



**Nasiari v Omwami (Environmental and Land Originating Summons E003 of 2023) [2024] KEELC 4951 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4951 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023**

**E ASATI, J**

**JUNE 13, 2024**

**BETWEEN**

**NIGHT SIFULA NASIARI ..... APPELLANT**

**AND**

**RAYMOND OMWAMI ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the preliminary objection raised by the Defendant herein vide the Notice of Preliminary objection dated 9<sup>th</sup> March, 2024. The preliminary objection is based on the ground that the suit is *res judicata*. That the subject matter of the present suit was the subject matter of appeal No. E058 of 2023 whereby the court pronounced its judgement on 17<sup>th</sup> November, 2022 in H.C. Appeal No. E005 of 2022 arising from a lower court case No. E011 of 2022.
2. The preliminary objection was argued by way of written submissions. It was submitted on behalf of the Defendant that the substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#). That for *re judicata* to suffice, the court has to consider the following issues;
  - i. The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit.
  - ii. The former suit must have been between the same parties or parties under whom they claim or parties in privity with the original parties.
  - iii. The parties must have litigated under the same title.
  - iv. The court which decided the former suit must have been competent.
  - v. The former suit must have been heard and finally decided by the court.



3. Counsel relied on the case of *Siri Ram Kaura –vs- M.J.E. Morgan* CA 71 of 1960 (1961)EA 462 and *Njangu –vs- Wambugu & Amor* Nairobi HCCC NO.2340 of 1991 to support the submissions.  
Counsel also relied on the provisions of article 159(2)(b) of *the Constitution* of Kenya to submit that justice ought not to be delayed.
4. On behalf of the Plaintiff, it was submitted that the former suit was between the Defendant herein and one Dawson Majani who are not the same parties herein. That the relief that was sought in the former suit is not similar to the relief sought herein. That in the present suit, the Plaintiff is seeking that the Defendant who is her brother transfers to her what he holds in trust for her.
5. I have considered the preliminary objection and the submissions made in support and in opposition thereof. It is clear from a reading of the pleadings of the former suit and the present suit that the subject matter of the former suit was only one parcel of land namely; No. North Maragoli/Bukhulunya/293 wherein the Defendant herein sought exhumation of a body that had been interred thereon by a person whom the Defendant considered a trespasser. The claim in this suit is by the sister of the Defendant seeking that the land that the Defendant holds in trust for her be transferred to her. The subject matter concerns four parcels of land as listed in the plaint namely North Maragoli/Kisatiru/507, North Maragoli/Kisatitu/1275, North Maragoli/Bukhulunya/ 293 and North Maragoli/Kisatiru/1276.
6. My reading of the judgement in the former suit does not reveal that the issue of trust between the Defendant and the Plaintiff or his siblings was canvassed and decided on in the former suit. The court found in the appeal that trust had not been pleaded or proved in the former suit.
7. The preliminary objection seeks to have the suit struck out. Striking out of pleadings and suits is a draconian action that ought to be undertaken only as a last resort when the pleading or the suit is so hopelessly defective that it cannot be cured by any amount of amendment. That is not the case herein.
8. This court finds that the grounds raised in the Notice of Preliminary Objection have not been proved hence the court has no basis to strike out the suit. The preliminary Objection is therefore hereby dismissed. No orders as to costs as the suit is still pending hearing and determination.

Orders accordingly.

**RULING, DATED AND SIGNED AT VIHIGA, READ VIRTUALLY THIS 13<sup>TH</sup> JUNE, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,  
JUDGE.**

