



REPUBLIC OF KENYA



KENYA LAW
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**Mungai v Ngunya & 3 others (Land Case E154 of 2023)
[2024] KEELC 5820 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E154 OF 2023
OA ANGOTE, J
JULY 31, 2024**

BETWEEN

ANITA WAMBUI MUNGAI PLAINTIFF

AND

SAMUEL MAINA NGUNYA 1ST DEFENDANT

AUCTIONEERS 2ND DEFENDANT

NCBA BANK KENYA PLC 3RD DEFENDANT

LAND REGISTRAR, NAIROBI 4TH DEFENDANT

RULING

Background

1. The Plaintiff instituted a Motion dated November 6, 2023, seeking as against the Defendants, inter-alia, a stay of the intended sale of L.R No Nairobi/Block 93/527 (hereinafter the suit property) by way of public auction, temporary injunctive orders restraining the Defendants from interfering with the suit property and in the alternative an order that the status quo be maintained pending determination of the suit.
2. The 1st Defendant filed a Preliminary Objection to the Application aforesaid on the November 20, 2023. On the March 5, 2024, the Court directed that the Preliminary Objection be determined first and directed that parties file submissions in respect to the same.



3. Vide the Preliminary Objection, the 1st Defendant avers that:

“The issues being raised in the Motion dated 6th November, 2023 are issues which were addressed by this Court in an earlier Application by the Plaintiff dated the 16th [18th] November, 2021, and this offends the res judicata principle.”

Submissions

4. The 1st Defendant filed submissions in support of the Preliminary Objection[undated]. Counsel submitted that the question of whether the issues in the present suit are substantially in issue in ELC E 219 of 2021 and whether the Motion of November 6, 2023 is res judicata are purely matters of law and the Preliminary Objection is properly before the Court.
5. According to Counsel, the present suit offends the provisions of Section 7 of the *Civil Procedure Act*; that the test for determining whether a suit is res judicata was set out in the case of Nancy Mwangi T/ A Worthlin Marketers vs Airtel Networks (K) Ltd & Ors [2014]eKLR and Bernard Mugo Ndegwa vs James Nderitu Githae & 2 Others[2010]eKLR to wit, the matter in issue is identical in both suits; the parties in the suit are the same, the claim/title is the same, the Court has concurrent jurisdiction and the previous decision was final.
6. Counsel noted that as affirmed by the Court in Uhuru Highway Development Ltd vs Central Bank of Kenya & 2 Others [1996] eKLR, the doctrine of res judicata applies to both suits and applications and that as appreciated in Nicholas Njeru vs Attorney General & 8 Others [2023] KEELC 20213, the doctrine of res judicata is founded on public policy aimed at ensuring finality to litigation and preventing the harassment of an individual twice with the same account of litigation.
7. According to Counsel, the issues raised in the Motion of 6th November, 2023 are issues that were addressed by the Court in the earlier Application of 18th November, 2021 including the particulars of fraud/and or misrepresentation therein and that the present Motion constitutes a futile attempt to re-litigate the same.
8. Counsel urged that as stated in Greenhalg vs Mallard [1947]ALL ER, a party cannot be allowed to bring the same action twice by carrying out cosmetic changes to the pleadings and that the Court of Appeal in Pop-In (Kenya)Ltd vs Habib Bank AG Zurich[1990]eKLR was categorical that a plea of res judicata does not only apply to points specifically pleaded by parties and upon which the Court is actually required to form an opinion and pronounce judgement, but every point which properly belongs to the subject of litigation.
9. The 2nd and 3rd Defendants filed submissions in support of the Objection on 20th May, 2024.Counsel submitted that the preliminary objection meets the threshold as set out in Mukisa Biscuit vs Westend Distributors Limited (1969) E.A being a proper question of law not necessitating any evidential probing.
10. It was submitted that as set out in Section 7 of the *Civil Procedure Act* and explained by the Supreme Court in John Florence Maritime Services Limited & Another vs Cabinet Secretary Cabinet and Infrastructure & 3 Others [2021] eKLR, the principles warranting invocation of the doctrine of res judicata include, existence of former final order of judgement, rendered by a Court of competent jurisdiction over the same subject matter and parties.
11. Counsel urged that the Motion of 6th November, 2023 is an attempt by the Plaintiff to circumvent the doctrine of res judicata; that any new evidence should have been produced before the Court rendered



its determination; that the aforesaid Motion is not only res judicata, but constitutes an abuse of Court process and should be dismissed and that the entire suit should be dismissed.

