



Kahora & another (Suing as the legal representatives of the Estate of Esther Watiri Kahora) v Nyambura & 2 others (Land Case 103 of 2024) [2024] KEELC 7393 (KLR) (Environment and Land) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7393 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
LAND CASE 103 OF 2024
MC OUNDO, J
NOVEMBER 7, 2024
(FORMERLY NAKURU ELC 176 OF 2018)**

BETWEEN

**FRANCIS KAHORA KAMAU 1ST PLAINTIFF
JAMES MWANGI KAHORA 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ESTHER
WATIRI KAHORA**

AND

**PHILISIA NYAMBURA 1ST DEFENDANT
MICHAEL WAWERU 2ND DEFENDANT
LAND REGISTRAR, NAIVASHA 3RD DEFENDANT**

RULING

1. Before me for determination is a Notice of Motion Application dated 8th April, 2024 brought under the provisions of Section 7 of the [Civil Procedure Act](#) and all enabling provisions and regulations of the law wherein the 1st and 2nd Defendants/Applicants sought that the court finds the instant suit Res Judicata Nakuru ELC suit No. 40 of 2013 and thereafter proceed to dismiss the same. They also sought that the cost of the application be provided for.
2. The application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Michael Waweru, the 2nd Defendant herein who deponed that vide a Plaint in Nakuru ELC No. 40 of 2013, he had sought for eviction orders against Grace Nyokabi Kinuthia who was in



occupation of land parcel numbers No. Naivasha/Mwiciringi Block 2/771 and Naivasha/Mwiciringi Block 2/772. That subsequently, judgement had been delivered on the 12th October, 2017 in their favour (1st and 2nd Defendants.)

3. That in the previous case being Nakuru ELC No. 40 of 2013, the parties had been 1st and 2nd Defendants, as Plaintiffs vs. Grace Nyokabi Kinuthia as the Defendant. That the current Plaintiff Esther Watiri Kahora and Grace Nyokabi Kinuthia were one and the same person who was trying to re-litigate on the same issues relating to the same suit properties. That the subsequent suit was therefore Res Judicata and an abuse of the court process.
4. In response and in opposition to the Application, the Plaintiffs, through a Replying Affidavit dated 20th May, 2024 sworn by James Mwangi Kahora, the 2nd Plaintiff/Respondent deponed that he and his father were legal representatives to their late mother/husband's, Esther Watiri Kahora's estate.
5. That the Applicants' Application was based on a misapprehension of the law on Res Judicata wherein the Applicants had feigned ignorance of the facts of the instant case and therefore their Application was a waste of the court's time. That the instant Application was a third attempt by the Applicants to have the present suit struck out, on the ground that the same was Res Judicata, there having been previous rulings dated 20th January, 2020 to the contrary. That the instant application was filed to delay the hearing and determination of the instant case.
6. That pursuant to the provisions of Section 7 of the *Civil Procedure Act*, a case would be deemed Res Judicata if it had been heard and finalized on merit by a judicial authority of competent jurisdiction based on similar facts, the subject matter and parties. That parties and the prayers sought in the present case were different from the parties and the prayers sought in Nakuru ELC Case No. 40 of 2013. That it was thus in the interest of justice that the instant Application be dismissed with costs.
7. The 3rd Defendant did not participate in the instant Application.

Determination

8. Despite directions having been issued on 13th May, 2024 that the instant Application be canvassed by way of Written Submissions, at the time of writing this ruling, none of the parties had complied.
9. 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 and therefore such application is liable for dismissal. 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, I am obliged to dismiss the application but shall exercise my discretion and proceed to determine the same on its merit.
10. I have considered the application herein and its opposition. The Defendants/Applicants herein have sought that the court finds the instant being Res Judicata Nakuru ELC No. 40 of 2013 wherein the issues raised herein had been substantially in issue in the previous case which had been heard and determined vide a judgment of 12th October 2017.
11. The Plaintiff/Respondents on the other hand have opposed application holding the position that the same was based on a misapprehension of the law on Res Judicata. That the Applicants had feigned ignorance of the facts of the instant case and therefore their Application was a waste of the court's time.



That the instant Application was a third attempt by the Applicants to have the present suit struck out, on the ground that the same was Res Judicata. That the parties and the prayers sought in the present case were different from the parties and the prayers that had been sought in Nakuru ELC Case No. 40 of 2013. That further the issue on Res judicata had been dealt with via a ruling of the court dated the 20th October 2020 and 8th June 2023 and therefore in the interest of justice, this Application be dismissed with costs.

