of Appeal. The High Court Judgment was a merit-based determination of the issue of ownership of land parcel number Ruiru/Ruiru East Block 2/4785. Based on the above evidence, this court has no doubt that the 1st defendant has clearly demonstrated that this suit is *res judicata*. That is the finding of the Court on the first issue.
18. Has contempt by the plaintiff been established? The plaintiff came to court through a misguided suit seeking to re-open a dispute that had been adjudicated and settled by the High Court. Whereas there existed a prior determination of the issue of ownership, there was no prior order of the court restraining the plaintiff against filing the misguided suit. What the plaintiff did was to violate the doctrine of *res judicata*. That is not the same as contempt. Put differently, the act of filing the misguided suit does not in itself constitute disobedience of an order of this court. I do not, in the circumstances, think there is a proper basis for finding the plaintiff guilty of contempt.
19. Suffice it to state that, for her misguided litigation, the plaintiff will bear costs of this suit.
20. In the end, this suit is struck out for being *res judicata*. The plaintiff's application dated 17/4/2023 automatically stands struck out alongside the suit. The plaintiff shall bear costs of the suit.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF MARCH  
2024**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Mr Onchiri for the Plaintiff

Mr Amatutavi for the 1st Defendants

Court Assistant: Hinga

