



**Kimuta Limited v Flora Fresh Limited & 4 others (Environment & Land Case 40 of 2024)
[2025] KEELC 2946 (KLR) (Environment and Land) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 40 OF 2024**

**MC OUNDO, J
MARCH 27, 2025**

BETWEEN

KIMUTA LIMITED PLAINTIFF

AND

FLORA FRESH LIMITED 1ST DEFENDANT

EZEKIEL KARANJA 2ND DEFENDANT

**ELIZABETH WANGUI KARUNGAI AND CAROLINE WACHERU KARUNGAI
(BEING THE PERSONAL REPRESENTATIVES OF THE ESTATE OF JOHN
NYAMU - DECEASED) 3RD DEFENDANT**

ANTHONY WAITITU IGANJO 4TH DEFENDANT

ANN WANJIRU IGANJO 5TH DEFENDANT

RULING

1. Pursuant to a Ruling delivered on 11th July, 2024, where the court had dismissed Applications dated 6th March 2024 and 25th April, 2024 that had sought contempt orders against the Plaintiff and a joinder of the proposed 6th Defendant to the suit respectively, the 3rd Defendant has now filed a Notice of Motion Application dated 2nd October, 2024 brought under the provisions of Section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law where he seeks for the stay of this proceedings herein pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. E869 of 2023.
2. The said Application is based on the grounds therein and the Supporting Affidavit of equal date sworn by Elizabeth Wangui Karungai, a joint representative of the estate of John Nyamu (deceased) who deponed that the original 3rd Defendant was her late husband. That the deceased had settled on the



- Plaintiff's land with the knowledge of the late Francis Iganjo Mutahi who had been at all material times a shareholder holding one share in the Plaintiff and was also a director of the Plaintiff. That the said Francis Iganjo Mutahi was represented by the joint administrators thereon namely Ruth Muthoni Iganjo and Dickson Mutahi Iganjo.
3. That three shareholders /directors of the Plaintiff namely the late James Kanyotu, the late Mwangi Stephen Muriithi and the late Francis Iganjo Mutai had agreed on the sharing of the suit land registered in the name of the Plaintiff wherein although the late Mwangi Stephen Muriithi had not signed his part and owing to the said agreement, the late Francis Iganjo Mutahi took possession of his portion which has remained in possession of his estate to date.
 4. That subsequently, the late Francis Iganjo Mutahi had allowed the original 3rd Defendant to set up his residence on his portion of land wherein he (3rd Defendant) had built a bungalow and eventually occupied a portion measuring 8 acres or thereabout which is known as his to date.
 5. That indeed, the instant suit had been commenced without the knowledge and involvement of the estate of the late Francis Iganjo Mutahi hence the objection by the deceased. That this court (sitting in Nakuru) had been informed of the existence and pendency of a suit namely Milimani ELC. 901 of 2014 which had been commenced and sustained by the joint administrators of the estate of the late Francis Iganjo Mutahi against the late Mwangi Stephen Muriithi, Gitonga Mwangi Muriithi, the estate of the late James Kanyotu and the registrar of companies owing to, among others, their interference with the shareholding of the estate of the late Francis Iganjo Mutahi.
 6. That indeed, the court (sitting in Nakuru) had appreciated the fact that the dispute on the shareholding of the Plaintiff ought to be determined before it could deal with the claim for eviction against the Defendants in the present suit where it had proceeded to stay the suit pending the hearing and determination of the suit at Milimani. That the Plaintiff had purported to appeal the court's decision staying the suit herein in Nakuru Civil Appeal No. E013 of 2021.
 7. She deponed that being dissatisfied with the judgement of the court, the estate of the late Francis Iganjo Mutahi had filed an appeal in the court of Appeal at Nairobi in Nairobi COACA. No. 869 of 2023 which appeal was pending hearing and final determination. She opined that the sequence of events in relation to the claim by the Plaintiff and the estate of the late Francis Iganjo ought to be, a determination on the shareholders and directors of the Plaintiff, then a determination on whether the instant suit was properly instituted, followed by a determination on whether there had been an agreement by the subscriber shareholders to share the suit land and if yes, whether the late Francis Iganjo Mutahi had taken possession of his portion of the suit land. That finally, a determination on the basis of the Defendants' occupation and/or possession of the portions of the land they were occupying.
 8. That the joint administrators of the estate of the late Francis Iganjo Mutahi were not represented in the present suit thus their claim had not been addressed. That subsequently, great injustice would be occasioned on the said estate and on themselves on behalf of the estate of the late John Nyamu should the suit herein be heard as it was. That indeed, the Plaintiff although not represented, had been moving with speed to have the present matter heard and determined prior to the determination of the pending appeal before the court of appeal which appeal would have far reaching ramifications on the Plaintiff hence the instant Application.
 9. That she was apprehensive of the Plaintiff's actions owing to the fact that it had hired goons, destroyed her property and had continued to do so in blatant disregard of her claim herein. That it was thus in the interest of justice that the suit herein be stayed pending the hearing and determination of the pending appeal before the court of appeal in Nairobi COACA No. E869 of 2023.