12. The Plaintiff's Counsel submitted that while the provisions of Section 7 aforesaid are appreciated, the Plaintiff's Motion aforesaid does not fall within these limits in light of the new facts and evidence, to wit, the forensic examiner's report affirming that the spousal consents on the charge documents were fraudulent. Counsel cited the cases of C.K. Bett Traders Limited & 2 Others vs Kennedy Mwangi & another [2021] eKLR, and [*Njacami vs Mue & 2 Others \(Environment & Land Case E038 of 2022\)*](#) [2023] KEELC 18764 (KLR).
13. Counsel asserted that the Court of Appeal in Republic vs Kenya Ports Authority & Another [2019]eKLR while emphasizing the importance of finality in legal proceedings also recognized that the discovery of new and significant evidence could be a valid basis for revisiting a matter even after final judgment has been made and that the present application raises issues of legality of charge documents in light of the handwriting expert report which issues were not canvassed in the Court's ruling dated 19th October, 2023.
14. Counsel contended that the new evidence necessitates a comprehensive re-evaluation of the entire case in light of the forged signatures and consolidation of both matters, ELC Misc E219 of 2021 and the present suit would ensure that all relevant evidence and arguments are considered together leading to a more thorough and just resolution of the issues at hand.

Analysis & Determination

15. The threshold of a preliminary objection was set out by the Court of Appeal in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700 wherein Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. Newbold, P further held as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

17. The Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR re-affirmed the principle as set out in the Mukhisa case by stating as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a



demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

18. What is clear from the foregoing is that the character and nature of a preliminary objection is one that should only raise a point of law which is argued on the assumption that the facts raised are undisputed. The objection raised should not be one that calls for proof or seeks to adduce evidence for its authentication. The objection once argued should be capable of disposing of the suit or the application.
19. The preliminary objection herein is premised on the alleged violation of the doctrine of res judicata. The doctrine of res judicata is premised on Section 7 of the *Civil Procedure Act*. It prevents the Court from re-determining a matter/issue that has been finally determined by a competent Court. It is not in doubt that this issue goes to the jurisdiction of the Court and is capable of preliminarily disposing off the suit.
20. However, the question as to whether the issue of res judicata can be argued by way of preliminary objection has been the subject of debate. In the case of *Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Another* [2014] eKLR, the Court held as follows:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”

21. The Court in *Moses Mbatia vs Joseph Wamburu Kihara* [2021] eKLR, also considered whether the question of res judicata was a proper preliminary objection as follows:

“It is my view that all the relevant facts as summarized above are not in dispute and the matter did not call for the exercise of the trial Court’s discretion. Resultantly therefore the objection is a pure point of law.”

22. The 1st Defendant alleges that the Motion filed herein on 6th November, 2023 is res judicata the Motion of 18th November, 2021, determined on 19th October, 2023 in Misc ELC E219 of 2021. Misc ELC E219 of 2021 is before this Court. Further still, while not consolidated, the two matters have always been mentioned together.
23. The existence of the Motions and the Ruling are not factually disputed. The Court is privy to the aforesaid. In the circumstances, the Court does not consider that any extraneous evidence is required in this regard and finds that the objection is properly before it.
24. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* which 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.”

25. In the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015)* [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus;

“...The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, (2010) eKLR, under five distinct heads:

- (i) the matter in issue is identical in both suits;
 - (ii) the parties in the suit are the same;
 - (iii) sameness of the title/claim;
 - (iv) concurrence of jurisdiction; and
 - (v) finality of the previous decision.”
26. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit was the same matter which was directly and substantially in issue in the former suit.
27. Further, the former suit must have been between the same parties or parties under whom they claim; the parties litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
28. It is crucial to note that the doctrine of res judicata does not apply only to suits but also to applications. This legal position was stated in the case of *Mburu Kinyua vs Gachini Tuti* [1978] KLR 69 at 81 and



reiterated by the Court of Appeal in *Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others* [1996] eKLR as follows:

“That is to say, there must be an end to applications of similar nature; that is to say further, wider 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 inundated 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.”

29. The 1st Defendant contends that the present Motion is *res judicata* the Motion of 18th November, 2021 in Miscellaneous Application Number E219 of 2021, determined by this Court on 19th October, 2023. Supported by the 2nd and 3rd Defendant, he asserts that the Plaintiff is *vide* the impugned Motion attempting to re-litigate issues already decided contravening the principle of *res judicata* and abusing the process of the Court.
30. This is disputed by the Plaintiff who asserts that the Motion of 6th November, 2023 harbor peculiar facts greatly distinguishing it from ELC Misc E219 of 2021, especially on the issue of legality of the charge documents in light of the forensic document examiner's report which conclusively found that the spousal consents produced by the 1st Defendant were not signed by the Plaintiff as alleged.
31. According to the Plaintiff, these new facts and or evidence were not available in the previous case and were not dealt with finality by the Court's previous ruling in Misc ELC E219 of 2021, on 19th October.
32. The Court has considered the two Motions and the Ruling of 19th October, 2023. ELC Misc E219 of 2021 has been instituted by Anita Wambui Mungai as against Samuel Maina Ngunya, Phillips International Auctioneers, NCBA Bank Kenya PLC and the Land Registrar.
33. Similarly, this suit, ELC No. E154 of 2023, has been instituted by Anita Wambui Mungai as against Samuel Maina Ngunya, Phillips International Auctioneers, NCBA Bank Kenya PLC and the Land Registrar. The two Motions in issue have been instituted by the Plaintiff as against the Defendants. There can be no doubt that the parties are the same, litigating under the same title.
34. *Vide* the Motion of 18th November, 2021, in ELC Misc E219 of 2021, the Plaintiff sought *inter-alia*, for temporary injunctive orders restraining the Defendants jointly and severally from interfering with L.R No Nairobi/Block 93/527 (suit property) including by way of sale through public auction, private treaty, advertising or in any other manner; mandatory injunction to preserve the status quo that existed.
35. It was the Plaintiff's case *vide* the Motion that the suit property was matrimonial property having been purchased by her and the 1st Defendant, her husband at the time and that while their divorce was ongoing, she conducted a search at the Lands Registry and discovered that the 1st Defendant had taken a facility with the 3rd Defendant who had registered a charge sometime in 2017 and a further charge over the suit property in 2020.
36. It was her case that sometime in 2021, she was served with a redemption notice indicating the property was due to be sold by way of auction because the 1st Defendant had failed to repay the facilities advanced to him and that the charge over the suit property was fraudulent, her having not signed the spousal consents and having registered a caveat over the suit property.



