



**Kamau & another v Kiarie & 5 others (3rd, 4th and 5th Respondents Sued as Trustees of P.C.E.A Thindigua Church) (Environment and Land Case Civil Suit 93 of 2015) [2024] KEELC 4504 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4504 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 93 OF 2015**

**J OMANGE, J  
MAY 23, 2024**

**BETWEEN**

**PETER THUO KAMAU ..... 1<sup>ST</sup> PLAINTIFF**

**GRACE MUTHONI THUO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LUCY WAMAITHA KIARIE ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL KIARIE ..... 2<sup>ND</sup> DEFENDANT**

**FAITH MUTHONI CHURU ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH NDUNGU NJOROGE ..... 4<sup>TH</sup> DEFENDANT**

**LUCY WAMBUI WAWERU ..... 5<sup>TH</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR NAIROBI ..... 6<sup>TH</sup> DEFENDANT**

**3RD, 4TH AND 5TH RESPONDENTS SUED AS TRUSTEES OF P.C.E.A  
THINDIGUA CHURCH**

**RULING**

1. In the Notice of Motion application dated the 16<sup>th</sup> January 2024 the applicant seeks the following orders: -
  - a. That the ex parte orders issued on 30<sup>th</sup> November 2021 be set aside
  - b. That the eviction order given on 3<sup>rd</sup> February 2022 be set aside
  - c. Costs of the application.



2. The Application is supported by an Affidavit sworn by the applicant in which she deponed that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents used an ex parte order dated 30<sup>th</sup> November 2023 to obtain eviction orders dated 3<sup>rd</sup> February 2021 which orders this court has powers to set aside. She further deponed that there is a matter ELC E159 of 2022 by the Respondents seeking similar eviction orders which is yet to be determined.
3. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents opposed the said application vide a notice of preliminary objection dated 26<sup>th</sup> January 2024 on the grounds that the application was res judicata.
4. The applicant filed submissions dated 8<sup>th</sup> February 2024 in which Counsel stated that the ex parte orders were meant to exist for a short period of time unless extended by consent and therefore eviction orders could not be issued ex parte. It was further submitted that the court could set aside the orders as that there was no hearing accorded to the Plaintiff violating her rights under Article 50 of the Constitution. The Court was referred to the decision of the Court of Appeal in Evans Thiga Gaturu & Another v Naiposhs Company Limited & 13 Others.
5. Counsel argued that there is a pending suit ELC E159 of 2022 in which the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are seeking eviction orders which according to her is an admission of the illegality of the eviction orders obtained ex parte order.
6. On the issue of Res Judicata the applicant states that the court had not litigated on illegality of the order and as such the plea for Res Judicata as raised holds no water. The court was referred to the case of Kamunye & Others v Pioneer General Society Ltd (1971) EA 263.
7. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed submissions in respect of the preliminary objection and submitted that jurisdiction is key to any court as lack of jurisdiction takes away the court's authority to sit and determine a matter. This was the decision of the court in a ruling delivered on 6<sup>th</sup> April 2022.
8. It was submitted that the application had the same parties, same issues, and having being determined by a court of competent jurisdiction conclusively, the *res judicata* plea is merited as the threshold for the same was met as held in the case of Abok Kames Odera v John Patrick Machira Civil application No. 49 of 2001.
9. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents counsel submitted that an abuse of the court process is a process that seek improper use of the judicial process in litigation to irritate other parties in the same suit.  
To buttress this point, counsel relied on the decision of Justice Mativo in Agnes Muthoni Nyanjui & 2 others v Annah Nyamburah Kioi & 3 others (2015) eKLR.
10. Having looked at the submissions by both counsels, the cited authorities and the pleadings. The issues that come out for determination by the court are; Whether the application is *Res Judicata*? Whether the court should set aside the orders given on the 30<sup>th</sup> November 2021 and 6<sup>th</sup> April, 2022.
11. The preliminary objection is brought on grounds that the application is Res Judicata. Section 7 of the Civil Procedure Act Cap 21 provides 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”.



12. Black's law Dictionary 10<sup>th</sup> Edition defines res judicata as follows;

“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....”

In respect of the current application in considering whether the matter is *Res Judicata* the court is called upon to consider;

- i. The issues in the previous Application;
- ii. whether the issues are the same as in the current application and if so whether the decision addressed all the issues.
- iii. whether the parties are the same or are litigating under the same title and if the court that rendered the decision was of competent jurisdiction.

13. In *Uburu Highway Development Ltd – v – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court ruled that the application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same application having been finally determined “thrice by the High Court and twice by the Court of Appeal”, it could not be resuscitated by another Application.

The Court of Appeal further stated: -

“That is to say, there must be an end to applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for.”

14. The application herein seeks setting aside of court orders dated 30<sup>th</sup> November 2021 and 3<sup>rd</sup> February 2022. A perusal of the court record, shows that indeed there was an application dated 6<sup>th</sup> April 2022 which application sought the very same orders as this application. There is no doubt that the application sought similar prayers and was between the same parties. This application was determined albeit without input of the applicant's submissions and supplementary affidavit, which had been filed but ended up in another file.

The record shows that these documents were later retrieved from another electronic file. Essentially the applicant was not heard as their side of the story was not considered.

15. It is my view that in a case where a party has not been heard on merit, the matter cannot be said to have been substantially heard and determined.

It would be great injustice to lock out a litigant from being heard when it is evident that their side of the story was not before the court when it made its determination.

Indeed, it has been held that one of the exceptions to the doctrine of *Res Judicata* is where substantial injustice is likely to result. For these reasons I find that the preliminary objection has no merit.

16. On the question of whether the impugned order made on 30<sup>th</sup> November, 2023 should be set aside, it is not in contention that the order was issued ex parte.



Article 50 of the *Constitution* guarantees every person the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing (emphasis mine) before a court.

17. The Court of appeal in the case of *Kenya Power & Lighting Versus Benzene Holding t/a Wyco Paints* [2016] eKLR stated;

“The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”

The Court reiterated with approval the words of Nyarangi J in *Onyango v. Attorney General* (1986-1989) EA 456, at page 459 thus;

“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”

At page 460 the learned judge added:

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

And in *Mbaki & Others v. Macharia & Another* (2005) 2 EA 206, at page 210, this Court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

18. The applicants are entitled to be heard. I therefore find that the application is merited and is allowed. The order made on 30<sup>th</sup> November, 2021 and any consequential orders are hereby set aside.

The application should be listed for hearing inter parties. Costs to abide the outcome of the application.

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 23<sup>RD</sup> OF MAY, 2024.**

**JUDY OMANGE**

**JUDGE**

In the Presence of :-

Mr. Gathu for Plaintiff/Defendant-No appearance for Mr. Mundanya

