Kinuthia v Kariuki & 2 others (Environment & Land Case 896 of 2012) [2024] KEELC 5813 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5813 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 896 OF 2012

JO MBOYA, J

JULY 23, 2024

BETWEEN

STEPHEN WANYOIKE KINUTHIA ..... PLAINTIFF

AND

CECILIA WAMBUI KARIUKI ..... 1ST DEFENDANT

VIRGINIA WANGUI KARIUKI ..... 2ND DEFENDANT

FREDRICK MBURU KARIUKI ..... 3RD DEFENDANT

RULING

1. The Defendants/Applicants have approached the honourable court vide the Notice of motion application dated 21st May 2024; and which application has been brought pursuant to the provisions of Sections 3A and 20 of the *Civil Procedure Act*; Order 5 Rules 6,7, 15 and 15; Order 9 Rules 9 and 10; and Order 51 Rule 1 of the Civil Procedure Rules 2010 and in respect of which the Applicants have sought for the following reliefs [verbatim]:

    i. That this Honourable Court does grant leave to the firm of Kwew Advocates LLP to come on record for the Defendants/Applicants.

    ii. That this Honourable Court does summon James Ng'ang'a Mucheke, the court process server, for cross-examination in relation to the affidavit sworn on 13th December, 2012.

    iii. That this Honourable Court does set aside the Judgment delivered on 28th July, 2022.

    iv. That this Honourable Court does expunge from the record all the pleadings filed by E. M. Wachira & Co. Advocates, allegedly on behalf of the Defendants/Applicants.

    v. That this Honourable Court does grant leave to the Defendants/Applicants to file their Defence against the suit and other relevant pleadings.

vi. That this Honourable Court does issue any other orders that it may deem fit to grant in the circumstances.

vii. That costs of this Application be in the cause.

2. The instant application is premised on various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of Cecilia Wambui Kariuki, who is the 1st Defendant/Applicant. Instructively, the supporting affidavit is sworn on even date.

3. Upon being served with the subject application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 12th June 2024; and in respect of which the deponent has adverted to various issues, inter-alia that the subject application is barred by the doctrine of res-judicata as well as an abuse of the due process of the court.

4. Furthermore, the deponent of the Replying affidavit has also contended that the issues that are being raised at the foot of the current application were canvassed by the Applicants vide the previous application the 17th January 2024 and thereafter disposed of vide the ruling dated the 7th March 2024. In this regard, the deponent has invited the court to find and hold that the current application constitutes an endeavour by the Applicants to have a second bite on the cherry.

5. Be that as it may, the application came up for hearing on the 23rd July 2024; whereupon the advocates for the respective parties covenanted to canvass and dispose of the application vide oral submissions. Consequently and in this regard, the application beforehand proceeded for hearing on even date.

Parties' Submissions:

a. Applicant's Submisions:

6. The learned counsel for the Applicants' adopted and reiterated the grounds enumerated in the body of the application as well as the contents of the supporting affidavit sworn on the 21st May 2024. Furthermore, learned counsel for the Applicants thereafter raised, highlighted and canvassed four [4] salient issues for consideration by the court.

7. Firstly, learned counsel for the Applicants has submitted that the Applicants herein had previously filed an application dated the 17th January 2024 and which application was heard and disposed of vide ruling rendered on the 7th march 2024. Nevertheless, counsel pointed out that the court found and held that the advocates beforehand had neither sought for nor obtained leave of the court in accordance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 and hence the application dated the 17th January 2024 was struck out.

8. In addition, learned counsel for the Applicants has contended that having found and held that the Applicants advocates were improperly on record, the court therefore did not address the merits of the application wherein same [Applicants] had sought to impeach the default judgment delivered on the 28th July 2022.

9. Secondly, learned counsel for the Applicants has also submitted that subsequent to the delivery of the ruling dated the 7th March 2024, the Applicants herein have since proceeded to and lodged a complaint against the firm of M/s E. M Wachira Advocates at the advocates disciplinary tribunal. In any event, learned counsel added that the complaint before the advocates disciplinary tribunal is pending hearing and determination.

10. Be that as it may, it was contended that the Defendants/Applicants herein have maintained that same [Applicants] did not instruct and/or engage the law firm of M/s E. M Wachira & Co Advocates to act for them in respect of the instant matter.

11. Thirdly, learned counsel for the Applicants has also submitted that even though an affidavit of service was filed by and on behalf of the Applicants herein and wherein the Applicants contended to have served the Defendants, the question of service is disputed and hence the Applicants beseech the court to summon the process server for purposes of cross examination.

