



REPUBLIC OF KENYA



**Kero v Chief Land Registrar & 2 others (Environment & Land Case E046 of 2021) [2024] KEELC 7529 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7529 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE E046 OF 2021  
FO NYAGAKA, J  
NOVEMBER 12, 2024**

**BETWEEN**

**JAMES NDUNG’U KERO ..... PLAINTIFF**

**AND**

**CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 24/10/2023 the Defendants moved this Court under Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, Order 1 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules 2010. They sought the following orders:-
  1. The Honorable Court do declare the plaintiff’s suit instituted by an Amended Plaint dated 20/05/2022 as being res judicata.
  2. That the Honorable Court do strike out the plaintiff’s suit for being incompetent due to non-joinder or misjoinder of the parties and for failing cause of action against the defendants (sic).
  3. That the costs of this application be in the course.
2. The Application was based on grounds summarized hereafter. They are that the instant suit was res judicata in view of the decisions in Kitale’s ELC No. 7 of 2018 which was between Nyakinyua Mugumo Tree Company Limited v Director of Service of Surveys and 6 Others. The suit was instituted over land parcel LR. No. 1803 as the subject, and the Plaintiff herein was the 3<sup>rd</sup> Defendant in it and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were the 6<sup>th</sup> and 7<sup>th</sup> Defendants. The suit was eventually dismissed on merit by a court of competent jurisdiction. The same parcel of land LR. No. 1803 was also a subject in Kitale ELC No. 103 of 2015 between Nyakinyua Mugumo Tree Company Limited v The Director of Surveys



- and Others wherein the Plaintiff herein was the 3<sup>rd</sup> Defendant and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein were the 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively. It sought to restrain the Defendants from subdividing and processing the title deeds in respect of that parcel number. It was dismissed for want of prosecution.
3. Further, the issues pertaining the proprietorship, resurvey and issuance of title deeds in respect of parcel number L.R. 1803 were substantially in issue in the above decisions wherein they were conclusively determined on merit and therefore the said parcel of land is adjudged registered under the Nyakinyua Mugumo Tree Company Limited and all issues concerning the parcel were actually determined conclusively in the matters in both of which the Company was the Plaintiff. Therefore, the Court was functus officio. The Plaintiff having failed to join the Company which is the party to whom the property vests made the suit a non-starter and incurably defective hence it should be struck out in limine. The application was a mere waste of the Court's precious time and resources and an abuse of its process, and brought in bad faith.
  4. The application was supported by the Affidavit sworn on 24/10/2023 by one M. W. Odongo, the learned State Counsel. In the depositions therein, he reiterated the contents of the grounds in of the Application, but by way of affidavit. Further, he deposed that the Plaintiff had instituted this suit vide a plaint dated 23/05/2023 in which he sought to restrain the Defendants from interfering with his portion of land, namely, LR. 1803/483 or changing its character. He admitted in paragraphs 5 and 5B of the Amended Plaint that parcel number LR. 1803/2-1461 belonged to a company known Nyakinyua Mugumo Tree Company Limited. Further, he admitted that the Company had several shareholders of whom he was among. Further, sometime in 1981, the shareholders of the Nyakinyua Mugumo Tree Company Limited resolved to have the suit property originally known as LR. 1803 surveyed and sold to shareholders.
  5. That plaintiff did not allege that the company transferred any of the subdivisions to any of the shareholders, including himself. Despite the above revelations, the Plaintiff deliberately and carefully failed to join the Company of the shareholders as a party, a matter of information which was crucial to the court. The Defendants were neither parties to the arrangement of the shareholders nor were they in any way involved in the subdivision of the property. Further, failure to join the company or shareholders violated their right to fair hearing as entrenched in Articles 47, 48 and 50 of the Constitution and rendered the suit and all the process unconstitutional and incompetent. He annexed and marked as MWO 1 copies of the Kitale ELC Petition No. 7 of 2018 and Kitale ELC No. 103 of 2015 in which the Nyakinyua Mugumo Tree Company Limited was a party as a Plaintiff and the matters were determined with finality.
  6. He deposed further that the issues pertaining proprietorship, survey and issuance of title deeds in respect of parcel number LR 1803 was substantially in the issue in the previous cases quoted and were conclusively determined. Further, he deposed that the suit did not disclose any reasonable course of action against the Defendants concerning matters relating to parcel No. LR 1803, any of such issues relating to that parcel should be addressed administratively by the Nyakinyua Mugumo Tree Company Limited on the one hand and its shareholders on the other. Further, under the law, a share certificate issued by a land buying companies is not an instrument of ownership and cannot confer legitimate interest or expectation to third parties to a transaction, including the Defendants. This Court lacks jurisdiction to decide on this matter on the basis that there were existing judicial determinations touching on the subject hence the matter was res judicata. The suit was an abuse of the forces of the court, brought in bad faith and disclosed no cause of action.
  7. The Application was disposed of by way of written submissions. The Applicant filed its submissions dated 23/07/2023 on the same date. It summarized the Application. It then argued that through an Amended Plaint dated 20/05/2022, the Plaintiff pleaded that the parcel of land known as LR.



