



Kanyua & 3 others v Kamendi (Environmental and Land Originating Summons E002 of 2023) [2024] KEELC 13299 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023
CK YANO, J
NOVEMBER 20, 2024**

BETWEEN

**PHILIPHINA KANYUA 1ST APPLICANT
PAULINA KABURU 2ND APPLICANT
CATHERINE KABIRU 3RD APPLICANT
JEDIDA KANGARIA 4TH APPLICANT**

AND

MOSES MURIITHI KAMENDI RESPONDENT

RULING

1. The subject of this ruling is a Notice of Motion application dated 19th April, 2024. The application is said to be brought under Section 7, 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, Section 70, 73, 75 and 78 of the *Land Registration Act*, 2012 and all other enabling provisions of the law. The applicant is seeking the following orders: -
 1. That the instant suit and/or application is Res Judicata and filed contrary to Section 7 of the *Civil Procedure Act*, 2010 and therefore the Honourable Court lacks jurisdiction and the same should be dismissed in limine.
 2. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to order the Executive Officer of Meru Law Courts to avail the file in High Court In Meru Civil Case No. 61 OF 1993 from the Meru Law Court’s archives.
 3. That pending the hearing and determination of this application inter-parties, this Honourable Court be pleased to grant an Order removing any illegal and/or unlawful injunctions, inhibitions, cautions and/or restrictions placed upon all that property known as THARAKA/TUNYAI “A”/777.



4. That costs of this application be provided for.
2. The application is premised on the grounds in the face of the motion and supported by the affidavit of Moses Muriithi Kamundi, the applicant, sworn on 19th April, 2024. It is the applicant's contention that the application and the suit is Res Judicata and filed contrary to Section 7 of the Civil Procedure Act and therefore the court lacks jurisdiction for the reason that the matter has since been heard and determined in Meru High Court Civil Case No. 61 OF 1993. That by a consent agreement dated 24th March, 1993 and filed in court on 26th March, 1993 and adopted as a judgment of the court on 15th April, 1993, the matter was conclusively determined and the case was marked as closed. The applicant states that the respondents have unlawfully and without any colour of right reinstated the same suit herein, between the same parties either directly or indirectly by virtue of consanguinity and/or family ties, and litigating over the same suit premises being Tharaka/tunyai 'a'/777 which was and is the subject matter of the suit herein.
3. The applicant states that he stands to be vexed twice over the same matter, adding that no court should 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. That this court lacks jurisdiction and must down its tools forthwith.
4. In his supporting affidavit, the applicant avers that he is the registered owner of the property known as Tharaka/tunyai 'a'/777 and the Title Deed was issued on 15th November, 1993 by the court sitting in Meru High Court Civil Case No. 61 of 1993. The applicant has annexed copies of the Title Deed and Green Card marked "MMK1 (a) & (b), a copy of a consent Agreement dated 24th March, 1993 ("MMK2") and copy of proceedings in Meru High Court Civil No. 61 of 1993 marked "MMK4".
5. The applicant avers that the original parties in Meru High Court Civil Case No. 61 of 1993 was his late father, Stephen Kamundi and the respondents' father, the late Runcwe Ncundu Maiga alias Rugwe Ncundu. The applicant states that he took over that case after his father passed on. The applicant avers that he filed a Notice of Preliminary Objection dated 5th October, 2023 which has not been canvassed, necessitating the filing of this application. A copy of that preliminary objection has been annexed and marked "MMK5". The applicant states that this is a court of equity and that he who comes to a court of equity must come with clean hands, adding that equity begets equity and that every suit and/or litigation must come to an end and that there is a finality of every matter such as this before court. The applicant avers that he has been subjected to anguish and mental distress.
6. The respondents filed grounds of opposition dated 24th April, 2024 as follows:
 1. That the instant suit is not Res Judicata and the court has jurisdiction to deal with the dispute herein.
 2. That Meru High Court No. 61 of 1991 as can be seen from the applicants own annexures MMK2 was between different parties, different cause of action and different capacities from the one herein hence this suit cannot be Res Judicata.
 3. That the parties herein litigate under different title and the issues are substantially different from the issues in Meru HCCC No. 61 of 1993.
 4. That there are no illegal and/or unlawful injunctions, inhibitions, cautions and/or restrictions on the suit land, as the caution therein was properly registered by the Registrar on being



satisfied that the cautioner had sufficient interest and that the inhibition and the injunction was issued by this court on 29/2/2024.

