



**Kabogo v Kenya National Highways Authority & 3 others; Chief Land Registrar & 3 others (Interested Parties) (Environment & Land Case 7 of 2021) [2024] KEELC 5512 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5512 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 7 OF 2021**

**OA ANGOTE, J**

**JULY 18, 2024**

**BETWEEN**

**JOHN NGUGI KABOGO ..... PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**JOHN PETER KAMAU RUHANGI ..... 3<sup>RD</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**CABINET SECRETARY MINISTRY OF LANDS ..... INTERESTED PARTY**

**DIRECTOR OF SURVEY ..... INTERESTED PARTY**

**DIRECTOR, EACC ..... INTERESTED PARTY**

**RULING**

1. The 3<sup>rd</sup> Defendant has filed the application dated 30<sup>th</sup> October 2023, under Sections 1A, 1B, 3A & 7 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules* 2010. The 3<sup>rd</sup> Defendant has sought for the following orders:
  - a. That the Amended Plaint in Environment and Land Case No. ELC 7 of 2021 (Formerly Thika ELC Case No. 18 of 2020) be struck out and the suit be consequently dismissed.
  - b. That the costs of this application be granted to the 3<sup>rd</sup> Defendant.



2. The application is based on the grounds on the face of the Motion and the affidavit sworn by the 3<sup>rd</sup> Defendant, John Peter Kamau Ruhangi, who deposed that the subject matter in this suit was equally the subject matter in BPRT Case No. 653 of 2019 and ELC Miscellaneous Application No. E004 of 2020, between the Plaintiff and himself; that the Plaintiff was the 3<sup>rd</sup> Defendant's tenant in the suit property and that it is unheard of for a tenant to challenge the landlord's title.
3. The 3<sup>rd</sup> Defendant deposed that the Tribunal in BPRT Case No. 653 of 2019 rendered a Judgement with respect to the subject matter, Land Reference No. 28177 along Kiambu Road within Nairobi City County, and issued orders that the Plaintiff's temporary structures on the subject matter be removed or demolished and that the Solicitor General of the Republic of Kenya further wrote a letter to the Inspector General of Police advising him to effect the BPRT's orders.
4. The 3<sup>rd</sup> Defendant argued that the Plaintiff's judicial review application in Nairobi Judicial Review Case No. 142 of 2020, which sought to set aside the orders of the Tribunal by the High Court, was dismissed vide the ruling by Hon. Justice John Mativo and that the orders of the Tribunal in BPRT Case No. 653 of 2019 necessitated the filing of contempt of court proceedings in ELC Miscellaneous Application No. E004 of 2020.
5. It is the 3<sup>rd</sup> Defendant's case that in that case, the Plaintiff was found guilty of disobeying the orders issued by the Business Premises Rent Tribunal on 28<sup>th</sup> May 2020; that the Plaintiff was arrested and served four months imprisonment and that this suit is an abuse of the court process as it is one of many suits that have been filed by the Plaintiff.
6. It was deposed that the unsuccessful cases filed by the Plaintiff against the 3<sup>rd</sup> Defendant include BPRT Case No. 520 of 2018, ELC Appeal No. 32 of 2019, High Court Misc. App. 156 of 2020, Milimani Judicial Review 142 of 2020, and Thika ELC Case No. 18 of 2020, which was dismissed for want of territorial jurisdiction.
7. According to the 3<sup>rd</sup> Defendant, the parties to this suit are identical to the previous suits except that the Plaintiff has added more litigants to make it look like a fresh suit and that the Plaintiff has never followed due process in challenging the orders of the Tribunal in BPRT Case No. 653 of 2019 through filing of an appeal at the Environment and Land Court.
8. The Plaintiff opposed the application through a Replying Affidavit dated 17<sup>th</sup> November 2023. He deposed that this suit challenges the validity of the 3<sup>rd</sup> Defendant's title and that this issue was not determined by the Business Premises Rent Tribunal as it had no jurisdiction and was not dealt with in High Court Misc. Application 156 of 2020.
9. He asserts that the issue in BPRT Case No. 653 of 2019 was on payment of rent and the issue of the Plaintiff's committal to civil jail was subject to Civil Appeal No. E151 of 2022, which is pending at the Court of Appeal.
10. The Plaintiff deposed that the decision to file this suit as Thika ELC No. 15 of 2020 was made by her former advocate for her convenience and did not mean that he was forum shopping.
11. The 1<sup>st</sup> Defendant has opposed the application vide Grounds of Opposition dated 6<sup>th</sup> May 2024 in which he averred that the issues raised in this suit differ from the issues raised in BPRT case No. 653 of 2019 and the subsequent cases in ELC Miscellaneous Application No. E004 of 2020 and Judicial Review Application No. 142 of 2020. The 1<sup>st</sup> Defendant asserts that the main issue in this suit is a determination as to the lawful owner of the suit property and whether the suit property is located on a road reserve.



12. The 1<sup>st</sup> Defendant additionally claims that the parties in both the former suit and the instant suit are different and that the court that formerly heard and determined the issue is not competent to try this suit. All the parties filed submissions which I have considered.

