



**Malewa Ranching Company v Kimani & others (Environment & Land
Case 45 of 2023) [2025] KEELC 710 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 45 OF 2023**

YM ANGIMA, J

FEBRUARY 20, 2025

BETWEEN

MALEWA RANCHING COMPANY DEFENDANT

AND

JOSEPH KAMAU KIMANI & OTHERS DEFENDANT

RULING

A. Introduction

1. By a plaint dated 2.9.2020 the Defendant sued the Defendants alleging that the Defendants were involved in fraudulent and irregular sub-division, allocation, transfer and registration of the company's properties originally known as L.R. Nos. 3777/448, L.R. 3777/449 and L.R. 3777/451 on diverse dates between 2010 and 2017. The 1st to 8th Defendants who were said to be holding out themselves as officials of the company were said to be the main actors in the alleged fraudulent and irregular dealings with the company's properties.
2. Apart from the 72nd Defendant who was said to have acted negligently by facilitating the alleged fraudulent dealings, the rest of the Defendants were beneficiaries of various sub-divisions of the company's properties whose allocation and transfer the Defendant challenged. It was pleaded, inter alia, that beneficiaries of the sub-divisions had obtained registration without paying any consideration; without following the requisite statutory steps; without payment of stamp duty; without obtaining the consent of the land control board; and through fraudulent, unprocedural and corrupt practices.
3. As a result of the aforesaid matters, the Defendant sought the following reliefs in the plaint:
 - a. A declaration that the actions of the 1st -8th Defendants were illegal and fraudulent.
 - b. A declaration that the 72nd Defendant had abdicated its statutory duty by registering fraudulent, illegal, unprocedural and irregular land transfer instruments.



- c. A declaration that the 72nd Defendant's actions facilitated the commission of fraud by the rest of the Defendants against the Defendant.
 - d. An order for cancellation of all the resultant title deeds issued to the Defendants.
 - e. An order directing the land register to rectify the register and restore the Defendant as the owner of the suit properties.
 - f. Any other order that the court may deem fit and just to grant.
 - g. Costs of the suit.
4. Later on the Defendant amended its plaint on 13.05.2024 and reduced the number of Defendants in the proceedings to about 45.

B. Preliminary objection by the 45th and 49th Defendants

5. The 45th and 49th Defendants filed a notice of preliminary objection dated 11.06.2024 raising the following grounds:
- a. That the Defendants suit is res judicata since the issue of allocation, alienation and sub-division of title of various parcels of land previously known as L.R 3777/448, L.R 3777/449 and L.R 3777/451 and issuance of subsequent titles was heard and determined in Nyahururu ELC No. 38 of 2018 Michael Waweru Kirubi & 7 others v John Ndungu Mburu & 14 others (20191 eKLR (formerly Nyeri ELC No 145 of 2012) and therefore the instant suit offends Section 7 of the Civil Procedure Act, 2010.
 - b. That the issue of the election of directors of the Defendants Company and the Resolution of 1st November, 1994 disputed by the Defendant herein was also an issue that was heard and determined in the above suit Nyahururu ELC No. 38 of 2018 Michael Waweru Kirubi & 7 others v John Ndungu Mburu 14 others [20191 eKLR (formerly Nyeri ELC No 145 of 2012)
 - c. That the issue of the Land Registrar in accepting and causing the transfer of land resultant from the subdivision of all land the known as L.R 3777/448, L.R 3777/449, L.R 3777/451 was heard and determined by the Honourable Court on merit.
 - d. That the issues of fraud as raised in the instant suit was heard and determined by the court in the afore stated case and dismissed.
 - e. That all the issues raised in the instant suit were entirely settled by the Court.
 - f. That the following Defendants; Joseph Kamau Kimani, Ndung'u Kariuki, John Ndungu Mburu and Chief Land Registrar were also Defendants in the aforementioned case, sued by the Shareholders of the Defendant over the same issues over which they have been sued in the present suit.
 - g. That the attempt by the Defendant to introduce the above issues again in a fresh suit is akin to encouraging multiplicity of suits.
 - h. That the Honourable Court has no original nor appellate jurisdiction to determine the issues raised by the Defendants since they are res judicata.
 - i. That the Plaint as filed is fatally and incurable defective and as such cannot stand or be ventilated before this Honourable Court and should be dismissed with costs