10. In response and opposition to the 3rd Defendant's Application, the Plaintiff filed grounds of Opposition dated 7th October, 2024, two Replying Affidavits both dated 4th November, 2024 and sworn by Gitonga Mwangi Muriithi and Margaret Nyakinyua Murigu respectively and a Further Affidavit dated 26th November 2024 sworn by Margaret Nyakinyua Murigu.
11. The Plaintiff's Grounds of Opposition, were that:
- i. The Application is belated, mischievous and not made in good faith.
 - ii. Serving an Application one clear day to a hearing fixed in the presence of all parties' months ago is against the overriding objectives of the judicial process.
 - iii. The Applicant is notorious for antics meant to delay the hearing of the instant matter as they had even filed a Defence 6 years after the service of Summons to Enter Appearance and barely 2 weeks to the hearing date.
 - iv. The Applicants are not parties to Nairobi COACA No. E869 of 2023 and have no business seeking stay of proceedings over it.
 - v. The subject of Nairobi COACA No. E869 of 2023 is land and not a dispute on the shareholding of the Plaintiff herein.
 - vi. The Estate of Francis Iganjo Mutahi is not a shareholder or director of the Plaintiff.
 - vii. The Applicants are not members of Kamuta Ltd, are not privy to its operations and cannot therefore sustain the allegations of non-involvement of alleged shareholders and directors of the Plaintiff.
 - viii. The Administrators of the Estate of Francis Iganjo Mutahi are not party to the present suit and the grounds upon which the Application is based is misconceived and devoid of merit.
 - ix. The 3rd Defendant has a counterclaim for adverse possession in the present suit hence the outcome of the Appeal has no bearing in the present suit.
 - x. The Applicant's advocate acted for the Estate of Francis Iganjo Mutahi in Nairobi ELC 901 of 2014 from which the subject appeal arises and accordingly, the application is a conspiracy from the 4th and 5th Defendants with the 3rd Defendant to further delay the matter.
 - xi. There have been too many applications in the instant matter which are abusive to the court process and it is high time that the core dispute gets addressed.
 - xii. Delay in the prosecution of the matter hurts the Plaintiff and benefits the Defendants as they continue to milk their illegally occupied land dry without any proceeds going to the registered owner of the land.
 - xiii. The Applicant is only having the audacity to file the vexing application because there is in place interim orders. The court should consider the utility of those interim orders and discharge the same.
12. In his Replying Affidavit, Gitonga Mwangi Muriithi, a director of the Plaintiff deponed that the Defendants herein had been making relentless applications putting hurdles to full hearing of the matter herein because they had obtained status quo orders on 7th December, 2023 whose net effect had been to prevent the Plaintiff from utilizing the property while they exploit the property earning millions at the expense of the Plaintiff who is the undisputed registered owner of the suit property. That it was for that reason that the 4th and 5th Defendants had filed the Applications dated 23rd December, 2023, 14th