12. I have perused the said rulings herein and find that vide a ruling of 20th October 2020, the court had not delved into the substantive issue of res judicata but rather, after the same had been raised in the Respondents' Replying Affidavit to the Applicant's (Esther Watiri Kachora) application seeking interim orders of injunction against the Respondents, the court had stated as follows;

“If the 1st and 2nd Defendants wish to explore the issue on Res Judicata, they may wish to bring a formal application and avail all the necessary material for consideration. The preliminary objection herein is not valid. I dismiss it with costs.”

13. In the Ruling of 8th June 2023, the court having found that there had been no extension of time to file the Application, and neither had there been evidence that the Application had been served, it had proceeded to strike out the application dated the 3rd March 2023 wherein the 1st and 2nd Applicants/Defendants herein had sought for the dismissal of this suit for being res judicata. Subsequently on the 16th March 2023, the Applicants through their Counsel, had been granted leave to file the current application.

14. Having summarized what previously transpired I would beg to differ with the Respondents/Plaintiffs herein that the issue on Res judicata had been substantially determined in the above captioned rulings.

15. This said and done, subsequently, I find one issue arising for my determination to wit; whether the instant suit is Res Judicata.

16. 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.”

17. 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.”



18. I have keenly studied the judgement dated 12th October, 2017 in the impugned Nakuru ELC No. 40 of 2013. The parties therein had been Michael Waweru and Philisia Nyambura (Plaintiffs) vs Grace Nyokabi Kinuthia (Defendant). The Plaintiffs had sued the Defendant claiming ownership to land parcels No. Naivasha/Mwiciringi Block 2/771 and Naivasha/Mwiciringi Block 2/772 wherein they had sought for permanent injunction against her from trespassing thereon, for mense profits, damages and costs of the suit.
19. In response, the Defendant had denied trespassing on the suit land wherein in her counter claim she had pleaded that the suit properties were family land belonging to the late Wambui Waweru for which the Defendants had fraudulently transferred into their names. She thus sought for an order that the transfer of the suit properties to the Plaintiffs was null and void for want of LCB consent, that the titles be cancelled and for costs of the suit and interest thereof.
20. After a full trial, and consideration of the evidence adduced therein, the court found in favour of the Plaintiffs and allowed their suit thus dismissing the Defendant's counterclaim with each party to bear its costs.
21. In the current suit, the parties herein are Francis Kahora Kamau and James Mwangi Kahora (Suing as the Legal representative of the Estate of Esther Watiri Kahora) the original Plaintiff vs Philisia Nyambura, Michael Waweru and Land Registrar, Naivasha.
22. In the said suit, the Plaintiffs have sought that the suit lands No. Naivasha/Mwiciringi Block 2/771 and Naivasha/Mwiciringi Block 2/772 having been sub divisions of the mother title No. Naivasha/Mwiciringi Block 2/19 which was registered to the late Wambui Waweru, that the said subdivisions be declared null and void and the title deeds issued to the 1st and 2nd Defendants in the year 2003 be cancelled to pave way for the land to be subdivided among the four children of the late Wambui. They also sought for costs.
23. In 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.”
24. In the present suit, it has not been contested that there had been judgement rendered by a competent Court in a previous suit, being Nakuru ELC No. 40 of 2013 which in essence had found that Applicants herein were the legal proprietors of land parcels No. Naivasha/Mwiciringi Block 2/771 and Naivasha/Mwiciringi Block 2/772. It is also not in contestation that both the former suit and the current suit had been between the same parties being family members competing over the same subject suit parcels of land.



25. 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.....’”

26. 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.”

27. Now there having been a determination on the proprietorship of land parcels No. Naivasha/Mwicingi Block 2/771 and Naivasha/Mwicingi Block 2/772 in a Judgment rendered by a court having jurisdiction in Nakuru ELC No. 40 of 2013, which decision has not been overturned or set aside on Appeal and/or review, keeping in mind that the Plaintiffs/ Respondents in the present matter are now litigating as other parties and causes of action over a matter that was effectively determined, 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 and against the same Defendants. 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. The Application dated 8th April herein succeeds for which the Plaintiffs’ suit vide their Amended Plaintiff dated 25th November, 2022 is therefore incompetent and bad in law and the same is dismissed with costs for being Res judicata Nakuru ELC No. 40 of 2013.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 7TH DAY OF NOVEMBER 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