- No. 1803 belonged to the Nyakinyua Mugumo Tree Company Limited, the Farm, which had several shareholders. In 1981 the shareholders resolved that the parcel of land should be sold to individual shareholders. Further, by their own survey they carried out the exercise to give rise to title Nos. LR 1803/2 - 1461. He was assigned parcel No. L.R. No. 1803/2483 measuring 1.691 Hectares.
8. Further, that the Plaintiff was contesting a resurvey of the parcel of land of land L.R. No. 1803/2/-1461. The Defendants argued that the suit was res judicata and incompetent because there were prior suits that had settled the issue, the Plaintiff did not join the owners of the land. They stated that one issue in the matter was whether the suit was res judicata.
  9. Regarding the issue, learned counsel for the Defendants submitted that Section 7 of the *Civil Procedure Act* provides that where a suit is filed after a determination on the same issue by the same parties between the same parties vide a court of competent jurisdiction, the matter is res judicata which a plea against double jeopardy and operates as estoppel in that any future claims over the same issue cannot be entertained. They relied on the case of the Independent Electron Boundaries Commission versus Maina Kiai and 5 others [2017] eKLR. They explained the relationship between the two previously determined matters, being, Kitale ELC No. 103 of 2015 and Kitale Petition 7 of 2018, the argument being that Petition No. 7 of 2018 was a representative suit. They submitted further that although the plaintiff in the instant suit referred to a different land parcel number, the litigation was in respect of all that parcel of land LR. 1803. He argued that the issues in all the three suits intertwine and therefore the exclusion of Nyakinyua Mugumo Tree Limited did not make results different. They relied further on the decisions of E.T. -vs- Attorney-General and Another [2012] eKLR and Njangu -vs- Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported).
  10. Regarding whether the former litigation determined with finality they submitted that ELC No. 103 of 2015 was dismissed for want of prosecution and it was upon that dismissal that the Plaintiff in the instant proceeded to subdivide parcel No. LR 1803 into various parcels and title documents, known as indentures were issued to the shareholders, and they taxed their costs. Thus, the determination was therefore with finality.
  11. In regard to Petition No. 7 of 2018 they submitted that the Petitioners claimed that the issuance of indentures was clandestine and likely to deprive shareholders their lawful entitlements. The learned trial judge considered the similarity thereof with ECL No 103 of 2015 and arrived at the decision to dismiss the application for a conservatory order whereupon the ruling rendered the Petition otiose. The Petition was consequently dismissed for being an empty shell. They argued that the Petition was determined with finality. They relied on the Supreme Court decision of John Florence Maritime Services Limited and Another -vso Cabinet Secretary for Transport and Infrastructure and 3 Others 2015 EKLR. That the application be allowed.
  12. The Respondent filed submissions dated 16/07/2024. In them they gave the background of the application and then the issues for determination. The issue was basically one, which was whether the suit was res judicata. Then the analyzed the law, starting with Section 7 of the *Civil Procedure Act* and the definition of the doctrine as given in Brayan A. Garner's Blacks Law Dictionary. He then argued that the application was frivolous in the sense that sense that pleadings in Petition No. 7 of 2018 and ELC No. 103 of 2015 involved a big junk of land measuring 2050 acres while for the instant suit it was measuring 1.169 hectares. He then argued that the subject matters were different. He prayed that the Application be dismissed.