- November, 2023 and 6th March, 2024 while the 4th Defendant's proxy by the name of Willie Kihara Njoki had filed an Application dated 25th April, 2024. That indeed, the Application dated 6th March, 2024 in particular had scuttled the 3 hearing dates that had been scheduled for 20th, 21st and 24th April, 2024 that had been given on priority basis by Justice Ombwayo thereby causing delay in the resolution of the instant matter.
13. That the 3rd Defendant who for all intents and purposes was acting for and at the behest of the 4th and 5th Defendants in the present application had managed to scuttle the hearing that had been scheduled for the 7th and 9th October, 2024 and prevented the matter herein from being listed for hearing thereafter. That if the Defendants were no longer interested in an expedient trial, they should not be allowed to have their cake and eat it as they could not enjoy the status quo orders and have the instant matter stalled. He thus asked the court to forthwith discharge the said status quo orders. That the 3rd Defendant had made the Application herein in bad faith and with malicious intent hence was underserving of the discretionary orders.
 14. That there had been inordinate and unexplained delay prior to the filing of the present application the present Application having been filed on Thursday 3rd October, 2024 whereas the matter was coming for hearing on Monday 7th October, 2024 demonstrating that the 3rd Defendant had been hell bent on scuttling the hearing. That indeed, direction on the hearing for 7th and 9th October, 2024 had been given on 11th July, 2024 in the presence of the counsel for the 3rd Defendant who did not protest the same on the basis of an existing Appeal in Nairobi.
 15. That on 7th December, 2023, the Honorable Justice Ombwayo after he had been confronted with 3 applications from the 4th Defendant and 2 Applications from the Plaintiff, had seen it in his wisdom to fast track the hearing of the main suit and in that regard had done away with all the applications including contempt, amendment, injunctions, setting aside and directed that the matter be heard on 22nd, 23rd and 24th April, 2024. That subsequently, for the 3rd Defendant to now file yet another application after 7 applications had been dispensed with by both Justice Ombwayo and this court, she was dragging the court and all parties back to the position that the learned Judge had been avoiding. That the 3rd Defendant who had been present in court when Justice Ombwayo had given his directions on a 3-day hearing had failed to raise her present issues hence she was estopped from raising the issue of an appeal as a bar to the proceedings herein and seeking a review of the directions of both the Justices through a back door. He thus deponed that the instant Application lacked merit and was a waste of court's precious time.
 16. That the 3rd Defendant had attempted to occupy a portion of the subject premises by erecting a catering establishment structure but after the same had been swamped by rising waters of Lake Naivasha, they had abandoned the venture and the premises hence when the Deputy Registrar who had been sent separately by the court to conduct a site visit had visited the said site, none of them had captured the occupation of the premises by the 3rd Defendants. That a party who had abandoned the premises could not be heard to pray that the case be derailed as she gains nothing but only prevents the Plaintiff from optimally utilizing the property as long as the proceedings herein proceeded. That in any case, the 3rd Defendant was not a party to Nairobi ELC 901 of 2014 and was certainly not a party in Nairobi Civil Appeal No. E869 of 2023 thus one was at a loss as to why they should be interested in halting the present proceedings to await an appeal that she was neither privy to nor in control of.
 17. That the 3rd Defendant had belatedly filed a claim for adverse possession against the Plaintiff which claim had nothing to do with the Appeal referred to hence there was no basis why the proceedings herein should be stayed. That every party in the present matter and in the Nairobi Appeal had agreed that Plaintiff was the registered proprietor of the subject properties and no outcome in the Court of



Appeal would alter that fact thus making the attempt to stay an effort in futility. That indeed, the court had unlimited jurisdiction to render justice hence in the unlikely event that the Court of Appeal rendered a decision which would have a bearing in the instant matter, the court would not be out of remedies and may review any order or grant such relief as justice would dictate hence there had been no need to stay the matter.