12. At any rate, learned counsel has contended that the question of service goes to the root of the jurisdiction of the court and where service is disputed it behooves the court to investigate the veracity of such service.

13. Finally, learned counsel for the Applicants has submitted that the provisions of Article 50[1] of *the Constitution* underscores the necessity to afford a party, the Applicants not excepted an opportunity to be heard before a decision is made. However, in this case, learned counsel for the Applicants has contended that the Applicants have been condemned without being afforded the opportunity to be heard.

14. Arising from the foregoing, Learned Counsel has invited the court to find and hold that the Application beforehand is meritorious and thus ought to be allowed.

15. Other than the foregoing, learned counsel for the Applicants has also submitted that the court is seized and possessed of the inherent jurisdiction to allow the application and essentially set aside the impugn judgment.

b. Respondent's Submissions:

16. The counsel for the Respondent herein cited and referenced the Replying affidavit sworn on the 12th June 2024; and thereafter highlighted three [3] salient and pertinent issues for consideration by the court.

17. First and foremost, learned counsel for the Respondents has submitted that the issues that have been raised and canvassed at the foot of the current application, were dealt with and disposed of by the court in terms of the ruling that was rendered on the 7th March 2024. Consequently, and in this regard, learned counsel for the Respondent has submitted that the raising of the same issues before the court therefore constitutes an abuse of the due process of the court.

18. Secondly, learned counsel for the Respondent has also submitted that the current application which re-agitates inter-alia the question of service of the court process upon the Defendant/Applicants; the veracity of the appointment of M/s E. M Wachira & Co Advocates and finally the setting aside of the judgment delivered on the 28th July 2022 is prohibited by the doctrine of res-judicata.

19. Thirdly, learned counsel for the Respondent has submitted that this court is divested of the requisite jurisdiction to entertain this application. In any event, counsel has added that the current application constitutes a disguised attempt by the Applicants to have the court sit on an appeal over and in respect of own decision.

20. Arising from the foregoing, learned counsel for the Respondent has implored the court to find and hold that the application is devoid and bereft of merits and thus same [application] ought to be dismissed with costs.

Issues for Determination:

21. Having considered and appraised the application beforehand as well as the response thereto and upon consideration of the oral submissions canvassed on behalf of the respective parties, the following issues do crystalize [emerge] and are thus worthy of determination.

    i. Whether the Application before the court canvasses similar issues like the ones which were dealt with beforehand and if so, whether the Application is prohibited by the doctrine of res-judicata.

    ii. Whether the instant application constitutes and/or amounts to abuse of the due process of the court.

Analysis and Determination

Issue Number 1: Whether the application before the court canvasses similar issues like the ones which were dealt with beforehand and if so, whether the application is prohibited by the doctrine of res-judicata.

22. The Applicants herein have filed and mounted the instant application and wherein same [Applicants] have sought for a plethora of reliefs, but most importantly, the Applicants are essentially imploring the court to set aside the judgment which was delivered on the 28th July 2022 and thereafter to grant leave to the Applicants to file a statement of defence in opposition to the Plaintiff's claim herein.

23. Nevertheless, it is important to underscore that the Applicants beforehand had previously filed an application dated the 17th January 2024 and in respect of which the Applicants had sought for similar orders or essentially similar orders. Notably, the Applicants herein had sought for the setting aside of the judgment delivered on the 28th July 2022 and liberty to file a statement of defence.

24. Suffice it to point out that at the foot of the previous application, namely, application dated the 17th January 2024, the Applicants herein had contended that same [Applicants] had not been served with the summons to enter appearance as well as the Plaint filed by the Plaintiff/Respondent.

25. On the other hand, the Applicants herein had also contended that though the firm of M/s E. M Wachira & Co Advocates purported to enter appearance and filed a statement of defence on their behalf, same [Applicants] did not instruct the said firm of advocates.

26. Be that as it may, the court herein entertained the application filed and thereafter rendered a considered ruling which was delivered on the 7th March 2024; and wherein the court made various, albeit numerous findings.

27. To start with, the court found and held that the Applicants herein were duly served with the summons to enter appearance and Plaint and furthermore, that there was an affidavit of service on record which had not been challenged and/or impeached.

28. On the other hand, the court also found and held that the Applicants herein had duly and lawfully instructed the firm of M/s E. M Wachira & Co Advocates, who proceeded to and entered appearance and thereafter filed a statement of defence on behalf of the said Applicants.

