



Too v County Land Registrar Kakamega; Njuge (Interested Party) (Environment & Land Case E017 of 2023) [2025] KEELC 520 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELC 520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E017 OF 2023
A NYUKURI, J
FEBRUARY 13, 2025**

BETWEEN

DAVID KIPROTICH ARAP TOO PLAINTIFF

AND

COUNTY LAND REGISTRAR KAKAMEGA DEFENDANT

AND

RICHARD KARUGU NJUGE INTERESTED PARTY

RULING

Introduction

1. Before court is a Notice of Motion dated 16th January, 2024 filed by the defendant seeking the following orders;
 - a. That the plaintiff's suit be struck out on account of being Res judicata; and
 - b. That the costs of this application and suit be awarded to the defendant/applicant.
2. The application is premised on the Supporting Affidavit filed by Nelson O. Odhiambo. The applicant's case is that the suit herein is res judicata Eldoret HCC Misc. Application No. 88 of 2006; Kisumu Civil Appeal Application No. 254 of 2007; Eldoret ELC No. 964 of 2012 and Kakamega ELC No. 245 of 2016. He stated that on 29th November, 2016, the plaintiff filed Kakamega ELC No. 245 of 2016 with a similar claim and the same was struck out for being res judicata and that the plaintiff was described by the court in that case as a vexatious litigant. Further that the plaintiff was wasting court's time. He also stated that the suit herein is an abuse of the court process and this court lacks jurisdiction to entertain the same.



3. The applicant also averred that in Eldoret HCC no. 91 of 1978 eviction was issued against the plaintiff regarding the suit property known as plot No. 44. That in ELC No. 245 of 2016, the plaintiff filed suit as an employee of the Interested Party, but in this suit, he has sued the Interested Party. He attached warrants of eviction in Eldoret HCC Case No. 91 of 1978 and plaint and orders in Kakamega ELC No. 245 of 2016.
4. The application is opposed. The plaintiff filed replying affidavit dated 21st October, 2024 opposing the application. He stated that the application was fatally defective, incapable of being granted and ought to be struck out. According to the plaintiff, this suit is not res judicata as the plaintiff had not filed any other suit in any other court seeking similar reliefs. He stated that the issues in the present suit are new issues and have never arisen in other suits as the defendant has never caused removal of cautions placed on the suit property until the time of filing this suit.
5. The respondent filed submissions dated 21st October, 2024. Counsel for the applicant relied on Section 7 of the *Civil Procedure Act* and submitted that the application before court was frivolous and misguided and ought to be dismissed as the applicant has failed to inform court if the issues in the former suits are similar to the issues in the instant suit.
6. Counsel argued that the exhibits provided show that the defendants were different from the current defendant and that orders issued in one of the suits were eviction orders which are different from the orders sought herein.
7. Reliance was placed on the case of Estate of Riungu Nkuuri (Deceased)(2021) e KLR among other authorities on the elements to be proved in an application for res judicata.

Analysis and determination

8. I have carefully considered the application, response and submissions. The only issue that arise for determination is whether this suit is res judicata.
9. The Black's Law Dictionary 11th Edition defines Res judicata as follows;

“Latin” a thing adjudicated”. An issue that has been definitely settled by Judicial decisions. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been- but was not-raised in the first suit. The three essential elements are; 1) an earlier decision on the issue; 2) a final judgment on the merits and 3) the involvement of the same parties or parties in privity with the original parties.”

10. Section 7 of the *Civil Procedure Act* provides for the doctrine of Res Judicata as follows;

Res judicata

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.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.



Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

11. Therefore, a court is by law barred from adjudicating over an issue between the same parties which has already been determined on merit with finality by a competent court. To prove *res judicata*, the applicant must demonstrate that the issue in the current suit was directly and substantially in issue in the similar suit; that the former suit was between the same parties or their privies; that those parties were litigating under the same title; that the issue was heard and finally determined in the former suit; and that the court that heard and determined the former suit/ issue was competent to try the subsequent suit or the issue in which the issue was raised.

12. In the case of *The Independent Electoral and Boundaries Commission –vs- Maina Kiai & 5 Others* (2017) e KLR, the Court of Appeal held as follows;

“For the law of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied as they were rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the similar suit.
- b. That the 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 issue in which the issue was raised.”