18. That the Plaintiff was suffering losses amounting to tens of millions of shillings every month thus if the court was to entertain the 3rd Defendant at all, then the 3rd Defendant should at the very least be directed to deposit security for damages amounting to not less than Kshs. 100,000,000/=.
19. In reply to the 3rd Defendant's Supporting Affidavit, he stated that the contents of the same was about the Estate of Francis Iganjo Mutahi clearly demonstrating that the 3rd Defendant was a mere mouth piece of the 4th and 5th Defendants. That further, the content therein had delved deeply into matters of substance which should be dealt with at the trial such as the purported justification of the 3rd Defendant's presence in the premises. That the 3rd Defendant was trying to speak into the internal affairs of the Plaintiff which matters she was not privy to and could only talk about them from a hearsay perspective. That the allegations of hired goons by the Plaintiff was res judicata considering that the court had considered the issue during the 4th Defendant's applications for contempt and dismissed the same.
20. He reiterated that justice delayed is justice denied hence an attempt to stall the instant matter with an order for stay of proceedings would be denying the Plaintiff justice and aiding invaders to further continue milking the Plaintiff's premises dry. That it was thus in the interest of justice that the instant application be declined and dismissed with costs.
21. In her Replying Affidavit, Margaret Nyakinyua Murigu, one of the Administrators of the Estate of James Kanyotu (Deceased) and a Director of the Plaintiff by virtue of the deceased holding majority shares, opposed the application for stay of the proceedings herein for reasons that the matter before the Honorable Court had been substantially dealt with in Nairobi ELC Case No. 901 of 2024, Ruth Iganjo & Another versus Mwangi Stephen Muriithi & Others wherein a judgement had been rendered.
22. That the said matter was the subject of appeal in Nairobi Court of Appeal Case No. E869 of 2023 and had been lodged by the Plaintiffs therein who had represented the estate of Mutahi Iganjo. That the 4th and 5th Respondents herein were the beneficiaries of the said estate. That the matter before the Court of Appeal was at an advanced stage as directions for hearing had already been issued. That consequently, the Honorable Court's proceedings stood at risk of creating a multiplicity of suits resulting in conflicting orders over issues which had been admitted by all parties herein as being substantially similar to the issues before the Court of Appeal in Nairobi.
23. That further, the Honorable Court stood a risk of giving disgruntled parties in the instant suit an opportunity to relitigate issues that had substantially been dealt with by a court of concurrent jurisdiction and soon a court of higher ranking thereby resulting in a mongrel of orders which would create an undesirable situation for execution of the orders of the court. That it had also become apparent to her that some parties in the suit herein were introducing new issues for litigation vide the Counterclaim filed by the 3rd Defendant who claimed adverse possession with a view of litigating issues which had not been raised in the suit at Nairobi thereby causing significant prejudice to the Plaintiff who was the registered proprietor of the disputed properties. That consequently, it was undesirable on the part of the Plaintiff to continue with the present matter as it significantly undermined the proceedings in the Court of Appeal at Nairobi.



24. She thus prayed that the Honorable Court commends that the present suit and counterclaim be deemed as creating a multiplicity of suits and be struck out in its entirety as opposed to a stay of the proceedings.
25. In her Further Affidavit, she deponed that the firm of Wahome & Akedi Advocates had been on record in the instant matter for the Plaintiff having filed their memorandum of appearance dated 28th February 2020 at Nakuru ELC.
26. The 1st, 2nd, 4th and 5th Defendants on the other hand supported the 3rd Defendant's Application vide their Affidavit sworn on 17th October, 2024 by Anthony Waititu Iganjo, the 4th Defendant herein, deponed that the instant matter had been stayed pending the hearing and determination of ELC 901 of 2014-Nairobi which had subsequently been heard and judgement delivered wherein the Plaintiff's case therein, had been struck out on a technicality. That subsequently, the Plaintiff had filed an appeal in the Court of Appeal being [CA No. E869 of 2023](#)-Nairobi hence the trial court had in the intervening period stayed execution of the impugned judgement. That the outcome of the said COA [CA No. E869 of 2023](#)-Nairobi which was at the submission stage had a bearing on the present case except on claim of adverse possession.
27. That in the instant case, the Defendants had filed an application for contempt of court against the Plaintiff. That the court had dismissed the said application after which the 1st, 2nd, 4th and 5th Defendants had lodged an appeal being COA [CA No. E117 of 2024](#)-Nakuru whose outcome would have an impact on the case herein. That the Plaintiff's further bundle of documents and statement contained 90% of the pleadings and proceedings in ELC 901 of 2014-Nairobi, which was an acknowledgement that indeed, the case had an impact on the instant case. That subsequently, it was prudent to stay the present case pending the outcome of COA [CA No. E869 of 2023](#)-Nairobi and COA [CA No. E117 of 2024](#)-Nakuru.
28. On 5th November, 2024, directions were taken for the Application to be disposed of by way of written submissions. The Court had also indicated that it would consider the issue of the Plaintiff's representation in view of the substantive oral submissions by the parties on the same. However, at the time of writing this ruling, all parties had complied except the Plaintiff represented by the firm of Guandaru Thuita & Co. Advocate despite them having on 22nd January, 2025 requested for one extra day to enable them comply, wherein the court had granted them a leave of 7 days to do so

3rd Defendant's submissions.