29. Further and in addition, the court also found and held that the contention by the Applicants that same [Applicants] had neither retained and/or engaged the firm of M/s E.M Wachira Advocates was a red herring insofar as no complaint had ever been mounted against the said law firm before the advocates disciplinary tribunal.

30. Having made the foregoing findings, the court proceeded to and dismissed the previous application, namely, the application dated the 17th January 2024. For coherence, the basis upon which the Honourable Court dismissed the named application are well highlighted in the body thereof.

31. Notwithstanding the foregoing, the Applicants herein have now reverted to court raising the same issues and thus inviting the court to re-engage with the same, or near similar issues afresh.

32. Be that as it may, it is common ground that a court of law can only entertain and adjudicate upon a set of issues once and for all and where a party, the Applicants not excepted are dissatisfied then same [dissatisfied party] is at liberty to prefer an appeal to the court of appeal or such other established appellate forum.

33. However, a party who has canvassed a particular set of issues before the court cannot revert back to the same court and seek to re-agitate similarly issues. In this regard, the Applicants herein cannot be heard to be asking this very court to set aside and/or impeach the judgment which was delivered on the 28th July 2022, yet the court had previously dealt with a similar application.

34. To my mind, the current application which seeks similar or substantially the same reliefs like the previous application, namely, the application dated the 17th January 2024 is barred and prohibited by the doctrine of res-judicata. [See also the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya].

35. At any rate, the ingredients that underpins the doctrine of res-judicata have been canvassed and elaborated in a plethora of decisions. In this respect, it suffices to cite and reference the decisions of the Supreme Court of Kenya [the apex Court] in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015*) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), where the court held as hereunder;

> 58. 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 case¾to 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.
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> This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads:
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> i. the matter in issue is identical in both suits;
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> ii. the parties in the suit are the same;
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> iii. sameness of the title/claim;
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> iv. concurrence of jurisdiction; and
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> v. finality of the previous decision.
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> 59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus:
>
> > The courts must always be vigilant to guard 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 of a new cause of action which has been resolved by a court of competent jurisdiction.

In the case of Omondi v National Bank of Kenya Limited and others, (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata....."

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a) There is 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 must be between the first and the second action identical parties, subject matter and cause of action.(See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR)

36. Furthermore, the doctrine of res-judicata, both actual and constructive res-judicata, was also highlighted by the Court of Appeal in the case of Kenya Commercial Bank Ltd versus Benjo Amalgamated Ltd [2017]eKLR, where the court stated and held thus;

> Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by 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. In the case of Mburu Kinyua v Gachini Tutu (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in Henderson v Henderson (supra) stated:
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> > "Where a given matter becomes the subject of litigation in, and of 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 in special circumstances) permit the same parties to open the same subject of ligation in respect of a 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 judgment but to every point which properly belonged to the subject of litigation, and

which parties exercising reasonable diligence, might have brought forward at the time" (emphasis added).

37. At any rate, the fact that a party, in this case the Applicants have added additional reliefs, which are cosmetic in nature, do not take out the dispute [Application] outside the parameters of res-judicata.

38. Simply put, the addition of a further reliefs and/or prayer which was hitherto not impleaded does not negate the invocation and application of the doctrine of res-judicata.

39. To this end, it suffices to reference and reiterate the holding in the case of E.T. v Attorney General & another [2012] eKLR, where the court considered a similar situation like the one beforehand.

40. For coherence, the court stated and held thus;

> 57. The courts must always 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 is 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. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ....'

41. Flowing from the foregoing discussion, my answer to issue number one [1] is to the effect that the application beforehand is prohibited by the doctrine of res-judicata and thus the Applicants herein cannot be allowed to escape and/or evade the doctrine, merely by doing cosmetic additions to the current application.

Issue Number 2 Whether the instant Application constitutes and/or amounts to abuse of the due process of the court.

42. Other than the question of res-judicata, which has been highlighted and canvassed in the preceding paragraphs, it is also important to underscore that the Applicants herein have utilized various findings which were highlighted by the court at the foot of the ruling rendered on the 7th March 2024 and are thereafter seeking to circumvent the said findings, albeit through the backdoor, or better still, through the Roof.

43. Notably, whilst addressing the question as to whether or not the Applicants herein were duly served with the summons to enter appearance and plaint, the court pointed out that there was on record an affidavit of service which articulated the manner in which the Applicants were served.

