



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndibithi Farmers Company Ltd v Agricultural Development Corporation & 15 others (Environment & Land Case 84 of 2024)  
[2024] KEELC 13484 (KLR) (Environment and Land) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13484 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 84 OF 2024  
MC OUNDO, J  
NOVEMBER 28, 2024**

**BETWEEN**

**NDIBITHI FARMERS COMPANY LTD ..... PLAINTIFF**

**AND**

**AGRICULTURAL DEVELOPMENT CORPORATION ..... RESPONDENT**

**AND**

**OBADIAN R.M WAINAINA T/A COUNTRY TRAVEL MAPS . 1<sup>ST</sup> DEFENDANT**

**JOEL KIPKEMBOI YEGO T/A CHALAN ASSOCIATES ..... 2<sup>ND</sup> DEFENDANT**

**THOMAS KIPROP KIRUI T/A KIPLAN SURVEYORS ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**THE DIRECTOR OF SURVEY ..... 5<sup>TH</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 6<sup>TH</sup> DEFENDANT**

**HON. KITHURE KINDIKI (ON BEHALF OF MINISTRY OF INTERIOR &  
NATIONAL ADMINISTRATION) ..... 7<sup>TH</sup> DEFENDANT**

**INSPECTOR GENERAL OF POLICE ..... 8<sup>TH</sup> DEFENDANT**

**GENERAL SERVICE COMMANDANT ..... 9<sup>TH</sup> DEFENDANT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 10<sup>TH</sup> DEFENDANT**

**MWANA MWIRERI RIRONI & NAIVASHA FARMERS CO.  
LTD ..... 11<sup>TH</sup> DEFENDANT**

**BENJAMIN KIPKECH KIPKULEI ..... 12<sup>TH</sup> DEFENDANT**



**JOHN KARANJA KAMAU GEOFFREY KAMUMU GITHUKA PETER  
MAINA NDEGWA (SUED AS PURPOTED TRUSTEES OF ‘NEW’ NDABIBI  
MUTHAKWA SELF HELP GROUP) ..... 13<sup>TH</sup> DEFENDANT**

**STEPHEN MWAURA MUNGAI SAMUEL MANG’ATU MASENGO PARRIC  
MWANGI NGARUIYA (SUED AS PURPOTED TRUSTEES OF NEW NDABIBI  
SQUATTERS SELF HELP GROUP) ..... 14<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 15<sup>TH</sup> DEFENDANT**

## **RULING**

1. What is before me for determination is an Amended Notice of Preliminary Objection dated 9<sup>th</sup> October, 2024 wherein the 13<sup>th</sup> Defendant has sought that the instant suit be struck out with costs on the ground that the court lacks jurisdiction to entertain the entire suit against the 13<sup>th</sup> Defendant as similar issues were already heard and determined in Nakuru ELC No. E46 of 2021 by Lady Justice L. Omollo hence offending the provisions of Section 7 of the *Civil Procedure Act*.
2. In Response to the said Preliminary Objection, the Plaintiff vide its Replying Affidavit sworn by Edward Maina on 10<sup>th</sup> October, 2024 argued that the issues raised in the instant suit were not res judicata as alleged by the 13<sup>th</sup> Defendant/Applicant. That in fact, the said previous suit had been dismissed with no order to costs for reason that both the Plaintiff and Counter-Claim lacked merit. That no substantive determination had been made on merit on the issues raised by the parties. That the issues therein had not been solved as they lacked factual information that did not stand to be tested by rules of evidence. Reliance was placed in the decided case of Oraro v Mbaja [2005] eKLR.
3. That since the dismissal of the previous suit in Nakuru ELC No. E46 of 2021 did not involve the determination of the substantive issues in dispute, there had therefore been no final judgment on the merits of the case that could invoke the doctrine of res judicata. That the court had merely dismissed the Plaintiff and the Counter-Claim without addressing the core claims of either party for lack of sufficient evidence.
4. He placed reliance in the decided case of Supper Drill International Limited v Sidian Bank Limited [2021] eKLR to depone that for the doctrine of res judicata to apply, there must be a former suit between the same parties or parties claiming under them, the matter in issue must have been directly and substantially in issue in the former suit and lastly the matter must have been heard and finally decided by a court of competent jurisdiction.
5. He thus deponed that the Preliminary Objection raised by the 13<sup>th</sup> Defendant/Applicant was misconceived, without merit and an attempt to obstruct the just and fair resolution of the matters at hand hence the same should be dismissed with costs.
6. The 1<sup>st</sup> Defendant supported the Preliminary Objection.
7. Despite directions having been issued that the Preliminary Objection be canvassed by way of Written Submissions, only the 13<sup>th</sup> Defendant/Applicant complied. He summarized the factual background of the matter as follows;
8. That the genesis of the suit emanated from dispute of land ownership to parcel No. 1695 measuring 2504 acres which dispute had been discussed on merit in Nauru ELC E46 of 2021 and determined via