5. That the application is a replica of the defendant's Preliminary Objection dated 5/10/2023 and filed in court on the 9/10/2023 which the applicant has failed to prosecute and the filing of this application is an abuse of the court process.
7. The application was canvassed by way of written submissions which were duly filed by both parties.
8. The Applicant submitted that a preliminary Objection must be on a point of Law and he relied on the case of Mukisa Biscuit Manufacturing Co. Ltd. Vs. West End Distributors Ltd. (1969) EA 696 at page 700 paragraphs D-F.
9. The Applicant further relied on Section 7 of the *Civil Procedure Act* Cap 21 and the case of Meshack Agendo Omondi Vs. Eldoret Municipal Council & Another, Industrial Court (Eldoret) Cause 15(N)of 2010. The Applicant also referred to the Black's Law Dictionary (10th Edition) which outlines the three essential elements of establishing whether a matter is res judicata to wit; an earlier decision on the issue; a final judgment on the merits; and the involvement of same parties or parties in privity with the original parties. The applicant also relied on the case of Lawi Duda & Others Vs. Bamburi Cement Limited which cited an earlier decision in *Anaj Warehousing Ltd. Vs. National Bank of Kenya Ltd. & Another, Mombasa HCCC No. 311 of 2000*.
10. The Applicant submitted that the matter for determination by the Court is whether the present suit and/or application dated 14th December, 2022 is res judicata of the previously filed suit in light of Meru High Court in Meru Civil Case No. 61 of 1993. The Applicant relied on the cases of Joshua Ngatu Vs. Jane Mpinda & 3 Others [2019] eKLR cited in approval the case of Nguruman Ltd. Vs. Jan Bande Nielssen & Another (2017) eKLR; DSV Silo Vs. Owners of Sennar (1985) 2 All ER 104 as cited in Bernard Mugi Ndegwa Vs. James Nderitu Githae & 2 Others (2010) eKLR, Henderson Vs. Henderson (1843) 67 ER 313 and ET Vs. Attorney General & Another (2012) eKLR.
11. It was submitted that the matter before court has been deliberated fully and judicial mind was exercised and it came to a logical final decision. That there are several tests that are subjected to matters for them to qualify as res judicata as outlined in Bernard Mugo Ndegwa Vs. James Githae & 2 Others [2010] ECLR.
12. The Applicant referred to his replying affidavit dated the 5th October, 2023 and stated that is the cradle of the matter which originates from a series of transactions between his late father, Stephen Kamendi and the late Runcwe Ncundu Maiga Alias Rugwe Ncundu, the respondents' biological father who was the legal and beneficial owner of the property known as Tharaka/Tunyai 'A'/777. That the Green Card that has been annexed and marked as "MMK2" clearly depicts the original owner as at 13th January, 1993 as Runcwe Ncundu Maiga. He stated that the respondents' late father as vendor agreed to sell and the applicant's late father agreed to buy the land vide a series of transactions. That the transactions were duly executed by an advocate and acknowledgments issued. He referred to the agreements and acknowledgments marked "MMK3 (a-i)".
13. It was submitted that it came to light that the Vendor was selling the same parcel illegally to various other parties concurrently. That this then ensued the proceedings in the High Court in Meru Civil Case No. 61 of 1993. The Applicant submitted that the High Court was then fettered with the jurisdiction to handle land matters comprehensively.
14. The Applicant further submitted that he took over the matter when his late father Stephen Kamendi passed on as a legal and personal Representative of his estate and that by consent agreement dated 24th



March, 1993 and filed in court on the 26th March, 1993, the same was adopted as a judgment of the Court on the 15th April, 1993 when the matter was conclusively determined and the case was marked as closed.

15. It is the Applicant's submission that he has shown and proven a direct line of consanguinity (1st Class Family Affinity) between the litigants herein. That the Applicant is bound by his father and the Respondents bound by theirs, thereby showing that the parties then and now herein are actually one and the same persons in regard to the law and before Court.
16. The Applicant submitted that he has proven that the same suit premises in contention before court is the same being Court Tharaka/Tunyai 'A'/777 and so is the measurements comprised of Five Decimal Three Eight (5.38) Hectares.
17. The Applicant placed emphasis on the consent judgment in its terms which he highlighted. The Applicant submitted that the consent judgment dated 24th March, 1993 took effect on all four and the same stands to date. He urged the Court to find that all litigation must come to an end and that it must come to its logical conclusion. The Applicant relied on the case of Ukay Estate Ltd. & Another Vs. Shah Hirji Manek Ltd & 2 Others [2006]eKLR.
18. The Applicant submitted that the Court will note the suit or issue in which this matter is 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. That the suit is Res Judicata. The Applicant submitted that he has proven his application to the required standard and has met the threshold of Res Judicata.
19. On their part, the respondents cited Section 7 of the *Civil Procedure Act* and the definition of Res Judicata in the Blacks' Law Dictionary. They relied on the case of Independent and Electoral Boundaries Commission Vs. Maina Kiai & 5 Others [2017] eKLR. The respondents submitted that the issue at hand is that of adverse possession of LR. No. Tharaka/tunyai 'a'/777, while that which was litigated in 1993 was the transfer of the land to the plaintiff and that that makes it clear that the issues or subject matters are different in the two suits. That the parties to the two suits are also different. The respondents submitted that the claimants herein do not claim the land as representatives of Runcwe Nchundu who was the defendant in 1993 suit, but have brought the proceedings on their own rights as adverse possessors of the land.
20. The respondents further submitted that the parties were litigating under different title. It was submitted that the parties were litigating on the same title but under different cause of action. That in 1993 the case litigated on was of the land parcel No. Tharaka/Tunyai 'A'/777 based on contract of sale between the parties where it was transferred to the plaintiff, whereas the current suit cause of action is on adverse possession by the claimants. That that constitutes a completely different cause of action from the previous proceedings.
21. The respondents submitted that although the 1993 case was heard and finally determined and the case was closed, the issue of adverse possession was not for consideration. That the issue for adverse possession was never determined by a competent court at all. That the consideration now is whether the claimants have acquired title to the suit land by adverse possession. The respondents relied on the case of Dorcas Muthoni & 2 Others Vs. Michael Ileri Ngari [2016] EKLR; Films Rover International & Others Vs. Cannon Films Sales Ltd (1986)3 ALL ER 772; Joel Kipkurui Arap Koech Vs. Alice Wambui Magandu & 3 Others [2018]eKLR and Japhet Kaimenyi M'Ndatho Vs. M'Ndatho M'Mbwiria



