



Gachoni Enterprises Ltd v Nyaga & 4 others (Environment & Land Case 561 of 2015) [2025] KEELC 2999 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 561 OF 2015**

**AA OMOLLO, J
MARCH 27, 2025**

BETWEEN

GACHONI ENTERPRISES LTD PLAINTIFF

AND

DAVID NJERU NYAGA 1ST DEFENDANT

**MARTIN NJERU NAYAGA (BOTH OF THEM T/A NJERU NYAGA & CO.
ADVOCATES) 2ND DEFENDANT**

ARTHI HIGHWAY DEVELOPERS LIMITED 3RD DEFENDANT

ONESMUS KIMANI NGUNJIRI 4TH DEFENDANT

FRANKLIN KAMAU KIMATHI 5TH DEFENDANT

RULING

1. The Applicants filed a Notice of motion dated 31st July 2024 supported by an affidavit by David Njeru Nyaga seeking for the following orders;
 - a. That this Honourable Court be pleased to strike out the Plaintiff's suit with costs.
 - b. That the Plaintiff's suit is res judicata to Nairobi ELC No. 391 of 2010 (Gachoni Enterprises Limited Vs David Njeru Nyaga & 5 Others)
 - c. That the cost of this application be in the cause.
2. The motion was based on grounds inter alia; that the Plaintiff filed a suit in 2010 being Nairobi ELC No. 391 of 2010 which suit the parties thereto are the same and the Court rendered its ruling that the suit has abated, that the matters in issue in ELC 391 of 2010 are identical as to the present case with similar jurisdiction being Environment and Land Division at Nairobi. Once a suit abates under Order 5 Rule l(6) of the Civil Procedure Rules, 2010, the suit is null and no fresh suit shall be filed.



3. The Applicant impleads that there is no environment or land dispute that is disclosed in the pleading as between the Plaintiff and the 1st Defendant. That also the suit property in issue is solely registered in the name of the 3rd Defendant and the sale agreement being the cause of action is strictly between the Plaintiff and the 3rd Defendant.
4. The Plaintiff/Respondent filed its response 21st March 2025 outside the period that was extended to it and long after the 1st Defendant had filed his submissions. However, on the basis of the drastic orders sought, I will consider the replying affidavit sworn by Peter Mbogua though filed late. Mr Mbogua deposes that this suit is not res judicata as the issues raised here are distinct from what was raised in ELC 391 of 2010.
5. He stated that the parties involved in two suits are not identical and that the former suit was declared as abated but no substantive determination made on the merits. He avers that this suit discloses a cause of action as it was filed to seek redress for losses suffered by the Plaintiff including failure to refund Kshs 5,500,000 paid as deposit under a void agreement. That dismissing the suit would prevent adjudication on critical issues such as fraud and breach of contract which requires resolution for the interests of justice to be met.

Submissions:

6. In support of the motion, the Applicant filed submissions dated 4th February 2025. He submitted that the doctrine of res judicata serves to prevent endless litigation by ensuring that once a matter has been conclusively resolved by a competent court, it cannot be reopened, thus promoting finality, justice, and the efficient use of judicial resources.
7. That in this case, the Plaintiff has filed a fresh suit despite having filed Nairobi ELC 391 of 2010 which had abated thus effectively disregarding the principle of res judicata. He further argues that the Plaintiff is seeking to harass and embarrass him by relitigating the same issues. In support, he cited the case of Indian Supreme Court in Lal Chad v. Radaha Kishan (AIR 1977 SC 789) where it was stated that the principle of res-judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end.
8. The Applicant submits that the Plaintiff/Respondent is seeking similar remedies in respect of the same subject matter property L.R. No. 7149/115 (Original No. 7149/10). He cited the case of Edwin Thuo v. Attorney General & Another, Nairobi Petition No. 212 of 2012(unreported) where the court stated the courts must always be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court.
9. The application was supported by the rest of the Defendants.
10. On its part, the Plaintiff filed submissions dated 18th March 2025 submitting on the following issues;
 - a. Whether the suit is res judicata.
 - b. Whether the suit is fatally defective or an abuse of the court process.
 - c. Whether the suit is barred under order 5 rule 1(6).
 - d. Whether the plaint discloses a cause of action against the Applicant
11. In submitting this suit is not res judicata, the Plaintiff cited the case of John Florence Maritime Services Ltd And another versus CS Ministry of Transport and Infrastructure & 3 Others (2015)eKLR which



held that for resjudicata to apply, there must have been a conclusive determination on substantive issues. That the issues in the present claim were not determined in ELC 391 of 2010.

12. Under the heading of defect and or abuse of the court process, the Plaintiff cited article 159(2)(d) of the Constitution which mandates the Courts to administer justice without due regard to procedural technicalities. That it has a genuine cause of action.
13. The Plaintiff urged the court to disregard the provisions of order 5 rule 1(6) of the Civil Procedure Rules because it raises substantial issues. In supporting this argument, it relies on the case of D.T Dobie & Company Ltd v Muchina (1982)eklr.