11. In the above case, the Court of Appeal stated the purpose of the doctrine of *Res Judicata* as follows;

The role of the 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 Commonsensical Protection against Wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by 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 noisome nuisance and brought



to disrepute or calumny. The foundations of res judicata this rest in the public interest for swift, sure and certain justice.

11. A defence of res judicata will still be upheld if new issues are raised in the subsequent suit if those issues properly belonged to the subject matter in the former suit and ought to have been raised in the former suit on exercise of due diligence, even if the same were not raised due to mistake, inadvertence or negligence of the parties (see the case of John Florence Maritime Services Limited & Another –vs- Cabinet Secretary Transport for infrastructure and 3 others (Petition 17 of 2015)(2021) K ESC 39 KLR (CIV) (6 August 2021) Judgement).
12. In the instant case, the plaintiff herein has filed suit claiming ownership of the parcel of land known as Kakamega/Seregoit/44. He accused the defence of removing a caution on his title, cancelling his registration and registering the same in the name of Beverly Wamburi King’ori. He seeks declaration that he is the legitimate owner of the suit property; that the removal of caution and deletion of his name in the register is illegal. He also sought rectification of the register to restore his name as owner of the suit property and a permanent injunction to restrain the defendant from dealing with the suit property to his detriment. On his part, the defendant alleged in his defence that the removal of caution and registration done regarding the suit property complied with the law.
13. In the application before court, the defendant contends that this suit is res judicata in view of the decision in Eldoret HCC No. 91 of 1978; Kiprotich Arap Kiptoo –vs- Wilson Wambori, which shows that the plaintiff was evicted from the suit property. The defendant also attached a plaint in Kakamega ELC No. 245 of 2016: David Kiprotich Arap Too –vs- Stephen Mburu Njoroge wherein the plaintiff herein stated that he is proprietor of the suit property and that the defendant had trespassed on his land. He sought eviction orders. In that suit the plaintiff was declared a vexatious litigant and the court struck out the suit for being res judicata in view of the decision in Eldoret HCC Misc. 88 of 2006, Kisumu Civil Appeal no. 254 of 2007 and Eldoret ELC 964 of 2012.
14. It is clear from the attached orders and pleadings that the question as to whether the plaintiff is the lawful owner of the suit property herein has been determined with finality by a competent court and the court was emphatic that the land in dispute herein does not belong to the plaintiff herein and he should be evicted. The plaintiff has not denied the fact that the suit property in the former suits and in the current suit is parcel No Kakamega/ Sergioit/44. He has also not contested the fact that in all his former suits, he claimed ownership of the suit property and the courts made a determination on merit on his claims.
15. The plaintiff has argued that the parties are different and that he is now seeking removal of caution and declaratory orders which are different orders from orders sought in the former suit. In my view, those are cosmetic changes which are aimed at circumventing the doctrine of res judicata because, his complaint is the same as that made in suits filed in 1978 and 2016; which is that he is the owner of the suit property and no one should interfere with it. Considering the annexures attached to the instant application, it is clear that the plaintiff’s claim of ownership of the suit property was adjudicated upon and merit determination made by a competent court that he is not the owner of the suit property. Therefore, even if there is a new “trespasser” on the suit property, one he has never sued before, or if there is any other dealing registered in respect of the suit property by the defendant or any other person, that will not change the fact that it is settled by judicial pronouncement that parcel No. Kakamega/ Sergioit/44 does not belong to plaintiff. Hence seeking new reliefs does not mean that the plaintiff’s claim has not been determined. Therefore, he cannot lawfully come to court seeking any remedy against anyone in relation to the said parcel of land.



16. The upshot is that the parties and the issues in this suit are the same as those in the former suits and the courts (both in Eldoret and Kakamega) that made the former decisions were competent to make the decisions made, which decisions were merit decisions and final. Introducing new parties or removing former defendants in subsequent suits will not be of any help to the plaintiff. He must accept that parcel No. Kakamega/Sergoit/44 does not belong to him and move on.
17. In the result, and for the above reasons, I find and hold that this suit is res judicata and I hereby dismiss it with costs to the defendant.
18. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 13TH DAY OF FEBRUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Simiyu for the Defendant/Applicant.

Ms. Kimeli for the Plaintiff/Respondent.

Mr. Richard Karugu Njuge the Interested Party in person.

Court Assistant: M. Nguyai.