- a judgment dated 27<sup>th</sup> July 2023 for which there is a pending appeal in the Nakuru Court of Appeal being No. E008/2024.
9. That it was not in dispute that the cause of action was the same and that the court in the former suit had jurisdiction. That what was in dispute was whether the decision had been final.
  10. The 13<sup>th</sup> Defendant/Applicant framed three (3) issues for determination as follows:
    - i. Whether the amended preliminary objection is based on contested facts.
    - ii. Whether the parties are litigating under the same title.
    - iii. Whether there is a final judgement in the previous suit delivered on merit.
  11. While placing reliance in a combination of decisions in the case of George M W Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR and John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR) as well as the provisions of Section 7 of the *Civil Procedure Act*, the 13<sup>th</sup> Applicant submitted that the suit herein had violated the doctrine of res-judicata.
  12. That it was not disputed that the Plaintiff was claiming L.R No. 1695 in its entirety thus whether or not the said claim had been valid was not in issue but the mere fact that the Plaintiff was claiming the said parcel, which issue had been determined in the former suit, the current suit was res judicata.
  13. On the second issue for determination as to whether the parties were litigating under the same title, he submitted in the affirmative to the effect that the suit herein was substantially the same as the previous suit being Nakuru ELC No. E46 of 2021. That the Plaintiff herein was the 1<sup>st</sup> Defendant therein wherein it had filed a counterclaim seeking a declaration that it was the owner of property LR. No. 1695 the subject matter of the instant suit.
  14. His reliance was hinged in the decided case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Bidii Kenya Limited [2016] KESC 6 (KLR) where the court had approved the decision in ET v Attorney-General & another [2012] eKLR, to submit that the Plaintiff in the present suit could not defeat the defence of res judicata by introducing 1<sup>st</sup> to 16<sup>th</sup> Defendants save for the 13<sup>th</sup> Defendant who had been the Plaintiff in Nakuru ELC No. E46 of 2021. Further reliance was placed in a combination of decisions in the case of George M W Omondi's case (supra) and Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & Land Registrar, Uasin Gishu County [2020] KEHC 8370 (KLR).
  15. Reliance was placed on the provisions of explanation 6 of Section 7 of the *Civil Procedure Act* to submit that it must be deemed that when the Plaintiff herein counterclaimed against the 13<sup>th</sup> Defendant in Nakuru ELC No. E46 of 2021 seeking the determination of ownership in LR No. 1695 and nullification of the subdivisions, it had been litigating for a private right and litigating against all persons interested. Further reliance was placed in the decided case of Sawe (Suing as the personal representative of Chuma Arap Bet) v Chumo & another (Environment & Land Petition E005 of 2024) [2024] KEELC 4835 (KLR) to submit that the Plaintiff was just trying to bring new litigants so as to frame the said suit as a novel matter in order to circumvent the doctrine of res-judicata. That the cosmetic shift that had been brought upon by adding 15 more parties to the present suit did not change the remedy that the Plaintiff was seeking since they could as well have joined the 15 parties in Nakuru ELC No. E46 of 2021.
  16. On the third issue for determination as to whether the judgement that had been delivered in the previous suit had been on merit and final, he submitted in the affirmative to the effect that via a



counterclaim in Nakuru ELC No. E46 of 2021, the Plaintiff herein had substantively sought the same prayers as those in the previous suit. That the said Nakuru ELC No. E46 of 2021 had been determined on merit as the court had analyzed all the issues that had arisen therein basing its decision on merits, after having heard and assessed the evidence, to the effect that none of the parties had proved their case.