29. In support of their Application, the 3rd Defendant/Applicant vide their written submissions dated 18th January, 2025 summarized the factual background of the matter in details and then reiterated that the court had appreciated the fact that the dispute on the shareholding of the Plaintiff ought to have been determined before it could deal with the claim for eviction against the Defendants in the instant suit and stayed the suit herein pending the hearing and determination of the suit at Milimani which suit was to determine the shareholding. That indeed, the Plaintiff had purported to appeal against the said decision in the Court of Appeal at Nakuru in Nakuru Civil Appeal No. E013 of 2021 but lost interest in the said appeal and was now moving with speed to have the present matter heard and determined in disregard of the pending appeal by the joint administrators of the estate of the late Francis Iganjo Mutahi, which appeal would have far reaching ramifications on the Plaintiff. That Nairobi COACA No. E869 of 2023 was still pending hearing and final determination.
30. That in any event, the joint administrators of the estate of the late Francis Iganjo Mutahi had not been represented in the instant suit thus the said estate's claim had not been addressed as the Plaintiff had



rightly admitted in their Grounds of Opposition. They thus submitted that a grave injustice would be occasioned to the said estate and the 3rd Defendant should the suit herein be heard as it was.

31. As to whether the suit had properly been instituted, they submitted that it had been clear from the Replying and Further Affidavit that had been sworn by Margaret Nyakinyua Murigu, that the late James Kanyotu was a shareholder of the Plaintiff and his estate was represented by, among others, Margaret Nyakinyua Murigu. That however, it appeared from the said affidavit that the deponent and her co-administrators did not sanction the commencement of the suit herein thus it would be prejudicial to proceed with the same while the appeal was still pending and where the filing of the same had also not been sanctioned by the relevant shareholders/directors. That further, the estate of Francis Iganjo Mutahi had also not been represented in the present suit and had not sanctioned the filing of the same.
32. On the 3rd Defendant's locus in filing the instant Application, they submitted that whilst the Plaintiff's argument was to the effect that the 3rd Defendant had nothing to do with ELC No. 901 of 2014 and Appeal No. Nairobi COA No. E869 of 2023 since they had not been a party to the said suits, yet the said argument did not take into account that the 3rd Defendant was in occupation of the land and therefore had interest. That further, the 3rd Defendant's claim by way of counterclaim in the present suit could not be wished away.
33. It was thus their submission that the 3rd Defendant's claim was properly founded hence she had locus to institute and sustain a claim against the Plaintiff in relation to the 3rd Defendant's interest and possession of the suit land which was the subject of the proceedings herein. That since the determination of the shareholding of the estate of the late Francis Iganjo Mutahi would have an effect on the 3rd Defendant's claim, it was immaterial that the 3rd Defendant was not a party in the pending appeal.
34. The 3rd Defendant submitted that they had made out a case for granting an order of stay of the proceedings pending determination of the Appeal. They placed reliance in the decided case of Port Florence Community Health Care v Crown Health Care Limited [2022] eKLR to submit that granting stay of proceedings pending an appeal was discretionary. That the court ought to consider whether the pending appeal was arguable, whether any prejudice would be suffered should the orders sought be granted and whether the application was filed without undue delay, among others. They thus submitted that the 3rd Defendant had satisfied the conditions for which the court ought to stay the instant suit.
35. That the pending appeal was arguable as could be seen from the annexed Memorandum of Appeal that had been filed against the decision of the court in Milimani ELC No. 901 of 2024. That should the appeal be allowed; the court would grant the parties claiming to be shareholders of the Plaintiff an opportunity to have a determination made on their shareholding which ultimately would determine the prayers made in the present suit. It was thus their submission that they had satisfied the court that the appeal would be rendered nugatory should the stay of proceedings be declined in line with the Port Florence Community Health Care's case (supra).
36. As to whether the application had been filed without undue delay, they submitted in the affirmative to the effect that whereas the same had been filed after parties had already filed their respective pleadings and documents in readiness for the hearing of the suit on merit, the instant Application had been filed before the commencement of the said hearing. That further, as it had been confirmed by Margaret Nyakinyua Murigu in exhibit "3" annexed to her Replying Affidavit, the Court of Appeal had issued directions in relation to the hearing of the appeal and the instant application had been filed prior to the hearing of the said appeal.