C. Instant application by 45th and 49th Defendants

6. The 45th and 49th Defendants also filed a notice of motion dated 26.7.2024 seeking to strike out the Defendant's suit on essentially the same grounds as set out in their notice of preliminary objection. The motion was brought pursuant to Section 1A, 1B, 3A and 7 of the *Civil Procedure Act* (Cap 21), Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking the following orders;
 - a. That the Defendant's suit is res judicata since the issues of allocations and sub-division of the Title Nos L. R. 3777/448, LR 3777/449 and LR 3777/451 and issuance of titles was heard and determined in Nyahururu ELC No. 38 of 2018 in the case of Michael Waweru Kimbi & 7 Others 2019 (eKLR) (the previous suit) hence the instant suit offends Section 7 of the *Civil Procedure Act*.
 - b. That the Defendant's suit is misconceived, misplaced, frivolous, vexatious, incompetent and therefore an abuse of the court process.
 - c. That the Defendant's suit be dismissed with costs.
7. The application was based upon the grounds as set in the notice of preliminary objection. It was contended that in the previous suit the Defendant had through its shareholders litigated all the issues raised in the instant suit and that they were conclusively determined by a court of competent jurisdiction. It was contended that the cause of action was the same and was founded on the same facts and circumstances save for the addition of more Defendants.
8. The application was supported by an affidavit sworn on 26.7.2024 by John Mburu who was sued as the 45th Defendant. He relied on the same matters as set out in the preliminary objection and contended that the instant suit was res judicata within the meaning of Section 7 of the *Civil Procedure Act* (Cap 21). It was contended that all the issues raised in the instant suit were canvassed and determined in the previous suit. It was pointed out that some of the current Defendants were actually sued in the previous suit and that one, Cecilia Wanjiku Gathungu who was a Defendant in the previous suit had signed some minutes as an official of the Defendant authorizing the filing of the instant suit. It was further pleaded that the Defendant's attempt to introduce additional issues and additional parties could encourage multiplicity of suits over the same cause of action.

D. Defendants supporting the application

9. The record shows that the firm of Nderitu Komu & Co Advocates acted for about 66 Defendants as per the memorandum of appearance dated 7.06. 2021. They filed grounds dated 06.09.2021 in support of the motion dated 26.07.2021 seeking the striking out of the suit.

E. Defendant's response

10. The Defendant filed a replying affidavit sworn on 23.12.2021 sworn by Raphael Chege Nyaga in opposition to the said application. He deposed that he was the chairperson of the board of directors of the Defendant. He disputed that the instant suit was res judicata and contended that the parties and issues in the previous suit were different from those in the instant suit. He contended that the Defendant as a company was not party to the previous suit.



F. Direction on submissions

11. When the said application was listed for direction on 16.07.2024 it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their submissions. The record shows that the 45th and 49th Defendants filed their submissions on 29.09.2024 whereas the firm of Nderitu Komu & Co. Advocates filed theirs in support of the application on 09.11.2024. The Defendant's submissions were filed belatedly on 13.01.2025.

G. Issues for determination

12. The court has perused the notice of motion dated 26.07.2024, the Defendant's replying affidavit in opposition thereto as well as the grounds in support of the application filed by the several Defendants represented by the firm of Nderitu Komu & Co. Advocates. The court has also considered the material and documents on record. The court is of the view that the main issues for determination herein are the following;
 - a. Whether the Defendant's suit is res judicata in view of the judgment in the previous suit.
 - b. Whether the Defendant's suit is misconceived, frivolous, vexatious and otherwise on abuse of the court process.
 - c. Who shall bear costs of the application.

H. Analysis and determination

a. Whether the Defendant's suit is res judicata in view of the judgment in the previous suit

13. The court has considered the material and submissions on record on this issue. Whereas the 45th and 49th Defendants submitted that the instant suit was res judicata on account of the judgment rendered in the previous suit, the Defendant submitted otherwise. The Defendant submitted that the parties and issues in the previous suit were different from those in the instant suit.
14. The elements of res judicata were summarized in the case of Independent Electoral and Boundaries Commission vs Maina Kiai and 5 Others (2017) eKLR as follows;
 - a. the suit or issue was directly and 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 heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
15. The court has perused the pleadings in the previous suit. It is evident that the properties the subject of the suit were LR. Nos. 3777/451, 3777/449 and 3777/448 which were initially owned by the Defendant company. The suit was filed by 7 Defendants who were said to be shareholders of the company and beneficial owners of the properties alongside other shareholders. The shareholders had challenged the manner of sub-division and alienation of LR. Nos 3777/451, 3777/449 and 3777/448. It was alleged, inter alia, that the sub-division of these properties had been undertaken illegally and



fraudulently by some of the company's officials and that the process was undertaken in contravention of a survey agreement dated 19.01.1988 between the company and a certain firm of surveyors.