17. That in any case, the 13<sup>th</sup> Defendant had appreciated the finality of the judgement in Nakuru ELC No. E46 of 2021 and preferred an appeal against the said judgement being Nakuru COACA/E008/2024 which was still pending in court. That there was nothing that had stopped the Plaintiff from filing a cross appeal seeking that the subdivisions of the property LR. No. 1695 be declared illegal.
18. He thus submitted that the court of appeal reserved the jurisdiction to deal with all issues raised in these proceedings that were ancillary to the ownership of LR. No.1695. That subsequently, there was a real danger of a conflict in the decision by the Court of Appeal and this court on the ownership of LR. No.1695 and more particularly whether or not it was wholly owned by the Plaintiff. It was thus his submission that public policy militated against the instant proceedings hence it was in the interest of justice and good order that the instant suit be struck out with costs. That the Plaintiff's suit was an abuse of the court process as the court had already pronounced itself on the issues that it was seeking to canvass herein.

### **Determination.**

19. Despite directions having been issued that the Preliminary Objection be canvassed by way of Written Submissions, only the 13<sup>th</sup> Defendant/Applicant complied.
20. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that where parties fail to file submissions on an application as ordered by the court, it is deemed that they have failed to prosecute the application. The filing of submissions having been ordered, the failure by the parties to exercise the leave granted to them to file written submissions clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness, for which the Preliminary Objection would be deemed as unopposed. However since it is trite that not all undefended matters should be allowed as prayed, I shall exercise my discretion and proceed to determine the Preliminary Objection herein filed on its merit.
21. I have considered the Preliminary Objection wherein the 13<sup>th</sup> Respondent argued that the court lacks jurisdiction to entertain the entire suit against him for reason that the instant suit was Res Judicata Nakuru ELC No. E46 of 2021 wherein similar issues had been heard and determined via a Judgment of 27<sup>th</sup> July 2023 for which he had appreciated the finality of the judgment wherein he had preferred an appeal against it to the Court of Appeal sitting in Nakuru vide COACA/E008/2024, which Appeal was still pending hearing and determination.
22. That the Plaintiff was claiming L.R No. 1695 in its entirety which issue had been determined in the former suit. That the suit herein was substantially the same as the previous suit being Nakuru ELC No. E46 of 2021 wherein the Plaintiff in the present suit had been the 1<sup>st</sup> Defendant in the previous suit wherein it had filed a counterclaim against the 13<sup>th</sup> Defendant seeking a declaration that it was the owner of property LR. No. 1695 and a nullification of the subdivisions. That previously it had been litigating for a private right and against all persons interested. That the Plaintiff herein had substantively sought the same prayers as those in the previous suit. That the said Nakuru ELC No. E46 of 2021 had been determined on merit after the court had heard and assessed the evidence therein, where it had



