



**Butt & another v Ng’ang’a & 4 others; Come-Cons Africa Limited & another (Interested Parties)
(Environment & Land Case E429 of 2024) [2025] KEELC 4515 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 4515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E429 OF 2024**

**JG KEMEI, J
MARCH 27, 2025**

BETWEEN

MOHAMED SHAHEZAN BUTT 1ST PLAINTIFF

YASSAR BUTT 2ND PLAINTIFF

AND

BRADOH NJOROGE NG’ANG’A 1ST DEFENDANT

KENYA REVENUE AUTHORITY 2ND DEFENDANT

**RECEIVER MANAGERS, DUBAI BANK KENYA LTD-(IN
LIQUIDATION) 3RD DEFENDANT**

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE HON ATTORNEY GENERAL 5TH DEFENDANT

AND

COME-CONS AFRICA LIMITED INTERESTED PARTY

MORE GAS LIMITED INTERESTED PARTY

RULING

(In respect of the Plaintiff’s Notice of Motion dated 16/10/ 2024 and the 3rd Defendant’s Preliminary Objection dated 30/12/2024)

1. By the Plaint dated 16/10/2024, the Plaintiffs filed suit against the Defendants seeking the following orders; declaratory orders that they are the legal owners of the property known as LR No. 209/8381/2 (IR 48604) (the suit property herein), a permanent injunction restraining the Defendants from



- interfering with their quiet use, occupation and possession of the suit property, general damages as well as costs of the suit.
2. Simultaneously to filing suit, the Plaintiffs file the Notice of Motion of even date anchored on the provisions of Articles 40 and 60 of *the Constitution*, Section 13 (7) (A) and 19(1) of the Environment and Land Court, Section 1A, 3A of the *Civil Procedure Act*, Order 40 Rules 2(1) and 3(3), 4 and Order 51 of the Civil Procedure Rules seeking orders That;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this suit, there be and is hereby issued a temporary injunction restraining the Defendants, jointly and severally, either by themselves, their servants and/or agents proxies and/or persons exercising authority from them from inhibiting, trespassing into, entering, transferring, alienating, selling, disposing, dealing or any manner whatsoever interfering with or otherwise the Plaintiffs and their tenants quiet use, enjoyment, occupation and possession of the property known as LR No. 209/8381/2 (IR 48604).
 - d. The Officer Commanding Industrial Area Police Station (OCS) is directed to ensure the enforcement of the orders granted by this Honourable Court.
 - e. Costs of the application be provided for.
 3. The application is premised on the grounds on the face of it as well as the supporting Affidavit of Yassar Butt, the 2nd Applicant herein, sworn on 16/10/2024. The deponent avers that they are the registered owners of the suit property having purchased it by way of public auction from the 3rd Defendant on 2/7/2013. That the 3rd Defendant was exercising its statutory power of sale after the 1st Defendant defaulted in paying the loan facility advanced to it by the 3rd Defendant in the sum of Kshs. 29,498,862.50/=.
 4. The deponent avers that upon completion of the requisite process, they were issued with a Certificate of Sale and granted vacant possession. Subsequently they obtained a Vesting Order of the property via ELC No. 1200 of 2014. He depones that they later leased out the suit property to the 2nd Interested Party who is in occupation thereon as their Tenant. He avers that they have been enjoying continuous, quiet and uninterrupted possession of the suit property to date.
 5. The Plaintiffs contend that to their astonishment, by a Letter dated 15/8/2024, the 1st Defendant laid an unlawful claim on the ownership of the property by informing and instructing the 2nd Interested Party of the change of ownership and his acquisition of the property. He avers that the 1st Defendant's claim of ownership is illegal, unlawful and fraudulent as they have never disposed their interest over the suit property to anyone. That if at all the 2nd Defendant sold the suit property; the alleged sale was unlawful and illegal.
 6. Further, that the 1st Defendant's actions are a violation of the Plaintiffs' right to property guaranteed under Article 40 of *the Constitution*. The Applicants aver that there is a real and imminent threat of their unlawful eviction thus likely to cause them to suffer irreparable loss and damage that cannot be adequately compensated by an award of damages. That the 2nd Interested Party is operating a wholesale distribution of liquefied gas to generate its income.
 7. The 1st Defendant, Bradoh Njoroge Nganga filed a Replying Affidavit deponed on 5/11/2024. He contends that the instant suit is Res Judicata as parties had litigated the same matter in ELC No. 67