### **Analysis and determination**

13. The 3<sup>rd</sup> Defendant has through this application opposed the Plaintiff's suit on two grounds: that the suit is res judicata, and that the Plaintiff as a tenant, is estopped from challenging the 3<sup>rd</sup> Defendant's title and ownership to the suit property.
14. The 3<sup>rd</sup> Defendant has deponed that this suit is similar to multiple other suits which involve the same parties and concern the same subject matter. These suits are BPRT Case No. 520 of 2018, ELC Appeal No. 32 of 2019, High Court Misc. App. 156 of 2020, Milimani Judicial Review 142 of 2020 and Thika ELC Case No. 18 of 2020, which was dismissed for want of territorial jurisdiction.
15. The Plaintiff has opposed the application on the grounds that the issues raised in this suit concern ownership of the suit property and fraud in the acquisition of the same, which has never been raised before the Business Premises Rent Tribunal or any other court and that the Environment and Land Court is the proper forum to bring this suit as it has the mandate to determine the issue of ownership.
16. The legal framework of res judicata is set out in Section 7 of the *Civil Procedure Act* as follows:

“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.”
17. The Supreme Court in the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR delimited the operation of the doctrine of res judicata as follows:

“We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”
18. In the same case, the Supreme Court further laid out the elements to invoke res judicata in a civil suit as follows:

“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).”
19. The Applicant has additionally sought to rely on the dicta of the court in the Court of Appeal case of *Siri Ram Kaura vs M.J.E. Morgan*, CA 71/1960 [1961] EA 462, as quoted in [Maumbwa & 3 others vs Kisemei](#) [2022] eKLR as follows:
- “The general principle is that a party cannot in a subsequent proceedings raise a ground of claim or defence which has been decided on which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties.
- The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...
- The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application. It is therefore not permissible for parties to evade the application of *Res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”
20. The 3<sup>rd</sup> Defendant has annexed a copy of the Judgement issued by the Business Premises Rent Tribunal in Tribunal Case No. 653 of 2019, [John Peter Kamau Ruhango \(Landlord\) vs John Ngugi Kabogo t/a Club Sidai Oleng \(Tenant\)](#).
21. In this matter, the 3<sup>rd</sup> Defendant/Landlord sought to recover possession of the premises from the Plaintiff, on grounds that he had been served with the landlord’s notice dated 29<sup>th</sup> April 2019 which sought to terminate the tenancy with effect from 1<sup>st</sup> July 2019. In its judgement, the BPRT allowed the 3<sup>rd</sup> Defendant’s application for recovery of the suit property from the Plaintiff.
22. The Plaintiff also filed Judicial Review Application No. 142 of 2020 *John Ngugi Kabogo t/a Club Sidai Oleng vs the Business Premises Rent Tribunal and 13 others*. This suit was dismissed by Mativo J through a ruling dated 24<sup>th</sup> September 2020, in which the court allowed the preliminary objection filed by the BPRT and dismissed the suit.
23. The High Court in the above matter found that it lacked jurisdiction over the subject matter of the suit and that the suit ought to have been filed before the Environment and Land Court.



24. Another suit that was filed in relation to the subject matter herein is High Court Civil Misc. Application No. 156 of 2020 *Ben Mbugua Gathuri t/a Auckland Agencies Auctioneers v John Peter Kamau Rubangi and John Ngugi Kabogo t/a Club Sidai Oleng.*
25. In this case, Ben Mbugua Gathuri t/a Auckland Agencies Auctioneers through a Notice of Motion date 3<sup>rd</sup> March 2020, sought an order to direct the Officer Commanding Administration Police, Starehe Division to authorise police to escort him for purposes of breaking all doors and locks of the premises known as Club Sidai Oleng on the suit property.
26. They also sought that the police maintain law and order while the auctioneers remove the proclaimed goods as particularized in the proclamation notice. These orders were granted by the High Court on 20<sup>th</sup> April 2020. The Plaintiff thereafter sought for the setting aside of the said orders vide the Notice of Motion dated 7<sup>th</sup> May 2020. Justice Serگون found no merit in the said application and dismissed the same through the ruling dated 17<sup>th</sup> July 2020.
27. On their part, the 3<sup>rd</sup> Defendant filed ELC Misc Application No. E004 of 2020 John Peter Kamau Ruhangi v John Ngugi Kabogo t/a Club Sidai Oleng, in which it sought that the court find the Plaintiff in contempt for his failure to vacate the suit property.
28. In her ruling dated 22<sup>nd</sup> April 2021, Hon. Lady Justice Komingoi found the application to be merited. The court found the Plaintiff to be in contempt of the orders issued by the Business Premises Rent Tribunal dated 28<sup>th</sup> May 2020. She gave the Plaintiff 60 days from the date of the ruling to purge the said contempt, failure to which the Plaintiff would be fined Kshs. 200,000, and in default, serve four months imprisonment.
29. Having failed to purge the said contemptuous acts, the Plaintiff was sentenced to four months imprisonment on 24<sup>th</sup> March 2022.
30. In the matter before this court, the Plaintiff's claim is that the 3<sup>rd</sup> Defendant obtained the suit property by fraud and misrepresentation; that the suit property is a road reserve and was not converted for private use; that the 3<sup>rd</sup> Defendant irregularly failed to disclose to him that there was a special condition in the grant providing that the property shall only be used for one private dwelling house and that the 3<sup>rd</sup> Defendant was aware that he intended to erect commercial structures on the land.
31. The Plaintiff has sought that this court determines who between the Defendants is the lawful proprietor of the suit property; that in the event that the court finds that the grant was issued fraudulently and unprocedurally, it does order for cancellation of the grant and that in the event the parcel does not belong to the 3<sup>rd</sup> Defendant, the court does declare the Lease executed between him and the 3<sup>rd</sup> Defendant as having been void ab initio.
32. The Plaintiff's claim is that if the grant is revoked, the 3<sup>rd</sup> Defendant be ordered to reimburse him the money paid in rent from 2012 to date and for the cost of erecting the buildings on the suit property.
33. It is evident that this suit is distinct from the suit that was filed before the BPRT. The case before the Tribunal concerned the tenancy relationship between the Plaintiff and the 3<sup>rd</sup> Defendant, and did not concern the ownership of the suit property. In any case, the Tribunal lacked the jurisdiction to determine the issue of ownership of the land, or if indeed the suit property was on riparian land.
34. Similarly, High Court Civil Misc. Application No. 156 of 2020 *Ben Mbugua Gathuri t/a Auckland Agencies Auctioneers v John Peter Kamau Rubangi and John Ngugi Kabogo t/a Club Sidai Oleng,* concerned an application by an auctioneer for police presence in the execution of the orders of the Tribunal, and did not raise the same issues as those in this suit.