16. As a result, the Defendants in the previous suit sought the following reliefs in the suit;
 - a. A declaration that all sub-divisions and alienation in respect of the parcel of land originally known as Malewa Ranching Company Ltd situated at Kipipiri District in Nyandarua County of any portion of land contrary to the survey Agreement entered on the 19th January 1998 are null and void.
 - b. An order for permanent injunction restraining the Defendants whether by themselves, servants or agents and/or any person claiming under them from interfering with the Defendant's peace and quiet possession of the parcel of land originally known as Malewa Ranching Ltd LR No. 3777/448, 449 and 451.
 - c. An order for permanent injunction restraining the Defendants whether by themselves, servants, or agents and/or any persons claiming under them from continuing to enter upon, trespass, subdivide alienate and/or issue title deeds to individuals other than the Defendants and the original shareholders in the respect of land parcel known as LR No.. 3777/448, 449 and 451.
 - d. General damages for trespass.
 - e. Costs of the suit plus interest thereon at court rates.
17. The record shows that the suit proceeded to full trial before Hon. Justice M. O. Oundo. At least 3 of the Defendants including, Cecilia Wanjiku Gathungu, testified at the hearing in support of the suit. The Defendants in that suit also gave their side of the story in defence of the action. One of the defence witnesses was a director or former official of the company who fully explained how the properties of the company were sub-divided and distributed amongst the shareholders.
18. By a judgment dated and delivered on 22.10.2019 the Hon. Justice M. C. Oundo was not satisfied that there was any fraud or illegality in the manner in which the company's properties were sub-divided amongst the shareholders. The court found and held that the Defendants in the suit had failed to prove the fraud and illegality which was alleged in the suit. As a result, the court determined that suit as follows;

“In conclusion, I find that the Defendants have failed to prove their case on a balance of probabilities. I hold that the sub-divisions carried out in respect of Malewa Ranching Ltd LR No. 3777/448, 3777/449 and 3777/451 creating sub-titles was validly and procedurally carried out. The Defendants are not entitled to any of the reliefs sought in the plaint and their suit is hereby ordered dismissed with costs to the 1st, 8th, 10th, 11th and 12th Defendants herein”
19. The court is satisfied on the basis of the material on record that the shareholders' grievances in the previous suit were exactly the same ones as the Defendant's grievances in the instant suit. It is only that they were pleaded and particularized differently in the two suits. In the instant suit, the Defendant has given a more detailed description of the grievances and expanded the allegations and particulars of alleged fraud and illegality. The Defendant has spruced up its cause of action by including corruption and corrupt practice to its particulars of fraud and illegality. It has added lack of consent of the land control board and lack of enabling company resolutions. It has added more Defendants to the suit with a view to reclaiming the properties transferred to them.



20. The court is further satisfied that whatever grievances the shareholders of the company may have had at the time of filing the previous suit they could have pleaded them all at the material time. They were not at liberty to plead half of their grievances and leave the other half to be litigated by the company in a separate suit. They were not at liberty to litigate their grievances by instalments since that would lead to a multiplicity of suits.
21. The court is not impressed by the Defendant's contention that since it was not party to the previous suit which was substantially based on the same cause of action and the same properties then it should be allowed to prosecute the instant suit. There is no evidence to demonstrate that the Defendant was not aware of the previous suit at the time it was filed and prosecuted. There is no valid reason as to why it did not apply to be joined in that suit as one of the Defendants. After all, one of the key grievances in both the previous suit and the instant suit is whether or not the sub-division and distribution of the company's land was done contrary to the survey agreement dated 19th January 1988. The other key issue is whether or not the process was tainted with fraud and illegality.
22. In the previous suit, the court found and held that there was no evidence of fraud or illegality in the process of sub-division and distribution of company land. The court further held that the process of sub-division and creation of sub-titles was executed validly and procedurally. The court is of the view that it would be contrary to the doctrine of res judicata for the court to try and determine the same issues in a later suit. There is a danger of the judiciary suffering embarrassment if another court were to try the same issues and arrive at a different conclusion.

b. Whether the Defendant's suit is misconceived, frivolous, vexatious and otherwise on abuse of the court process

23. In view of the court's holding on the first issue it is not necessary to consider and determine this issue. The Defendant's suit shall fail on account of the principle of res judica.

c. Who shall bear costs of the application

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 45th and 49th Defendants shall be awarded costs of the application. However, costs of the suit shall be awarded to all the Defendants who had entered appearance to the suit and filed defences to the action.

I. Conclusion and disposal orders

25. The upshot of the foregoing is that the court finds merit in the notice of motion dated 26.07.2024. As a consequence, the court makes the following orders for disposal thereof;
 - a. That the Defendant's suit is res judicata in view of the existence of a previous judgment in Nyahururu ELC No. 38 of 2018- Michael Waweru Kirubi & 7 others
 - b. The Defendant's suit is hereby struck out in its entirety for being res judicata.
 - c. The 45th and 49th Defendants are hereby awarded costs of the motion dated 26.07.2024.
 - d. Costs of the suit are hereby awarded to all the Defendants who had entered appearance and filed defences to the action.



It is so ordered.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 20TH DAY OF FEBRUARY 2025.

In the presence of:

Mr. Kago for the Plaintiff

Mr. Ndirangu for the 45th and 49th Defendants

No appearance for the rest of the Defendants

.....

Y. M. ANGIMA

JUDGE