37. On whether any party would be prejudiced if stay of proceedings was granted, they submitted that it was confirmed that judgement had been entered in favour of the Plaintiff against the joint administrators of the estate of the late Francis Iganjo Mutahi under whom the Defendants claim had been premised. That subsequently, the Plaintiff was not likely to suffer any prejudice should stay of proceedings be granted noting the conflicting positions that had been taken by some of the shareholders thereon.
38. In conclusion, they placed reliance in the case of Port Florence Community Health Care's case (supra) to submit that judicial time was precious and scarce and must not be wasted in proceedings that would end up being academic exercises, to urge the court to stay the proceedings herein pending the hearing and determination of the aforementioned appeal.

1st, 2nd, 4th and 5th Defendants Submissions.

39. In support of the 3rd Defendant's Application, the 1st, 2nd, 4th and 5th Defendants filed their submissions dated 12th November, 2024 wherein they reiterated that [*CA No. E869 of 2023*](#) had stemmed from Nairobi ELC No. 901 of 2014 and that the subject matter therein was the same as the instant matter. That subsequently, the outcome of the Appeal would have a legal impact on the present case since all parties herein had heavily relied on the proceedings, pleadings and judgements in Nairobi ELC 901 of 2014.
40. That indeed, an administrator of the estate of James Kanyotu who had alleged that the estate of James Kanyotu held 50% share in the Plaintiff had conceded that the Court of Appeal matter was at an advanced stage thus it had been undesirable on the part of the Plaintiff to continue with the instant matter as it significantly undermined the proceedings in the Court of Appeal at Nairobi. That indeed, the said administrator of the estate of James Kanyotu had sought for the Plaintiff's suit to be struck out.
41. That since the judgement in Nairobi ELC No. 901 of 2024 had been stayed pending the hearing and determination of the Nairobi Court of Appeal matter, by extension, the present matter should also be stayed pending the hearing and determination of the said appeal. That further, they had filed contempt of court proceedings against the Plaintiff which application had been dismissed and they had lodged an appeal in the Court of Appeal-Nakuru being COA [*CA No. E117 of 2024*](#) wherein the record of appeal had duly been filed and parties were awaiting directions. That similarly, if the said appeal was successful, the order therein would have an impact on the instant case. They placed reliance on the decided case of *Karia v Keshe (Environment and Land Appeal E006 of 2023) [2024] KEELC 1184 (KLR) (6 March 2024) (Ruling)* where the court had cited the case of *Re Global Tours & Travels Limited, High Court Winding up case No. 43 of 2000*, to urge the court to grant the stay of the proceedings herein in the interest of justice.
42. Their submission was hinged on the provisions of Section 6 of the [*Civil Procedure Act*](#) and the decided case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] KEHC 10142 (KLR)* to submit that whereas the Defendants herein had not been parties in the Nairobi matter, the Plaintiffs in the said Nairobi matter were the legal representatives of the estate of Francis Iganjo Mutahi (deceased) while the 4th and 5th Defendants herein were the beneficiaries of the estate of Francis Iganjo Mutahi (deceased) although they had been sued in their individual capacity. That the other Defendants in the instant case had derived their occupational consent from the estate of Francis Iganjo Mutahi (deceased).
43. That indeed, the issue of shareholding and or Directorship of the Plaintiff had been under litigation since the year 2014 in the Nairobi matter which had never been settled as the appeal on the same was pending. That further, the 4th and 5th Defendants had a counterclaim based on adverse possession of



the entire suit land which was also being claimed by the Plaintiff herein, the estate of Francis Iganjo Mutahi (deceased), the estate of James Kanyotu (deceased) and the estate of Mwangi Stephen Muriithi (deceased). That subsequently, it did not matter whether or not the 3rd Defendant was a party in the COA [CA E869 of 2023](#) since the court could on its own motion stay proceedings once it had been notified of the previous suits and or pending Appeals relating to the same subject matter so as to avoid issuance of conflicting orders.

44. That indeed, it had also been on record that the Plaintiff had illegally entered the suit lands for the first time in October, 2023 from the year 1976 thus it could not allege that the instant matter should be concluded with urgency. That by the Plaintiff herein applying for eviction orders against the Defendants, it showed that the Defendants had been on the suit premises. That however, eviction orders being final orders, the same could not be issued at an interlocutory stage hence the essence of the status quo orders. That it was thus prudent to maintain the status quo orders and stay the proceedings herein.

Plaintiff's submissions.