- of 2018 (OS). That the suit was dismissed with costs in favour of the 2nd 4th and 5th Defendants herein by this Court (differently constituted).
8. He states that the issues raised in ELC No. 67 of 2018 are similar to the ones raised in the instant suit. He accuses the Plaintiffs of approaching the court with unclean hands. He argues that the Plaintiffs must be prevented from relitigating this suit as it has already been determined previously by a court of competent jurisdiction.
 9. The deponent further avers that he is aware that the 2nd Respondent offered the suit property for sale to recover tax arrears owed to it by the 1st Interested Party. He avers that he was the successful bidder at the auction conducted by the 2nd Defendant on 7/8/2024. He opines that the instant suit intends to frustrate the 2nd Defendant from recovering tax arrears. That the Plaintiffs have therefore not demonstrated a prima facie case with a probability of success to warrant the issuance of the orders sought. That the application should therefore be dismissed with costs.
 10. The 2nd Defendant opposed the application vide the Replying Affidavit of Alice Marigo sworn on 28/11/2024. The deponent avers that the 2nd Defendant in the ordinary performance of its functions, audited the operations of the 1st Interested Party and raised an additional assessment of Kshs. 901, 535.418. Consequently, the 1st Interested Party was issued with a demand notice but failed to pay the assessed tax arrears. Subsequently, they advertised the sale of the suit property on 5/9/2012. That to further protect its interests, the 2nd Defendant registered a Caveat on 14/9/2012 to secure the payment of taxes owed to it.
 11. She further deposes that the Plaintiffs moved the Court vide ELC Case No. 67 of 2018 (OS) seeking interalia orders that the Caveat registered thereon be removed. She states that the Judgment thereof was duly entered on 15/10/2020 and the court dismissed the case with costs. That being aggrieved with the court's decision, the Plaintiffs lodged an appeal against the said Judgment.
 12. He further deposes that the 2nd Defendant subsequently issued a notification of sale of the suit property to recover the tax arrears advising the Taxpayer to pay the taxes within 40 days. That the Plaintiffs' sought an order of injunction restraining the 2nd Defendant from auctioning the suit property pending the intended appeal. However, the application was dismissed with costs. She states that an Appeal against the said order was equally dismissed. That the Court of Appeal found that the Plaintiffs had no proprietary rights over the suit property to warrant the grant of the orders sought. With the ruling of the Court of Appeal and the 1st Interested Party having not settled the tax arrears, the 2nd Defendant sold the suit property by way of public auction on 7/8/2024. That therefore, the orders sought in the application and the Plaintiffs cannot be issued to prevent what has already taken place. That the orders are overtaken by events. She further argues that the Plaintiffs lack the locus standi to institute any suit over the suit property. That the Plaintiffs are guilty of material non-disclosure and are underserving of the orders sought in the application.
 13. She asserts that the suit is not only res judicata but it is also an abuse of the court process. That the application and the entire suit should therefore be dismissed with costs.
 14. In response the 1st and 2nd Defendants' Replying Affidavits, the Plaintiffs filed Supplementary Affidavits sworn by Yassar Butt on 20/11/2024 and 24/12/2024 respectively.
 15. In response to the 1st Defendant's Replying Affidavit, the Plaintiffs contend that the suit herein is not res judicata. They argue that the instant suit seeks a determination of the ownership of the property whereas the issue for determination in ELC 67 of 2018 (OS) was removal of the caveat placed by the 2nd Respondent. The Plaintiffs assert that the 3rd Defendant lawfully exercised its statutory power of



sale. That even if the Interested Party had tax arrears owed to the 2nd Defendant, that the 3rd Defendant has the first right in time to exercise their statutory power of sale to recover the amounts owed to it.