37. The Court rendered its determination on 19th October, 2023 dismissing the Motion. Vide its Ruling of 19th October, 2023, the Court noted thus:

“In the current case, I am not satisfied that the Plaintiff has discharged the burden of proving that her signature was forged. In addition to making the allegation of fraud, she has only submitted an O.B Report dated 5th March 2021. The report is only proof of the fact that she reported the alleged forgery/fraud to the police. The same is not proof that her signature was forged.....

....Having failed to prove, prima facie, that a caution was registered; that the spousal consent was forged; and that she has the interest of a former spouse in the suit property, I find that the Plaintiff has not established a prima facie case with a probability of success and is therefore not entitled to the injunctive relief.”

38. The Court’s jurisdiction in determining the Motion aforesaid is unquestioned.

39. Vide the impugned Motion of 6th November, 2023, the Plaintiff seeks inter-alia, a stay of the intended sale of the suit property, Nairobi/Block 93/527 by way of public auction slated for 9th November, 2023, temporary injunctive orders restraining interference with the suit property pending the determination of the suit, and in the alternative that the status quo be maintained.

40. It is the Plaintiff’s case herein that the suit property is matrimonial property; that the 2nd Defendant has scheduled a sale of the suit property; that the sale aforesaid is pursuant to default by the 1st Defendant of a loan issued to him by the 3rd Defendant and in which the suit property was charged as security.

41. She maintains that the 1st Defendant unlawfully charged the property and that there was no adherence to the rule of law as far as spousal consent is concerned, the same having been forged and that further, a caveat had been registered on the suit property at the time it was allegedly charged.

42. Considering the foregoing narration, it is clear that vide both Motions, the Plaintiff sought temporary injunctive orders seeking to have the Defendants restrained from interfering with the suit property.

43. The Plaintiff’s claim in this respect is founded on the allegations that the charges registered against the suit property are fraudulent as her signature on the spousal consents were forged and a caveat had been registered against the suit property at the time it was charged.

44. As aforesaid, the Court having considered the evidence adduced in this respect in the Motion of 18th November, 2021 in Misc E219 of 2021, it found that the Plaintiff had not established a prima facie case and was subsequently not entitled to the injunctive orders sought.

45. The Plaintiff has now come to Court with a forensic report, which she alleges proves that her signature was forged. Counsel asserts that this constitutes new evidence, which was not available in the previous case and was not determined by the Court in Misc E219 of 2021. This, he posits, removes the impugned Motion from the ambit of res judicata.

46. This Court does not agree. As expressed by the Court of Appeal in Uhuru Highway (supra):

“...Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted



part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

47. In its Motion of 18th November, 2021, the Plaintiff was required and indeed obligated to bring forth her entire case and evidence in respect thereof. Having failed to do so, the Plaintiff cannot attempt another bite at the cherry.
48. If indeed this evidence was not available at the time of the Motion and could not have been reasonably acquired at the time, the recourse available to the Plaintiff would have been institution of a review application.
49. The Court is therefore of the considered view that the institution of the current Motion constitutes an abuse of the process of the Court as defined by the Court of Appeal in the case of Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] eKLR as follows:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive.”

50. It is noted that vide their respective submissions, the Plaintiff has alluded to consolidation of the suits, while the Defendants call for striking out of the present suit. It is trite that submissions are not an avenue for raising new issues and the Court cannot venture into a determination of the same. The Preliminary Objection was as against the Motion of 6th November, 2023.
51. In the end, the Court makes the following determination;
 - i. The Preliminary Objection dated 20th November, 2023 is merited.
 - ii. The Motion dated 6th November, 2023 be and is hereby struck out with costs.
 - iii. The Plaintiff shall bear the costs of the Preliminary Objection.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of

Mr. Musa for Plaintiff

Mr. Kibera for 2nd and 3rd Defendants

Mr. Andati for 1st Defendant

Court Assistant – Tracy

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