Analysis and Determination:

14. After considering the pleadings and the submissions filed by the two parties, the court's simple task is to determine
 - i. whether once a suit is declared as abated, it bars filing of fresh suits on the same subject matter.
 - ii. Whether the present suit is res judicata.
15. The Applicant annexed a copy of the Plaintiff in ELC 391 of 2010, and an order issued on 10th November, 2014 which declared the former suit as having abated for non-compliance with Order 5 rule 1(6) of the Civil Procedure Rules. The said Rule states thus;

“(1) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”
16. The Plaintiff/Respondent does not deny that the above order was issued but contests its applicability to this suit on two grounds, first that the parties in that suit is not identical to the current suit. Second, that under the provisions of article 159 of the Constitution, this court should disregard procedural technicalities.
17. I have perused the plaintiff in the case ELC 391 of 2010 with this suit and confirm that the parties in both suits are the same as the present plaintiff is the same as the Plaintiff in ELC 391/2010. The parties whose names appear as the 1st to 6th Defendants in ELC 391/2010 are the same parties sued in the current suit as 1st to 6th Defendants. The subject matter of the claim as raised in the current suit is similar to the claim in the previous suit, which is sale of land title number 7149/115 and refund of the sum of Kshs 5,500,000. The argument that there are parties who have been added in my view does not change the fact of similarity of parties and the subject matter in dispute.
18. Rule 1(6) of order 5 does not state whether or not a fresh suit can be filed. If the Rules Committee intended that to be so, nothing stopped them from inserting such proviso as they did under order 24 (7) (1) of the Civil Procedure Rules. In order to determine the question of a new suit can be filed in the circumstances, I shall do a comparison to cases that end due to non-compliance with the Rules and also the rights of parties to be heard.
19. Under order 24(7)(2), there is provision that an abated suit can be revived subject to a party showing sufficient cause. For suits dismissed for non-attendance, Order 12 rule 6(1) of the Civil Procedure Rules state that, “Subject to subrule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit.”



20. It is my considered opinion that the Plaintiff could not apply to revive ELC 391 of 2010 because the failure to collect and serve the summons cannot be reversed. However, a new suit can be filed as long as the claim is not caught up with the limitation of time. This would afford the parties an opportunity to enjoy their right to a fair hearing as anticipated in article 48 and 50(1) of the *Constitution* of Kenya 2010. Article 50(1) says;
- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
21. This right to be heard was discussed by the Supreme Court of Kenya in the case of Dr Evans Kidero & 4 Others versus Ferdinand Waititu & 4 Others (2014) KESC 11 (KLR) where at paragraphs 257 and 258 of that judgement they said;
257. Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.
258. What then are the norms or components of a fair hearing? The Supreme Court of India, in *Indru Ramchand Bharvani & Others v. Union of India & Others*, 1988 SCR Supl. (1) 544, 555 found that a fair hearing has two justiciable elements:
- (i) an opportunity of hearing must be given; and
 - (ii) that opportunity must be reasonable (citing *Bal Kissen Kejriwal v. Collector of Customs, Calcutta & Others*, AIR 1962 Cal. 460).
22. The 1st Defendant asserted that the suit is res judicata. This is far from the truth as he annexed a copy notice of preliminary objection dated 16th December, 2013 filed in ELC 391/2010 which sought for the striking of that suit after the Plaintiff failed to comply with the provisions of order 5 rule 1(6) as regards extracting of summons to enter appearance. Thus, the suit was not determined on merits that would invoke the application of Section 7 of the *Civil Procedure Act*.
23. Section 7 of the *Civil Procedure Act* bars a court from trying a suit whose subject matter has been substantially litigated upon by the same parties and finally determined by a court of competent jurisdiction. It is noteworthy that in the abated suit, the issues in the pleadings were not litigated on and conclusively determined on merit by court. In the case of *Edwin Thuo v. Attorney General & Another*, Nairobi Petition No. 212 of 2012 relied on by the 1st Defendant was also quoted by the Supreme Court in the case of *John Florence Maritime Services Ltd And another versus CS Ministry of Transport and Infrastructure & 3 Others* (2015)eKLR, citing paragraph 11 which stated thus;
- “The application of the principle of res judicata has the potential of locking out a person from the doors of justice or even reaching the out-stretched arms of justice if the claim is disposed of without venturing into the merits. Consequently, the factors and circumstances



ought always be nit-picked and caution exercised. The court ought to be in no doubt that the principle is applicable to the facts and circumstances of each case.”

24. Lastly, the 1st Defendant pleaded that the plaint does not disclose any reasonable cause of action. Under paragraph 22 of the Plaint, the plaintiff discussed the particulars of breach of duty and professional obligations of the 1st and 2nd Defendants. The particulars of breach are listed from paragraphs (a) to (t). This matter has not proceeded to hearing and it would be difficult to determine via an interlocutory application whether the grounds pleaded are baseless or not.
25. Therefore, in light of the foregoing analysis, I find no merit in the application by the 1st Defendant. The same is dismissed with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MARCH, 2025

A. OMOLLO

JUDGE

