



**Mayuki v Siku & another; Wanjema (Intended Defendant) (Environment & Land Case 965 of 2016) [2024] KEELC 7214 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7214 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 965 OF 2016  
OA ANGOTE, J  
OCTOBER 31, 2024**

**BETWEEN**

**ALI HANGAYA MAYUKI ..... PLAINTIFF**

**AND**

**EMMANUEL MAHISU SIKU ..... 1<sup>ST</sup> DEFENDANT**

**WASHINGTON RURIGI KINGORI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MARTIN MUTONGA WANJEMA ..... INTENDED DEFENDANT**

**RULING**

1. The Plaintiff has filed an application dated 16<sup>th</sup> June 2023 under Order 1 Rule 3, Order 8 Rule 3 of the Civil Procedure Rules and Section 3 & 3A of the *Civil Procedure Act*, in which he has sought for the following orders:
  - a. Spent
  - b. That the Honorable Court do grant leave to the Plaintiff to enjoin Martin Mutonga Wanjema as a 3<sup>rd</sup> Defendant herein to the suit as per a copy of the Amended Plaintiff attached to the application herein.
  - c. That on joinder of the intended 3<sup>rd</sup> Defendant Martin Mutonga Wanjema, summons to enter appearance be served upon him.
  - d. That the cost of this application be in the cause.
2. The application is supported by the affidavit sworn by the Plaintiff, Ali Hangaya Mayuki. He averred that he is the registered owner of the suit property, Plot No. 2304 measuring 0.01 Ha, Nasra Estate Nairobi, described in the letter of allotment reference number 8139/1300 in the name of John



Ngumba (deceased) issued on 28<sup>th</sup> November 2007, and that he purchased the plot from his then agent, Jane Adhiambo (Deceased) who resided in Nairobi.

3. The Plaintiff deponed that after the demise of Jane Adhiambo, the 1<sup>st</sup> Defendant got hold his documents and forged a Power of Attorney registered as P/A 64388/1 giving him power to deal with the said plot without his knowledge.
4. It was deponed that the 1<sup>st</sup> Defendant, using the forged power of attorney, entered into a deed of agreement with the 2<sup>nd</sup> Defendant for the sale of the suit property without his authority and that despite a court order, the 2<sup>nd</sup> Defendant entered into a sale agreement dated 17<sup>th</sup> October 2016 with Martin Mutonga Wanjema, the intended 3<sup>rd</sup> Defendant and that the intended 3<sup>rd</sup> Defendant is almost completing construction on the suit property despite being aware of the court orders and the pending suit.
5. The 2<sup>nd</sup> Defendant has opposed the application through a Preliminary Objection dated 26<sup>th</sup> October 2023, in which he averred that the application is res judicata as it offends the provision of Section 7 of the Civil Procedure Act, lacks merit and should be dismissed.

### **Submissions**

6. Counsel for the Plaintiff has, through the Submissions dated 30<sup>th</sup> May 2024, submitted that no application for joinder of the Intended 3<sup>rd</sup> Defendant or of amendment has been refused or allowed by this court, or another court of competent jurisdiction, and that an earlier application dated 22<sup>nd</sup> April 2022 was dismissed for being defective on 8<sup>th</sup> June 2023.
7. Counsel argued that joinder of the 3<sup>rd</sup> Defendant is necessary to enable the court to completely to adjudicate upon and settle all questions in this suit, and that the transfer of the suit property to the 3<sup>rd</sup> Defendant was done to defeat the cause of justice and to place the subject matter away from the Plaintiff through fraudulent transactions.
8. Counsel relied on Order 8 of the Civil Procedure Rules on amendment of pleadings, and the cases of BWK (of unsound mind suing through the next friend CMK) vs Samuel Maina Kung'u, Joseph Mburu Kung'u, Francis Kung'u Gachanja, Jennifer Wanjiru Kung'u & Land Registrar Murang'a (Environment & Land Case 486 of 2017) [2021] KEELC 178 (KLR) (21 December 2021) (Ruling)
9. Counsel for the 2<sup>nd</sup> Defendant submitted that this application is res judicata, as the prayers sought were dealt with on 8<sup>th</sup> June 2023.
10. Counsel submitted that there is no difference between this application and the one dismissed earlier, and that the Plaintiff is trying to re-open an issue that has been conclusively dealt with. Counsel relied on the case of Diocese of Eldoret Trustees (Registered) vs Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR.