(2012)eKLR and submitted that the orders of injunctions and inhibition were properly issued by the court. The respondents also relied on the case of Pacific Frontier Seas Ltd. Vs. Kyengo & Another (2022) KECA 396 (KLR) and Muchanga Investments Limited Vs. Safaris Unlimited Africa Ltd & 2 Others Civil Appeal No. 25 of 2002 (2009) eKLR 229.

22. The respondents submitted that the instant application is a delaying tactic made in bad faith and is misconceived, incompetent, lacks merit and is an abuse of the court process and ought to be dismissed with costs.

Analysis and Determination

23. I have carefully considered the application, the response and the submissions filed by the respective parties. The issue for determination is whether the suit is resjudicata.

24. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission Vs. Maina Kiai & 5 Others [2017]eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

25. In the case of Henderson Vs. Henderson (1843) 67 ER 313 res-judicata was described 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 litigations 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 pleas 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.”

26. Similarly, in the case of Attorney General & Another Vs. ET (2012) eKLR, where it was held that:

“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 form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi NBK & 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.”

27. In that case, the court quoted Kuloba J. in the case of Njanju Vs. Wambugu and Another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: “if parties were allowed to go on litigating forever of the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he come to court, then I do not see the use of doctrine of res judicata...”
28. In this case, the applicant avers that the Respondents have unlawfully and without any colour of right reinstated the same suit herein. That the parties are same either directly or indirectly by virtue of consanguinity and/or family ties. That the original parties in the High Court in Meru Civil Case No. 61 of 1993 are the applicant’s late father Stephen Kamendi and the respondents’ late father Runcwe Ncundu Maiga Alias Rugwe Ncundu.
29. The respondents however submitted that the instant suit is not res judicata and that the court has jurisdiction to deal with the dispute herein. That the previous case was between different parties over a different cause of action and different capacities from the one herein, hence the suit cannot be res judicata. That the parties herein litigate under different title and the issues are substantially different from the issues in Meru HCC No. 61 of 1993.
30. For me to determine if the current suit is res judicata, the only two questions that I have to ask myself are: firstly, whether the issues which were before the court previously in Meru High Court Civil Case No. 61 of 1993 are the same as those in the present suit; secondly, whether there was a final determination on those issues by the previous court.
31. There is no dispute that the subject matter in both the previous suit and the instant suit is the same, that is, Land Parcel No. Tharaka/Tunyai ‘A’/777. The applicant has exhibited a consent agreement in which the parties in Meru High Court Civil Case No. 61 of 1991 were Moses Muriithi Kamundi (Suing as a legal and personal representative of the Estate of Stephen Kamendi (deceased) Vs. Runcwe Ncundu Maiga alias Rugwe Nchundu. The said document also referred to an unnamed third party. The consent agreement inter alia, provided for the transfer of the suit land and payment of some costs. The current suit has however, been filed by the respondents herein who are claiming title to the suit land by way of adverse possession. It goes without saying that the issue at hand which is a claim of adverse possession is different with the issue of transfer that was litigated in the previous suit. The parties to the two suits are also different. Whereas the cause of action in the current suit is on adverse possession, it is clear from the applicant’s own averments that the cause of action in the previous suit was based on a contract of sale. Moreover, from the scanty proceedings availed in Meru High Court Civil Case No. 61 of 1993, this court cannot determine whether the issues therein were heard and determined. More information in the form of evidence is required to decide whether the case is res judicata or not.
32. By reason of the foregoing, I find that the application dated 19th April, 2024 lacks merit and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF NOVEMBER, 2024

In the presence of:

Court Assistant – Mwangi

Ms. Gumato for Respondents

Njanja for Applicant



**C.K YANO,
JUDGE**