16. The Deponent further argues that the Plaintiffs are total strangers to the contested tax arrears and therefore the 2nd Defendant cannot purport to sell the property previously owned by its tax debtor. Further, that the title was unlawfully and fraudulently acquired from the 3rd Defendant which was under receivership. That the application should therefore be allowed as prayed.
17. In response to the 2nd Defendant's Replying Affidavit, the Plaintiffs in their Supplementary Affidavit dated 24/12/2024 restates the assertions in the Supplementary Affidavit of 20/11/2024 and further avers that they have the locus standi to institute the instant proceedings as the registered proprietors. That the issue of res judicata does not arise in the instant suit as the two suits have two distinguishable causes of action. That the current suit is found upon a claim of ownership of the title whereas the previous suit was for removal of a caveat placed by the 2nd Defendant on the suit property.
18. He further avers that they have since reported the fraudulent and criminal actions to the Directorate of Criminal Investigations for further investigations and taking of appropriate actions.
19. The 3rd Defendant opposed the application dated 30/12/2024 through its preliminary objection fashioned on the grounds that;

“ the suit filed by the Plaintiffs is defective for failure to obtain the sanction of this Honourable Court to commence and continue proceedings against an institution in liquidation under Section 56 (2) of the [Kenya Deposit Insurance Act](#), Cap. 487C Laws of Kenya.

20. The Court directed that the application and the Preliminary Objection be canvassed by way of written submissions. The Plaintiffs' submissions in respect to the application are dated 31/01/2025 and those in opposition to the Preliminary Objection are dated 25/2/2025. The 1st Defendant's submissions are dated 26/2/2025 whereas the 2nd Defendant's submissions are dated 7/2/2025. The 3rd Defendant's in support of the Preliminary Objection are dated 21/2/2025. I have had an opportunity to read through the submissions which now form part of the record of this court.

Analysis and determination

21. Having Considering the pleadings, the application, the Preliminary objection, the affidavits and the rival submissions, the issues for determination are:
 - a. Whether the instant suit is res judicata
 - b. Whether the Preliminary Objection by the 3rd Defendant is merited.
 - c. Whether the Plaintiffs' are entitled to the orders sought
 - a. Whether the instant suit is res judicata and an abuse of the court process
22. Section 7 of the [Civil Procedure Act](#), cap 21 Laws of Kenya provides for the doctrine of res judicata as a bar for the court to determine a subsequent similar suit in the following terms;

“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”.



23. Section 28 of the Environment and Land Court also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.
24. Flowing from the above statutory provisions, it is therefore clear that to succeed in the plea of res judicata, the following elements must be proved;
- a. The court that heard the matter must have been competent
 - b. The matter directly and substantially in issue must be the same as that formerly determined.
 - c. The parties must be the same and or litigating under the same titles.
 - d. The matter must have been heard and finally decided.
25. These principles were stated in the case of *The Independent Electoral and Boundaries Commission - vs- Maina Kiai & 5 Others*, [2017] eKLR, where the Court of Appeal held that:
- “For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
- 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.
26. The Supreme Court stated the purpose of the doctrine of res judicata in the case of *John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2021) eKLR, para 54 as follows;
- “The doctrine of Res judicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier actions. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”
27. In the instant matter, the 1st and 2nd Defendants have argued that this suit is res judicata in view of the previous suit being; ELC Case No. 67 of 2018 (O.S): *Mohamed Shahanaz Butt & Yassar Butt – vs- Kenya Revenue Authority, Commissioner of Lands & The Honourable Attorney General*. The Plaintiffs have refuted the claim of resjudicata on the basis that the key issue for determination in the previous suit was the removal of the caution and in the current suit it is the issue of ownership to land.
28. The genesis of the said suit was that, the 1st Interested Party being a Tax Payer was in tax arrears of Kshs. 901, 535.418. The 2nd Defendant herein issued the 1st Interested Party herein with a demand notice