44. Furthermore, the court ventured forward and underscored that even though the Applicants were contending that same had not been served, however, the contents of the affidavit of service had neither been impeached nor impugned whatsoever. In this regard, the court held that the allegations of non-service by the Applicants was fanciful taking into account the contents of the affidavit of service.

45. Be that as it may, the Applicants herein are now pretending to be wiser and are inviting the court to issues summonses to the process server with a view to having same appear before the court for cross examination on the basis of the affidavit of service.

46. In my humble view, what the Applicants herein and their learned counsel are endeavouring to achieve, is to circumvent and defeat the holdings and findings of the court, which endeavour must not only be frowned upon, but must be tamed for the interest of the Rule of Law and General Administration of Justice.

47. Secondly, the court also found and held that the Applicants herein had duly retained and instructed the firm of M/s E. M Wachira & Co Advocates and that the denial by the Applicants to have engaged the said law firm, was intended to mislead the court and essentially to defraud the cause of justice.

48. In any event, it is not lost on the court that there was similarly a clear finding that the contention that the firm of M/s E. M Wachira Advocates had not been retained by the Applicants was erroneous taking into account that no complaint, [if any] had hitherto been lodged with the advocates disciplinary tribunal. [See the provisions of Sections 57,58 and 59 of the *Advocates Act*, Chapter 16, Laws of Kenya].

49. However, plucking a leaf from the decision of the court, the Applicants herein have now mischievously purported to mount a complaint before the advocates disciplinary tribunal and thereafter annexed a copy of [sic] the complaint with a view to imploring the court to turn back on a previous finding.

50. Quite clearly, the Applicants herein are engaging and indulging in lottery with the court and perhaps, endeavouring to dupe the court into falling in a trap by sitting on appeal over and in respect of own decision.

51. In my humble view, the current application and the tactics being deployed by the Applicants, fit within the parameters of what constitutes gross abuse of the due process of the court.

52. To buttress the foregoing exposition of the law, it suffices to adopt and reiterate the holding of the court in the case of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR, where the court stated and held thus;

> 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
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> a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
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> b. Instituting different actions between the same parties simultaneously in different court even though on different grounds.
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> c. Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
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> d. Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

e. Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]

f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-

> "A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."

25. Justice Niki Tobi JSC observed: -[16]

> "That abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two-court process were involved in some gamble a game of chance to get the best in the judicial process."

53. Likewise, the concept of abuse of the due process of the court was also elaborated upon by the Supreme Court of Kenya [the apex court] in the case of *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016)* [2018] KESC 27 (KLR) (19 September 2018) (Ruling), where the court held as hereunder;

> 27. In *Kenya Section of the International Commission of Jurists v Attorney General & 2 Others Criminal Appeal No. 1 of 2012*; [2012]eKLR, this Court, on the issue of abuse of the process of the Court, held inter alia:"The concept of "abuse of the process of the Court" bears no fixed meaning, but has to do with the motives behind the guilty party's actions; and with a perceived attempt to manoeuvre the Court's jurisdiction in a manner incompatible with the goals of justice.
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> The bottom line in a case of abuse of Court process is that, it "appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption..."....Beyond that threshold, lies an unlimited range of conduct by a party that may more clearly point to an instance of abuse of Court process."

54. Without belabouring the point, there is no gainsaying that the Applicants herein cannot be allowed to play games [poker] with the due process of the court and, endeavour to have a second bite on the cherry, either in the manner sought or at all.

55. In a nutshell, my answer to issue number two[2] is to the effect that the subject application constitutes and amounts to an abuse of the due process of the court and must therefore be called out and

frowned upon. [See also the decision in Muchanga Investments Ltd v Safaris Africa [Unlimited] Ltd [2009]eKLR]

Final Disposition:

56. Arising from the discussion, [whose details have been highlighted in the preceding paragraphs], it must have become crystal clear that the application beforehand is not only misconceived and mischievous; but same is also devoid of merits.

57. Consequently and in the premises, the application dated the 21st May 2024 be and is hereby dismissed with costs to the Plaintiff/Respondent.

58. To avoid the filing of a supplementary bill of costs, the costs attendant to the application be and are hereby assessed and certified in the sum of Kes.20, 000/= only to be borne by the Applicants/ Defendants.

59. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 23RD DAY OF JULY 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court assistant

Mr. Kiongera for the Defendants/Applicants.

Mr. Kingára for the Plaintiff/Respondent.