35. ELC Misc Application No. E004 of 2020 *John Peter Kamau Rubangi v John Ngugi Kabogo t/a Club Sidai Oleng*, was a contempt application following the failure by the Plaintiff to comply with the Tribunal's orders.
36. Lastly, Judicial Review Application No. 142 of 2020 *John Ngugi Kabogo t/a Club Sidai Oleng v the Business Premises Rent Tribunal and 13 others* was not determined on its merits and was dismissed for want of jurisdiction.
37. On this basis, the 3<sup>rd</sup> Defendant/Applicant has failed to establish that the question of fraud in the acquisition of ownership of land Reference No. 28177 along Kiambu Road within Nairobi City County, was ever dealt with by a court of competent jurisdiction; and that there is a former judgement, determined on merit, in respect to the issue of ownership of the suit property.
38. This suit is consequently not *res judicata*.
39. The 3<sup>rd</sup> Defendant has sought that this court strikes out the Amended Plaintiff on the grounds raised above. Courts have however maintained that the power to strike out pleadings is draconian and should only be exercised where there is abuse of process, where such pleading is scandalous, frivolous or vexatious or where the suit discloses no reasonable cause of action.
40. This court is guided by the Court of Appeal's decision on the issue of striking out pleadings in the case of *Kivanga Estates Limited vs National Bank of Kenya Limited* [2017] eKLR as follows:
- “Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists, as an appellate court, this Court will not interfere with the exercise of the former's discretionary power to strike out the pleading.”
41. Further, in *D.T Dobie Company (K) Ltd vs Muchina & Another* [1980] eKLR, Madan JA stated as follows with respect to summary dismissal of a suit:
- “If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.
- No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
42. In this case, the Plaintiff's suit is that the suit property is a road reserve and was not converted for private use. He asserts that the 3<sup>rd</sup> Defendant failed to disclose to him that there was a special condition in the grant of the suit property providing that the property shall only be used for one private dwelling house; that the 3<sup>rd</sup> Defendant was aware that he intended to erect commercial structures and that the 3<sup>rd</sup> Defendant failed to disclose that the Commissioner of Land's consent to lease the suit property to him was mandatory and was not granted.



43. The Plaintiff has sought the following reliefs from the court, that:
- a. this court determines who between the defendants is the lawful proprietor of the suit property;
  - b. that in the event that the court finds that the grant was issued fraudulently and unprocedurally, it does order for cancellation of the grant; that in the event that the parcel does not belong to the 3<sup>rd</sup> Defendant, the court does declare the leases executed between the plaintiff and the 3<sup>rd</sup> Defendant as having been void ab initio;
  - c. if the grant is revoked, the 3<sup>rd</sup> Defendant be ordered to reimburse the Plaintiff all the amounts paid in rent from 2012 to date and
  - d. the cost of erecting the buildings on the suit property.
44. The Plaintiff has not claimed that he is entitled to the suit property. Indeed, the Plaintiff has not disputed that he entered the suit property as a tenant of the 3<sup>rd</sup> Defendant.
45. This court is satisfied that the Plaintiff raises triable issues which are in the nature of public interest. This suit should therefore proceed to trial and be considered on its merits.
46. For those reasons, the 3<sup>rd</sup> Defendant's application dated 30<sup>th</sup> October 2023 is unmerited, and is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Ngengi for 3<sup>rd</sup> Defendant/Applicant

Mr. Airo holding brief for Mwangi for 1<sup>st</sup> Respondent/Defendant

Court Assistant: Tracy