- but failed to pay the assessed tax arrears. Subsequently, the 2nd Defendant advertised the property for sale on 5/9/2012. That to further protect its interests, the 2nd Defendant registered a Caveat thereof on 14/9/2012 to secure the payment of taxes owed to it.
29. On the other hand, it is the case of the Plaintiffs that they purchased the suit property vide a Public Auction on 2/7/2013 and thereafter the 3rd Defendant was put under liquidation forcing them to obtain a Vesting Order in Nairobi HCCC ELC Division No.1200 of 2014 on 22/10/2014. Despite obtaining the said vesting orders, they were unable to have the suit land registered in their favour because of the existence of a caveat in favour of KRA
30. Determined to secure the registration of its interest in the suit land, the Plaintiffs moved the Court vide ELC Case No. 67 of 2018 (OS) seeking for orders that;
- a. This Honourable Court do order that the caveat entered on property known as LR No. 209/8381/2 as entry No.5 dated 14/9/2012 by the Defendant/Respondent be declared unlawful and unfair.
 - b. This Honourable Court do order that the Defendant/Respondent to remove or cause to be removed the caveat the caveat entered on property known as LR No. 209/8381/2 as entry No.5 dated 14/9/2012.
 - c. That a declaration be made that the Plaintiffs are the legal owners of all that property known as LR No. 209/8381/2.
 - d. The Defendant/Respondents do bear the costs of this application.
31. Judgment was subsequently entered on 15/10/2020. The Learned Judge in dismissing the suit with costs held that; under the law as it existed then KRA was justified in placing the caveat on the suit land; that by the time of purchase of the property, the caveat had been in place for about 10 months; that, if the applicants had conducted due diligence before the purchase, they would have discovered that the property was encumbered, and that the Plaintiffs ought to have disclosed to the court the status of the property when they applied and obtained for vesting orders in their favour. That the Plaintiffs were the authors of their own misfortune.
32. In other words, the Court declined to firstly remove the caveat and secondly declare the Plaintiffs as the legal proprietors of the suit land.
33. The Plaintiffs being aggrieved by the said determination lodged an appeal in *Butt & another v Kenya Revenue Authority & 2 others (Civil Application E145 of 2023)* [2023] KECA 835 (KLR) (7 July 2023) (Ruling) where the appeal court dismissed their application or stay of execution of the judgement.
34. I will now examine whether given the above background the instant suit is resjudicata.
35. Matters in issue; In the instant suit the Plaintiffs have sought the prayers inter alia; declaration of ownership, a permanent injunction, general damages and costs of the suit. These prayers when juxtaposed with the prayers in previous suit, it is obvious that the predominant matter in issue was and still is ownership of the suit land. In both suits just like in the pending COA appeal, they have asked the court to decree that they are the legal owners of the suit land. In my view the prayers for removal of caution and the permanent injunction are ancillary prayers to secure ownership of the land.
36. Parties in both suits are the same; The parties are the same in both suits save for the addition of the 1st and 3rd Defendants as well as the Interested Parties. The issue of new litigants been added to the same cause was also considered and addressed in the case of *Diocese of Eldoret Trustees (Registered) v*



Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR where faced with similar circumstances of addition of new parties the court held that;

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.’

