



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Waweru & another (Environment & Land Case
E096 of 2021) [2024] KEELC 5742 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5742 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E096 OF 2021**

JG KEMEI, J

JULY 30, 2024

BETWEEN

STANLEY MUNGAI WAWERU PLAINTIFF

AND

THE ESTATE OF THE LATE KEZIAH WAMAITHA

WAWERU 1ST DEFENDANT

SUSAN NYAMBURA NUNGI 2ND DEFENDANT

RULING

1. The Defendants/Applicants vide a Notice of Motion dated 29/11/2021 expressed under Order 5 Rule 2 (1) *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* seek in the main dismissal of this suit for being *res judicata* in view of the determinations in Nairobi ELC 614 of 2009 and Nairobi Misc Cause No. 8 of 2016. The Application is based on the grounds on the face of it which are restated in the SA of even date of Susan Nyambura Nungi, the Applicant.
2. She deposed that she is the administrator of the Estate of the 1st Defendant, her late mother, pursuant to a confirmed Grant issued in Nbi ELC 614 of 2009. That the 1st Defendant who died on 9/12/2010 as shown by copy of Death Certificate annexed as SNN1, was the registered owner of LR No. Karai/Karai/818. That the Court in Kikuyu Succession Cause No. 16 of 2014, where she had applied for letters of administration was transferred to Nairobi as Succ. Misc. 8 of 2016. She annexed a confirmed grant marked as SNN2 confirming the mode of distribution for the 1st Defendant's children including the Plaintiff and SNN3 being the Orders in the Miscellaneous Cause. Further that the Plaintiff lacks locus standi to bring this suit because he is not the legal representative of the Estate of Keziah Wamaitha Waweru and no transfer was ever done during the lifetime of their father on 2 acres of LR No Karai/Karai/818 now claimed as the alleged consent was made in 1987 yet their father died in 2004.
3. The Application is not opposed.



4. On 17/10/2022 directions were taken for parties to canvass the motion by way of written submissions by way of written submissions.
5. The Applicants through the firm of Kahuthu & Kahuthu Advocates filed submissions dated 29/5/2024. The Defendants submitted that the Plaintiff has filed a similar suit as this one in Nbi ELC No. 614 of 2009 and an application for stay of execution against the confirmed grant of the Estate of Keziah Wamaitha. The Defendant posited that the issues raised herein have been already ben adjudicated upon and what is remining is distribution of the 1st Defendant's estate. She urged the court to allow the Applications drawn.
6. The Plaintiff acting in person filed his submissions dated 27/11/2023. Denying the plea of res judicata he submitted that the Misc No. 8 of 2016 was never heard and concluded on merit as the same was dismissed for want of prosecution. Copy of the said Ruling delivered on 17/8/2017 is annexed and notably the court excluded parcel Karai/Karai.818 from the schedule of assets of the deceased's estate (the late Keziah Wamaitha Waweru). He levelled fraudulent claims against the 2nd Defendant and their mother in an attempt to defraud him the suit land which he contends is solely his and does not form part of the 1st Defendant's estate.
7. The singular issue for determination is whether the application is merited.
8. The plea of res judicata is anchored under Section 7 of the [Civil Procedure Act](#) as follows;-

“7. Res judicata

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.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. - (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. - (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. - (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons



interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

9. The *Black's Law Dictionary* 10th Edition defines “*res judicata*” as

“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”
10. The essence of this doctrine is that judicial determinations must be final, binding and conclusive. There must be finality to litigation. This position was affirmed by the Supreme Court decision in *John Florence Maritime Services Limited & Another v. Cabinet Secretary, Transport and Infrastructure & 3 Others* [2021] eKLR and for the plea of *res judicata* to succeed, the following ingredients must be satisfied;

“a. There was a former judgment or order which was final;

b. The judgment or order was on merit;

c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d. There had to be between the first and the second action identical parties, subject matter and cause of action.”
11. The above position is reflected in South Africa as well. In the case of *First Rand Bank Limited v. Badenhorst NO & Others* [2023] ZAGPJHC 779 it was observed that the doctrine of *res judicata* is an implement of justice that seeks to protect litigants, and the courts, from repetitive litigation. To determine whether a suit is *res judicata* Q Leech JA held as follows; -

“In my view, the cause of action must be determined from an assessment of the whole of the case in which the final judgment was delivered. The basic ingredients or the factual basis – the necessary, material, central basic facts - that emerge from such an assessment must be compared against the facts distilled from the subsequent case in which the defence of *res judicata* is raised. The defence will find application if those facts are the same, and the other requirements are satisfied.”
12. As already outlined in the statutory provisions and case law above, for the plea of *res judicata* to suffice there must be a final determination touching on the same subject matter involving similar parties. The 1st Defendant averred that there is a final judgment in Nairobi ELC 614 of 2009 but no copies of the proceedings and ensuing Judgment if any, were availed before this Court. A glean of the Complaint dated 3/9/2021 filed herein at para. 14, the respondent concedes that Nairobi ELC No. 614 of 2009 *Stanley Mungai Waweru v Keziah Wamaita Waweru and Susan Nyambura Nungi* was dismissed for want of prosecution. Accordingly, there was no final determination that settled the parties rights in regard to the dispute before it.



13. On the other hand, the Applicant relied on the Grant issued in Kikuyu Succession Cause No. 8 of 2016 to claim *res judicata*. She annexed SNN1 and SNN2 being the copies of the death certificate of their late mother and a confirmed Grant in respect of her estate.
14. It is trite that the jurisdiction of a succession court is distinct from the Environment and Land Court jurisdiction. A succession court is mandated to identify the assets of a deceased person, the beneficiary entitled to them and consequently distribute them as provided for under the *Law of Succession Act*.
15. In the instant case, the cause of action as can be gleaned from the Respondent's plaint, he is challenging the title of the suit land which according to him was irregularly obtained in favor of the 1st Defendant from his late father who lacked capacity to transfer the suit land. In the end, the nature of the succession proceedings and the instant suit cannot therefore be said to *res judicata*,
16. In absence of evidence of a final court determination to that effect, and to inform the court as to who the parties were in Nbi ELC 614 of 2009 and attendant cause of action to be contrasted with the instant one, I find that the claim of *res judicata* is not proven.
17. The upshot of the forgoing is that the application dated 29/11/2021 is unmerited.
18. It is dismissed.
19. The parties being related, I order that each of them bears their own costs.
20. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff/Respondent – present in person

Kahuthu for 1st Defendant/Applicant

Kahuthu for 2nd Defendant / Applicant

Court Assistants – Phyllis/Oliver