## Issue, Analysis and Determination

13. This court has considered the application, the law and the submissions by the parties. The only issues for the determination of the court are whether the suit offends Section 7 of the *Civil Procedure Act* and who to bear the costs of the application, and if the application succeeds, and of the suit.
14. The issue of res judicata as contended by the Applicants in this suit is simple: that the issues in this matter were similar to those determined in Kitale ELC No. 103 of 2015 and Petition No. 7 of 2018 as between the same parties, and they were determined with finality by this Court. Since the earlier matters were determined by this Court, the argument on the competency of the court is moot as it is not in contention. I will turn to the other aspects of the law on res judicata after analyzing the law immediately below.
15. The law on res judicata is provided for under Section 7 of the *Civil Procedure Act*, and it is not only simple but settled. The Section provides,

“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.”
16. From the provision it means that the court that determined the previous matter(s) should have been of competent jurisdiction, the findings it made were on merit on issues between same parties litigating under same title. The import of that is that even where a party excludes or includes one or more parties in a subsequent suit it does not change the character and application of the law in that regard. Therefore, courts have to be vigilant to find whether a party is being disingenuous by trying to ‘mutate’ himself and the subject matter as to appear as though they are different.
17. In *Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR the Court of Appeal stated as follows:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
18. In *Mwangi v Mokaya (Environment and Land Appeal 13 of 2023)* [2023] KEELC 18642 (KLR) (6 July 2023) (Ruling) this Court held:

“The elements of res judicata are therefore that the

  - a. issue being tried the second time was previously tried and determined
  - b. issue being tried was the same, directly or substantially in issue as in the former proceeding
  - c. court that tried it had competent jurisdiction
  - d. determination was on merits and not on a technicality hence conclusive on the issue
  - e. parties in the former proceeding were the same or litigated therein under the same title.”



19. In the case of *Uhuru Highway Development Ltd v Central Bank of Kenya* (1999) eKLR the court listed the important ingredients of the res-judicata and follows:-
- a. The former judgment or order must be final.
  - b. The judgment or order must be on merits.
  - c. It must have been 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 identity of the parties, of subject matter and cause of action.”
20. My understanding and interpretation of the law on res judicata, as elucidated in the above cited decisions is that all the elements envisioned must be fulfilled in order for the plea to succeed. This now forms the basis for determining the instant application. The issue of competency of the court is neither here nor there herein.
21. As this commences this analysis, it begins by considering an important point of law: does the dismissal of a suit for want of prosecution mean that the matter has been determined on merits? This is crucial in determining whether the argument by the learned State Counsel that the dismissal of Kitale ELC No. 103 of 2015 for want of prosecution can found the basis of the contention herein that the suit is res judicata.
22. The Court Appeal when faced with a similar submission that a suit dismissed for want of prosecution was res judicata in the case of *Michael Bett Siror v Jackson Koech (Civil Appeal 53 of 2016)* [2019] KECA 941 (KLR) (6 March 2019) (Judgment) aptly stated;
- “(29) Both the appellant and the respondent in their affidavit sworn in support and in response to the appellant’s motion, were in agreement that two of the previous suits filed by the respondent were dismissed for want of prosecution, while another was abandoned and withdrawn by the respondent. This means that none of the suits was fully argued nor were the issues finally determined.
- (30) We accept that dismissal of a suit for non-attendance or for want of prosecution can amount to a judgment, however, such a judgment does not satisfy the requirements of section 7 of the *Civil Procedure Act*, as the issues raised in the suit has not been addressed and finally determined by the court, but the judgment is the result of what may be described as a technical knockout.’
23. This court refers to the definition given by Bryan A. Garner in *Black’s Law Dictionary* 11<sup>th</sup> Edition, Thompson Reuters, St. Paul, MN. at p. 1567 where the learned author states that res judicata is;
- “An issue that has been definitely settled by judicial decision...The three essentials elements are (1) an earlier decision on the issue (2) a final judgement on the merits and (3) the involvement of same parties or parties in privity with the original parties.”
24. Thus, it is my humble view that the conclusion of a matter through an order of dismissal for want of prosecution, though a judgment in itself, is not a determination on the merits of the matter on merits and therefore its existence in respect of any suit does not render a subsequent filing by the same parties over the same subject res judicata. Unlike a conclusion of a matter on merits in which one of the parties can move the same court to set aside through an application for review as provided for under Section



80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, a party who is aggrieved by an order of dismissal for want of prosecution can only call for an application to set aside. An application for review call for a re-look, by the same court, at the merits of the matter unlike the one for setting aside the order of dismissal for want of prosecution which can only require the court to look at the circumstances that led to the issuance of the order but not the merits by way of evidence, of the matter.