37. Sameness of title; Evidently the title the subject matter of the suit is LR No. 209/8381/2 (IR 48604). It was the same in the ELC 67 OF 2018(OS) too.
38. Concurrence of jurisdiction; The Plaintiffs have approached the same court for similar reliefs. It is trite that this court cannot sit on appeal on its own decisions.
39. Finality of previous decision; it is not disputed that the court determined the predominant issue of ownership to finality and that must be the reason that the Plaintiffs submitted themselves to the appellate Court on appeal. There is no evidence that has been adduced by the Plaintiff in their current pleadings to point to circumstances that justify reopening of the suit.
40. I am in concurrence with the 2nd Defendant’s submissions that courts must exercise vigilance against the drafting of pleadings so as to give a new facelift to an otherwise and decided old case. See the decision of E T v AG & Anor (2012) EKLK. The Plaintiffs had the opportunity to bring their whole case in ELC 67 OF 2018 (OS) and cannot be afforded a second bit at the cherry. It is a practice that runs afoul public policy that litigation must come to an end. In light of the foregoing and the fact that addition of new parties herein does not sanitize a new cause of action. The inevitable conclusion is that this suit is thus Res judicata.
41. It is not disputed that there exists an appeal pending in the Court of Appeal which therefore brings this suit in sharp contrast to the provisions of Section 6 of the CPA with respect to subjudice. Evidently the Plaintiffs having submitted themselves to the jurisdiction of the COA have unflinchingly brought themselves to this Court on the very issue of ownership which they are challenging on appeal. Interestingly the Plaintiffs conveniently or by design failed to disclose these cases being the judgement in ELC 67 of 2018(OS), the Ruling delivered by this Court (differently constituted in the Plaintiffs application of 7/4/22 on temporary injunction (just like in this suit) and the appeal in the COA. It is trite that non-disclosure of material facts in an application for temporary injunction disentitles one from discretionary reliefs.
42. In view of the foregoing, I have no hesitation in finding, as I hereby do, that the present suit is res judicata and amounts to an abuse of the process of court.
43. The above decision is sufficient to dispose of the suit however for completeness of the record I will now shift to the Preliminary objection raised by the 3rd Defendant challenging the legality of the suit before the court. The Court takes judicial notice that the 3rd Defendant Bank was placed under receivership vide Gazette Notice No 6227 in Vol CXVII of 89 dated the 24/8/25. The contention by the 3rd Defendant which is not denied by the Plaintiffs is that the in the absence of leave of the court to bring suit against the said 3rd Defendant, the suit is but a nullity. The Plaintiffs have argued that the 3rd Defendant having failed to enter a memorandum of appearance and file a statement of defence within the stipulated time, it has no locus to raise a pleading let alone a preliminary objection. The court notes that there is no pleading challenging this state of affairs save what is contained in the written submissions of the Plaintiffs. It is trite that submissions are not pleadings and in the absence



of a pleading the court is unable to determine the issue in a vacuum. Even if for argument sake the 3rd Defendant had come on record properly, the suit could still be still born on account of non-compliance with the provisions of Section 56(2) of the KDI Act which provides as follows;

“No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the Court.”

44. I am further guided by the decision of the Court in *Bisai & Another –vs- Kenya Commercial Bank Ltd* (2002)2 E.A 346, Mwera J (as he then was) stated that; -

“in order to commence any action or proceedings against the 3rd Defendant (a company in Liquidation), the Plaintiffs were obliged, mandatorily by the *companies Act* to first obtain leave from the Court. That the Leave ought to be sought before bringing an action or proceedings and not retrospectively.”

45. From the pleadings filed herein, it is clear that the 3rd Defendant, Dubai Bank Kenya Limited is a company in liquidation. The Plaintiff does not dispute that no leave was sought prior to the commencement of this suit. The sanction of the court was required prior to the commencement of the suit. That being the case and this suit have been so filed without leave, the same is defective and misconceived as against the 3rd Defendant.

46. Final orders for disposal

In the end I make the following orders;

- a. This suit is resjudicata. It is dismissed
- b. Consequently, the Notice of motion dated the 16/10/25 be and is hereby dismissed
- c. The Preliminary objection dated the 30/12/24 is a pure point of law. It is upheld.
- d. The Plaintiffs shall meet the costs of the suit in favour of the 1st, 2nd and 3rd Defendants.
- e. For avoidance of doubt any orders subsisting on record are hereby discharged.

47. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF MARCH 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

In the presence of;-

1. Mr Kimaitu HB for Nyingoro for the Plaintiffs
2. Mr Mwaura for the 1st Defendant
3. Mr Lemiso for the 2nd Defendant
4. Ms Onyango HB for Ms Kinga for the 3rd Defendant
5. Ms Mwalozi for the 4th and 5th Defendants
6. N/A for the 1st and 2nd IP



7. Githua HB for Karuti

8. C/A- Ms Yvette Njoroge