- arrived at its decision that that none of the parties had proved their case. That there had been a final determination in the previous suit.
23. This said and done, subsequently, I find two issues arising for my determination to wit;
- i. Whether the instant suit is Res Judicata.
  - ii. Whether a dismissal is an order of the court.
24. The doctrine of Res Judicata is enshrined 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. The rationale for the doctrine of res judicata was discussed by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR wherein it had observed as follows; -
- “The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
26. I have keenly studied the judgment dated 27<sup>th</sup> July 2023 in the impugned Nakuru ELC No. E46 of 2021 reported as *Kipkulei v Ndibithi Farmers Co. Ltd & 3 others* (Environment & Land Case E46 of 2021) [2023] KEELC 19001 (KLR) (27 July 2023) (Judgment)
27. The parties therein had been Benjamin Kipkech Kipkulei vs Ndibithi Farmers Co. Ltd, Edward Maina, Jane Maina and Moses Gakinya wherein the Plaintiff had sued the Defendants for damages for trespass and malicious damage to his parcels of land known as LR No. 1695/12, LR No. 1695/13, LR No. 1695/14, LR No. 1695/15, LR No.1695/16 and LR No. 1695/17 and had sought for permanent injunction against them from interfering with his use and enjoyment of the suit properties.
28. In response, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants filed their defence and counterclaim wherein 1<sup>st</sup> Defendant sought a declaratory order that it was the lawful and registered owner of parcel of land known as LR No. 1695 and that the subdivision of LR No. 1695 and issuance of the title deeds to the land parcels referred to as LR No. 1695/12, LR No. 1695/13, LR No. 1695/14, LR No. 1695/15, LR No. 1695/16 and LR No. 1695/17 was illegal improper and fraudulent.
29. After a full trial, and consideration of the evidence adduced therein, the court found that the Suit and Counterclaim lacked merit and proceeded to dismiss them with no order as to costs.
30. In the current suit, the parties herein are Ndibithi Farmers Company Ltd vs Agricultural Development Corporation and 15 others wherein the Plaintiffs have sought amongst other orders, declaratory orders that parcel No. 1695 is its property to the exclusion of the 1<sup>st</sup>, 12<sup>th</sup> and 13<sup>th</sup> Defendants (the Plaintiff



in the former suit), that further the court be pleased to declare any transactions on parcel No. 1695 carried on by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants on behalf of the 1<sup>st</sup>, 12<sup>th</sup> and 13<sup>th</sup> Defendants was null and void ab initio.

31. In the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR the Supreme Court at paragraph 86 rendered itself on the threshold for proving the applicability of the doctrine of Res Judicata by stating as follows; -

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. 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.”

32. In the present suit, it has not been contested that there had been judgment rendered by a competent Court in a previous suit, being Nakuru ELC No. E46 of 2021 which in essence had found that both the Suit and Counterclaim lacked merit wherein it had proceeded to dismiss them with no order as to costs. It is also not in contestation that both the former suit and the current suit had been between the same parties competing over the same subject suit parcels of land.

33. Indeed in the case of *Omondi Vs National Bank of Kenya Limited and Others* (2001) EA 177 the court held as follows:

‘.....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 vs 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

34. This sentiment was upheld in the persuasive decision in the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR, where Odunga J (as he then was) at paragraph 42 observed as follows; -

“However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the *Civil Procedure Act*, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.”



35. Now there having been a determination in the previous suit wherein both the Suit and Counterclaim had been dismissed for lack of merit in a Judgment which had been rendered by a court having jurisdiction in Nakuru ELC No. E46 of 2021, the said decision has not been overturned or set aside on Appeal and/or review.
36. Having found that there had been an application of the judicial mind and a final adjudication made in the previous matter, wherein the suit and counter claim were dismissed, the subsequent suit herein would thus operate as res judicata pursuant to the provisions of Section 7 *Civil Procedure Act*, that emphasizes that the matter ought to have been heard and finally decided.
37. The dismissal of the former suit having amounted to a judgment, and being mindful of attributes of the decision in the Independent Electoral & Boundaries Commission (supra), I find and hold that the Plaintiff herein cannot thus prosecute a fresh suit in respect of the same issues simply by adding parties to the previous parties wherein it has pegged its claim under the same title as the parties in the earlier suit. Litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and the procedure to be adhered to.
38. The Application on the Amended Notice of Preliminary Objection dated 9<sup>th</sup> October, 2024 herein succeeds for which the Plaintiffs' suit vide its Plaint dated 7<sup>th</sup> November 2023, is incompetent and bad in law and the same is dismissed with costs for being Res judicata Nakuru ELC No. E46 of 2021. This said and done, the interim order of status quo issued in the ruling of 25<sup>th</sup> July 2024 is herein set aside suo motto.

The 13<sup>th</sup> Defendant shall have costs of the application.

**DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

