



REPUBLIC OF KENYA



Muchoki & 3 others v Ndung & 2 others (Environment & Land Case E029 of 2023) [2024] KEELC 4412 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E029 OF 2023**

MD MWANGI, J

MAY 23, 2024

BETWEEN

**MARY WAMBUI MUCHOKI 1ST PLAINTIFF
SAMMY KARIUKI WACHIRA 2ND PLAINTIFF
SYLVESTER MAGENI 3RD PLAINTIFF
PETER IRUNGU MUIGA 4TH PLAINTIFF**

AND

**SAMUEL MUGUCHIA NDUNG 1ST DEFENDANT
MARY KAMAU 2ND DEFENDANT
NAIROBI CITY COUNTY 3RD DEFENDANT**

(In respect of the 2nd Defendant's application dated 5th April, 2024 and the 3rd Defendant's application dated 21st April, 2024)

RULING

Background

1. This Ruling is in respect of two applications. The first application is by the 2nd Defendant dated 5th April, 2024 whereas the second application is by the 3rd Defendant dated 21st April, 2024.
2. The 2nd Defendant's Chamber Summons application seeks for orders that;
 - a. The Plaintiffs' Complaint dated 31st January, 2023 and filed vide the Judiciary E-filing System on 31st January, 2023 be and is hereby struck out for being res judicata and an abuse of Court process in view of the Judgement and Ruling delivered on 8th February, 2019 and 16th March, 2023 in Milimani ELC Civil Case No. 808 of 2012 respectively.



- b. The costs of this application and the Suit be borne by the Plaintiff.
3. The application is supported by the Affidavit of A.K. Kiluva, Counsel for the 2nd Defendant deponed on the 5th April, 2024. Counsel avers that the instant suit is res judicata in view of the Judgement delivered in Milimani ELC Civil Case No. 808 of 2012. Counsel cites the case of *Njue Ngai v Ephantus Njiru & Another* as well as the case of *Kenya Commercial Bank Limited v Nenjob Amalgamated Limited*; where the principles of res judicata were discussed.
4. Counsel avers that there must be an end to litigation and it is therefore in the interest of justice that instant suit be struck-out with costs plus costs of the instant application.
5. The second application was filed by the 3rd Defendant praying for orders that;
 - a. The Honourable Court be pleased to strike out the Plaintiffs' Plaintiff dated 31st January, 2023.
 - b. The costs of this application be borne by the Plaintiffs.
6. The application is premised on the grounds on the face of it and the Supporting Affidavit of Geoffrey Cheruiyot deponed on the 21st April, 2024. In summary, the deponent avers that the Plaintiffs are laying a claim on Plot No. 8, Kahawa West, Phase II which property was subject to a previous suit, ELC Case No. 808 of 2012 between the Plaintiffs herein and the Defendants herein. He avers that Judgement in ELC No. 808 of 2012 was delivered on 8th February, 2019. The court being satisfied with the evidence adduced by the 2nd Defendant (Mary Kamau) in support of her Counterclaim, found that she was indeed allotted Plot No. 8 Kahawa West, Phase II by the Nairobi City Council way back in 1992. The Plot was therefore not available for allocation to the Plaintiffs in the year 2001.
7. The Applicant contends that the matter was therefore determined with finality and the status of Plot No. 8 Kahawa West, Phase II and its ownership was settled by the Court. He argues that the Plaintiffs herein, having been party to the previous suit, are not entitled to the prayers sought in their Plaintiff. The suit ought to be struck-out with costs to the 2nd Defendant.
8. Despite service of the Application, the Plaintiffs did not file any response to both applications. The applications are therefore not opposed. Considering that the issues raised in the application are similar, I will determine the applications together.

Issues for determination

9. Having considered the applications herein and the Plaintiff filed herein, the only issue for determination is whether the instant suit is res judicata as alleged by the Applicants.

Analysis and Determination

10. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the *Civil Procedure Act* which states:

“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 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.”



11. 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 issues previously and finally determined by any court of competent jurisdiction.
12. The doctrine of res judicata as stated has been explained in a plethora of decided cases. In the case of the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR, the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

 - a) The suit or issue was directly and subsequently 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 is raised.”
13. The court explained the role of the doctrine as follows:

“The rule or doctrine of res judicata serves the salutary 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 pragmatic and commonsensical 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 or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”
14. From the pleadings and the annexed Judgement in ELC Case No. 808 of 2012, it is not in dispute that the subject matter in the previous litigation and the current suit is the same. Both the former suit and the present suit are between the same parties.
15. In the case of *E.T.V v Attorney General & another* (2012) eKLR Majanja J stated that;

“The courts must be vigilant to guard against 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 is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”
16. Applying the stated law to the facts before me, it is clear that the Plaintiffs seek to re-open issues that were raised and dealt with in the earlier proceedings. In my view, by filing this suit, the Plaintiff are trying to re-litigate a concluded matter.



Conclusion

17. Accordingly, I find and hold that the 2nd and 3rd Defendants' applications dated 5th April, 2024 and 21st April, 2024 respectively are merited. They are allowed as prayed. Consequently, this suit is struck out with costs to the 2nd and 3rd Defendants.

18. The 2nd and 3rd Defendants shall also have costs of the applications.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MAY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

N/A for the Plaintiffs and the 1st Defendant

Mr. Kiluva for the 2nd Defendant/Applicant

Ms. Chepkoyo holding brief for Mr. Ndalila for the 3rd Defendant/Applicant

Yvette: Court Assistant

