



**Chesome v Wafula & another (Environment and Land Appeal  
E015 of 2023) [2024] KEELC 7449 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7449 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E015 OF 2023  
EC CHERONO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**RICHARD CHESOME ..... APPELLANT**

**AND**

**IBRAHIM WAFULA ..... 1<sup>ST</sup> RESPONDENT**

**MIX WAFULA SIMIT ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal arising from the Ruling delivered by Hon. Gesore  
(CM) in Bungoma CMCC No. 85 of 2021 delivered on 16/02/2023)*

**JUDGMENT**

**Introduction**

1. Richard Chesome referred to as the Appellant in this judgment filed this appeal on 12<sup>th</sup> March, 2023 against Ibrahim Wafula and Mix Wafula Simit referred to in this judgment as the Respondents.
2. The appeal seeks to set aside the ruling of the trial magistrate Hon. Gesora (C.M) delivered on 16<sup>th</sup> February, 2023 in CMCC 85 OF 2021 in relation to the application dated 30<sup>th</sup> March, 2022.
3. In the impugned ruling, the trial magistrate dismissed the said application with costs and termed it as an abuse of the court process after finding it to be re-judicata. The Grounds of appeal as can be discerned from the Memorandum of Appeal can be summarized as follows;
  - a. The honourable learned magistrate erred in law and in fact in dismissing the applicant's application on the grounds that the application was res judicata and an abuse of the process of the court.



- b. The honourable learned magistrate erred in law and in fact when he failed or completely ignored the appellants submissions and the law and authorities and ended up misapplying the law.
    - c. The honourable magistrate's ruling has occasioned a miscarriage of justice likely to prejudice the appellant herein.
4. The Appellant commenced his suit on the trial court by way of originating summons dated 6<sup>th</sup> December, 2021 where he was claiming beneficial interest over Land Parcel No. E. Bukusu/ S.Kanduyi/ 14626 and that the 1<sup>st</sup> Respondent herein holds the said land in trust for him. The Appellant subsequently filed an application dated 30<sup>th</sup> March, 2023 where he sought for the following orders;
  - a. That this Honourable court be pleased to issue restraining orders against the 1<sup>st</sup> Respondent, his agents, representatives and/ or any other person claiming through him from selling, leasing, charging and/or in any other way dealing in land parcel No. E.Bukusu/ S. Kanduyi/14626 until this application is heard inter partes.
  - b. That this Honourable court be pleased to issue restraining orders against the 1<sup>st</sup> Respondent, his agents, representatives and/ or any other person claiming through him from selling, leasing, charging and/or in any other way dealing in land parcel No. E.Bukusu/ S. Kanduyi/14626 until the substantive suit is heard and finally disposed off.
  - c. Costs of this application be provided for.
5. In that application, the Appellant argued that his claim to the suit land was based on adverse possession and that the Respondents intended to dispose of the land, which would render the suit ineffective and cause him irreparable harm.
6. The 1<sup>st</sup> respondent on his behalf and on behalf of the 2<sup>nd</sup> respondents filed a replying affidavit in opposition to the application dated 15<sup>th</sup> June, 2022. They deposed that he was the registered owner and user of the suit land having acquired it through a mutual written land sale agreement between himself and the Appellant herein. He deposed that the Appellant was no longer in occupation or use of the suit land. He argued that the agreement presented by the Appellant was fraudulent as the original agreement was previously produced in a previous case being Bungoma CMC ELC No. 56 of 2019. He also argued that the application and entire suit was res-judicata as the issues in dispute had previously been heard and determined in BGM CMC ELC NO. 31 OF 2012, BGM CMC ELC No. 56 of 2019 and HC ELC Misc. No. E009 of 2021.
7. When this appeal came for directions, the parties agreed to canvass the same by way of written submissions. The Appellant filed submissions dated 9<sup>th</sup> July 2024 where he submitted that he was not a party in BGM CMC ELC NO. 31 OF 2012 while in HC ELC Misc. No. E009 of 2021, the subject matter was Land Parcel No. E.Bukusu/S.Kanduyi/7235 which is not the subject matter in issue at the moment and that in BGM CMC ELC NO. 56 OF 2019 although the parties were the same but the claim was for a claim of a portion measuring 100ftx100ft from land parcel NO. E.Bukusu/ S.Kanduyi/7235 and an order of permanent injunction while the claim herein is for adverse which is a different claim. Therefore, it was his contention that the trial court erred in finding that the suit before it was res-judicata. Reliance was placed in various cases inter alia; James Maina Kinya vs. Gerald Kwendaka (2018) Eklr, Mbira Vs. Gichuhi (3021)1 E.A. 137, Kasuve vs. Mwaani Investments Ltd & 4 Others (2004) 1 KLR 184 and Kasarani Investments ltd vs. John Wambua Gachutha & Another (2016) eKLR.