### **Analysis and Determination**

11. The following issues are for the determination of this court:
  - a. Whether this application is res judicata.
  - b. Whether this court should allow joinder of the intended Defendant.
  - c. Whether leave to amend the Plaint should be granted.



12. In Kenya, the law on res judicata is found at Section 7 of the *Civil Procedure Act* which provides 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 can 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.”

13. 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 expounded on the concept of res judicata as follows;

“...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”.

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 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.”

14. The doctrine of res judicata applies to applications in the same way it applies to suits. 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.”

15. The rationale behind the doctrine of res judicata is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles: that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was what was held with approval in *Omondi vs National Bank of Kenya Ltd and Others* (2001) EA 177.
16. The 1<sup>st</sup> Defendant has opposed the application on the grounds that this court, in its ruling dated 8<sup>th</sup> June 2023, dismissed an application for joinder of the proposed Defendant. In these circumstances, there is no doubt that the parties are the same and that the jurisdiction of the court is identic. The question that remains is whether the same claims have been raised in both applications and the finality of the previous decision.
17. The ruling of this court delivered on 8<sup>th</sup> June 2023 was pursuant to the Plaintiff’s application dated 26<sup>th</sup> April 2022, brought under Order Rule 15 of the Civil Procedure Rules, in which it sought to enjoin Martin Mutonga Wanjema as a third party to the suit.
18. This court held that a third party is enjoined at the instance of the Defendant and through the procedure set out under Order 1 Rule 15-22 of the Civil Procedure Rules. The court found that the Plaintiff could not enjoin the proposed Third Party as the application was fatally defective.
19. First, the earlier determination of this court was not made on the merits of the application, as the application was found to be faulty. Secondly, the earlier application had been brought under Order 1 Rule 15 of the *Civil Procedure Act*, in respect to third party proceedings.
20. On the other hand, the application before this court has been made under Order 1 Rule 3 on joinder of Defendants, and under Order 8 Rule 3 on amendment of pleadings with leave. This application is therefore distinct from the earlier one. It is consequently not barred by the doctrine of res judicata.
21. The Plaintiff has sought to enjoin Martin Mutonga Wanjema as a Defendant in this suit. The process of joinder of a Defendant is legally guided by Order 1 Rule 3 of the Civil Procedure Rules 2010, which provides:

“All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
22. Order 1 Rule 10(2) of the *Civil Procedure Rules* additionally provides that a court may, either on application made by a party or without, allow joinder of a party whose presence it considers to be necessary in a suit. It states as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”



23. The authority upon which the court may allow the joinder of an intended Defendant is discretionary, which power must be exercised judiciously. The court in *Civicon Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR aptly expounded on how courts are to exercise their discretion in allowing or denying joinder:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

24. The following principles were distilled by the court in *Joseph Njau Kingori vs Robert Maina Chege & 3 Others* [2002] eKLR in considering whether to allow joinder of an intended party:

- “1. . He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”

25. The Plaintiff in this matter has argued that the intended 3<sup>rd</sup> Defendant is a proper party to this suit because during the pendency of this suit, the 2<sup>nd</sup> Defendant purported to transfer ownership of the suit property to Martin Mutonga Wanjema through a sale agreement dated 17<sup>th</sup> October 2016, and that the latter is constructing a structure on the suit property.

26. The Plaintiff has annexed to the application a copy of the sale agreement between the 2<sup>nd</sup> Defendant and the proposed 3<sup>rd</sup> Defendant, which sale agreement is with respect to the suit property.

27. On this basis, this court is persuaded that the joinder of Martin Mutonga Wanjema is necessary because he is a proper party to the suit, and the ultimate orders in this matter would not be enforceable in his absence.

28. In conclusion, this court finds the Plaintiff’s application to be merited and the same is allowed as follows:



- a. Leave be and is hereby granted to the Plaintiff to join Martin Mutonga Wanjema, as a 3<sup>rd</sup> Defendant herein to the suit.
- b. The Amended Plaint to be filed and served within 14 days.
- c. That on joinder of the intended 3<sup>rd</sup> Defendant, Martin Mutonga Wanjema, summons to enter appearance be issued and served upon him.
- d. That the cost of this application to be in the cause.

**DATED, SERVED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31<sup>ST</sup> OCTOBER, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of

Mr. Kahuthu for the Plaintiff

Ms Macharu for 2<sup>nd</sup> Defendant/Respondent

Court Assistant: Tracy