25. The above discussion leads this Court to make a finding that the argument by the learned state counsel that since the issues and the parties common in the instant suit were similar as in Kitale ELC No. 103 of 2015, Nyakinyua Mugumo Tree Company Limited v Director of Surveys & Others which was dismissed for want of prosecution makes the instant suit res judicata is erroneous. This Court does not agree with the learned State Counsel in that contention.
26. With the above finding this Court is left to consider one matter whose decision would or would not render the instant suit res judicata. It is Kitale ELC Pet. No. 7 of 2016. In that matter, as shown above, the parties were the Nyakinyua Mugumo Tree Company Limited v Director of Surveys & 6 Others. In the matter, and as the judgment a copy of which is annexed to the supporting Affidavit herein as MWO-1 show, the Plaintiff was 3<sup>rd</sup> Defendant while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the 6<sup>th</sup> and 7<sup>th</sup> Defendants. The subject matter therein was parcel No. LR. 1803. In the instant suit the parcel of land is LR. 1803/483. It is not denied that the said suit was dismissed on merits. This happened on 28/05/2020 when the learned judge delivered his judgment in the matter.
27. Whereas it is contended by the Plaintiff that the suit land in the instant suit is a small piece compared with the large parcel involved in the previous suit, the parcel in the instant suit is one of the many parcels which came into existence as a result of the subdivision of parcel No. LR. 1803. Further, the issues in the previous suit were the subdivision and survey of the entire parcel No. LR. 1803, which is pleaded by the Plaintiff at paragraphs 5D and 5E of the Amended Plaint in instant suit that it took place and gave rise to the suit land, being No. 483, which was demarcated giving rise to 1.1692 Ha and in respect of which the 2<sup>nd</sup> Defendant had since produced a different Area List which affects his portion, which the Plaintiff party now wants to 'protect' through a relief of issuance of an injunction.
28. Further, the Plaintiff's pleadings are to the effect, at paragraph 5A of the Amended Plaint, that Nyakinyua Mugumo Tree Company Limited used to own the parcel of land known as LR. 1803/2-1461 owned by several shareholders including the Plaintiff himself.
29. The Plaintiff's own pleadings reveal that indeed the parcel No. LR. 1803 was owned by Nyakinyua Mugumo Tree Company Limited, was subdivided to give rise to the parcel Nos. LR. 1803/2-1461. He also pleads that the suit land, being LR. No. 1803/483, was one of the plots among the ones stated above. It is therefore erroneous and misleading for him to argue that his parcel of land was different simply because of him having sued over one specific plot/parcel hence that it was a small plot of its own which would make it a different subject. Additionally, it is strange that the Plaintiff deliberately failed to include the Nyakinyua Mugumo Tree Company Limited in the instant suit, perhaps to hide the existence of the instant suit to their knowledge yet the reliefs sought will definitely affect the Company's interest in not only the land he claims but others whose sizes automatically become an issue by virtue of the Plaintiff's claim that the Area List produced by the 2<sup>nd</sup> Defendant is different from the size he bought.
30. While it is not fatal to not include a party who ought to have been included in a matter, where it is apparent from the pleadings and subject matter that a party left out of the proceedings is a necessary party, it is desirable and for purposes of avoiding a multiplicity of suit, to join the party(ies) or remove



those mis-joined, at the earliest stage of the suit. Order 1 Rule 9 of the Civil Procedure Rules which states:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

31. The learned judge, F. Gikonyo J. when deciding on a similar issue, in *Zephir Holdings Ltd vs Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya* (2014) eKLR, held that:

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

32. The Court of Appeal in *William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others* (2016) eKLR held that:

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

33. In the case of *Republic vs. District Land Registrar, Uasin Gishu & Anor* (2014) EKLR Justice Ochieng held that:

“.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”

34. Failure to implead a party to a suit is not fatal. It is a mere technicality which when noticed should be cured at the earliest instance by an amendment while a mis-joinder could be addressed through an application to strike out the party improperly joined to any suit or claim. In any event, Article 159(2) (d) of the *Constitution* provides against the use of procedural technicalities at the expense of substantive justice. It stipulates that:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”

35. For that reason, the Court is of the view that much as the *Nyakinyua Mugumo Tree Company Limited* was left out of the instant suit, and perhaps for disingenuous reasons, the suit could not be lost solely



on that account, may not at all. Instead the Defendants ought to have moved the Court to enjoin the said party as a necessary one, as provided for under Order 10 of the Civil Procedure Rules, 2010.

36. The upshot is that the issues herein as between the parties are among those that were between the parties in Kitale ELC. No. 7 of 2018 which was determined on merits. The suit therefore is res judicata. I hereby strike it out with costs to the Defendants.
37. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**HON. DR. IUR F. NYAGAKA**

**JUDGE, ELC KITALE**

**At 10:02 AM in the presence of:**

Nakitare Advocate -----for the Plaintiff

No appearance for Defendants/ Applicants