## Legal Analysis and Decision

8. I have carefully considered the entire appeal including the record of appeal and the submissions as well as the case law contained in the said submissions.
9. This being a first appeal, this Court is under a duty to consider the evidence adduced before the trial Court, evaluate it afresh and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses as they testified. Secondly, an appellate Court should not interfere with the exercise of the discretion of the trial Court unless it is satisfied that the Court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of its discretion and as a result, there has been an injustice. This was so held in the case of *Pithon Waweru Maina –vs- Thuka Mugiria Civil Appeal No. 27 of 1982* or eKLR 1983.
10. Although the Appellant raised three (3) grounds of appeal on the materials on record, my view is that the singular issue that arises for determination is whether the applicant's application in the trial court was res judicata.
11. It is not in dispute that there exist other suits involving the parties herein and parties under whom they claim and the suit land. The Respondent draws the courts attention to BGM CMC ELC NO. 56 OF 2019 which both parties agree was in respect of the same parties and same subject matter which is the suit land. The Appellant however contends that the cause of action in the suit giving rise to the impugned ruling is on adverse possession which cause of action is different from that in BGM CMC ELC NO. 56 OF 2019. The question that therefore lingers is whether in this scenario, the doctrine of res judicata is applicable.
12. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 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”
13. The Black's law Dictionary 10<sup>th</sup> Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
14. The import of this provision and the principle generally is that a person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.



15. To decide whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question. Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

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

16. In the Court of Appeal case of Siri Ram Kaura – Vs – M.J.E. Morgan, [CA 71/1960](#) (1961) EA 462 the then EACA stated that:-

“It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

17. On quick examination of the pleadings and prayers sought in BGM CMC ELC NO. 56 OF 2019, the Appellant herein sought for orders of specific performance in relation to an agreement for sale dated 24<sup>th</sup> September, 1999 and for injunctive orders against an alleged trespass. In the said suit he claimed land measuring 100ft by 100ft forming part of LR No. E.Bukusu/S.Kanduyi/7235. The court rendered itself vide a judgment dated 24<sup>th</sup> June, 2021 where it dismissed the Appellants claim. From the foregoing, it is clear that the parties herein were involved in previous cases which have been heard and determined. The Appellant in the current suit seems to have done what Kuloba J in Njangu vs Wambugu and another referred to as a cosmetic facelift in an attempt to get what was not achieved in the previous suit. I say so because it is evident that the Appellant herein is currently referring the subject land as land parcel No. E.Bukusu/ S. Kanduyi/14626 which is a sub-division of land parcel No. E.Bukusu/ S. Kanduyi/7235, a fact that he was aware of as can be seen from the pleadings and by introducing another cause of action.

18. In my humble view, parties must go to court with all their causes of action and must sue all the persons they ought to sue. The doctrine of res judicata prohibits parties from suing in bits and pieces or giving a subsequent case a legal face lift by removing parties who were parties in the earlier dispute and/or case filed and determined. In HCCC 958 of 2001 Milimani Commercial Court Nairobi - George Omondi vs National Bank of Kenya Limited and 2 others Ringera J as he was then held;

“I accept the submissions by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments”.

19. In conclusion, I concur with the trial magistrate that the suit giving rise to the application dated March 30, 2022, is res judicata and constitutes an abuse of the court process. Accordingly, I find this appeal lacks merit and the same is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 07<sup>TH</sup> DAY OF NOVEMBER, 2024.**



.....

**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Mr. Sabwami H/B for Bulimo for Applicant.
2. Respondent/advocate-absent.
3. Bett C/A.