45. The Plaintiff's submission through the firm of Wahome and Akedi Advocates was that they were the Estate of James Kanyotu (Deceased) who had held 50% shares in the Plaintiff. That the court had no jurisdiction to stay the proceedings herein since the proceedings in Nairobi were at the appellate stage. That instead, the instant suit ought to be struck out in its entirety as the same was res judicata (by admission of parties) and had violated principles of justice under the provisions of Sections 3A and 7 of the [Civil Procedure Act](#). That the issues for determination were therefore as follows:
- i. Whether M/s Wahome & Akedi Advocates have authority to act for the Plaintiff and whether an administrator of the Estate of James Kanyotu (Deceased) ought to be allowed to make representation on behalf of the Plaintiff;
 - ii. Whether the issues raised in the Plaintiff and counter-claim are res judicata and whether the application to stay proceedings is merited; and
 - iii. Costs.
46. On the first issue for determination on the representation of the Plaintiff, submission was to the effect that the firm of Wahome & Akedi Advocates had the requisite authority to act for the Plaintiff and that Margaret Nyakinyua Murigu ought to be allowed to act for the Plaintiff as she was representing the Estate of James Kanyotu who had 50% shares in the Plaintiff. That indeed, the firm of Wahome & Akedi had been on record for the Plaintiff alongside the firm of Guandarua Thuita & Co. Advocates after it filed its Memorandum of Appearance dated 28th February 2020 when the instant matter had been before the ELC Court at Nakuru. That the firm had also filed a notice of appointment dated 19th June, 2024 for purposes of mapping when the matter herein had been transferred to Naivasha court from Nakuru.
47. That indeed, at all material times, Counsel Mr. Guandarua Thuita had acknowledged the firm's representatives appearing at different stages. That in any case, there was no jurisprudence or legal principle deterring an Advocate from filing separate pleadings or documents when jointly acting for a party. They however acknowledged that for good order it had always been the practice that the lead Counsel files the documents. That the issue of representation and filing of documents had only arisen due to the different position that had been taken by the 50% shareholder in the Plaintiff from the one that had been held by the Estate Mwangi Stephen Muriithi which were also holding 50% shares in the Plaintiff. They urged the court to consider that to date, the shareholding in the Plaintiff was split on a 50:50 basis between two families.



48. That whereas the company had a separate legal personality from its shareholders, it was trite that shareholders with an equal controlling stake in a company ought to be considered as their interests had the effect of determining the decision of the company. Reliance was placed in combination of decisions in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR and *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] KECA 248 (KLR) to submit that Margaret Nyakinyua Murigu in her capacity as the personal representative of the Estate of James Kanyotu (Deceased), had the authority to swear an affidavit on behalf of the 50% shareholder who in turn had the authority under the Company's Articles of Association to act for the company.
49. That further, the Estate of James Kanyotu (Deceased) could sue claiming that the property in the form of the shares held in the Plaintiff had been put at risk. That the Application herein could lead to a multiplicity of orders unfavorable to the interests of the Estate of James Kanyotu since the matter in Nairobi ELC 901 of 2024 had been concluded and the judgement entered in favour of the Plaintiff. That subsequently, it defied logic why the non-shareholding director in the Plaintiff was bent on prosecuting the instant matter thereby putting the shareholders of the Plaintiff at risk of loss if adverse orders were made. They thus submitted that the deponent, Margaret Nyakinyua Murigu's affidavit was properly on record as she was representing the interests of the Estate of James Kanyotu (Deceased), being the administrator of the said estate.
50. They hinged their reliance on the provisions of Section 258 (1) of the *Companies Act* to submit that in the instate case, both the Estate of James Kanyotu and that of Mwangi Stephen Muriithi had one (1) share each. That accordingly, any resolution on a contentious issue, such as the present one, may not be passed thus the court had to consider the interest of each shareholder/member and unlock the deadlock. It was their submission that the proprietary interests in the shares of the deceased held in the Plaintiff had been put at risk by virtue of the position that had been taken by the current director in the company who held no share in the Plaintiff hence the deponent had been well within her rights to file the affidavit taking a position to protect the interests of the Estate of James Kanyotu that had 50% shareholding.
51. On the second issue for determination as to whether the issues that had been raised in the Plaint and counter-claim were res judicata and whether the application for stay was merited, they submitted in the affirmative and urged the court to strike out the entire case to prevent abuse of the court process. Reliance was placed on the provisions of Section 3A of the *Civil Procedure Act* to submit that the inherent power of the court was paramount to any interest of the parties before the court.
52. They further placed reliance on the decided case of *Nguruman Limited v Jan Bonde Nielson* [2014] KEHC 1718 (KLR) and the provisions of Section 7 of the *Civil Procedure Act* to submit that that the explanatory notes to Section 7 of the *Civil Procedure Act* were instructive in the matter herein. That under explanation 2, the doctrine of res judicata was applicable in the instant matter as the other suit in Nairobi ELC Case No. 901 of 2014 had been substantially determined and was the subject of appeal before the Court of Appeal in COACA No. E869 of 2023. That subsequently, regardless of whether the appeal was pending, the issues were res judicata as they had been determined with finality in Nairobi ELC Case No. 901 of 2014. That indeed, pursuant to Explanation 4, the doctrine of res judicata was still applicable even if an issue which was raised in the present matter could have been raised in Nairobi ELC Case No. 901 of 2014 but was never raised.
53. That whereas the issues in the counterclaim that had been filed by the 3rd Defendant/Applicants who had claimed adverse possession on the suit properties were capable of being raised in Nairobi ELC Case No. 901 of 2014 but were never raised, did not mean that this court was vested with jurisdiction to hear and determine the counterclaim. They placed reliance in the court of Appeal's decision in John



Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] KECA 472 (KLR) to submit that the present suit was res judicata and that the outcome of the Court of Appeal would be binding on this court. That in any case, the parties themselves had admitted that all the issues in the suit had been directly and substantially similar.

54. That the presence of the instant suit had given an unsuccessful litigant the opportunity to re-open the case and relitigate their issues or explore remote arguments that they had not previously raised in Nairobi ELC No. 901 of 2014. They thus submitted that the application seeking stay of proceedings was not merited as the circumstances of the instant case did not fall under Section 6 of the Civil Procedure Act on stay of suit. That subsequently, the court ought to exercise its inherent power under section 3A of the Civil Procedure Act and strike out the entire suit.
55. On costs, it was their submission that since all the parties in the matter herein had been at fault having admitted that the instant matter was res judicata Civil Appeal No. E869 of 2023, no order as to costs should be made.

Determination.

56. I have considered the application before me dated 2nd October 2024 filed by the 3rd Defendant who sought for the stay of this proceedings herein pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. E869 of 2023 who's outcome would have far reaching ramifications on the Plaintiff. I have further considered the responses therein, the submissions, the law and the authorities cited. Of interest to note is that there is no dispute that the impugned pending appeal stemmed from Nairobi ELC 901 of 2014 for which the Plaintiff's stand herein is that the current matter is thus res judicata Nairobi ELC 901 of 2014 which was determined with finality. That further the 3rd Defendant/Applicant was not a party to Nairobi COACA No. E869 of 2023 and therefore had no business seeking stay of proceedings over it. That furthermore, the outcome of the Appeal had no bearing on the 3rd Defendant/ Applicant's counterclaim for adverse possession in the present suit.
57. The 1st, 2nd, 4th and 5th Defendants on the other hand supported the 3rd Defendant's Application seeking stay of proceedings for the reason that this matter had been stayed pending the hearing and determination of ELC 901 of 2014-Nairobi which had subsequently been heard and judgement delivered wherein the Plaintiff being dissatisfied filed an appeal in the Court of Appeal being CA No. E869 of 2023-Nairobi hence the trial court had in the intervening period stayed execution of the impugned judgement. That the outcome of the matter pending before the Court of Appeal hence had a legal impact on the present case, with an exception on the claim of adverse possession, since all parties herein had heavily relied on the proceedings, pleadings and judgements in Nairobi ELC 901 of 2014.
58. Having summarized what the application entails as herein above, I find the issues herein arising for determination as follows;
- i. Whether this suit is res judicata Nairobi ELC 901 of 2014, and if not;
 - ii. Whether the current proceedings should be stayed.
 - iii. Representation of the Plaintiff.
 - iv. Who shall pay costs
59. On the first issue for determination, it is trite that where the jurisdiction of the court is questioned, the issue has to be resolved before the merits of the dispute is determined. See Owners of the Motor Vessel "Lillian S" -v- Caltex Oil (Kenya) Ltd [1989] KLR 1.



60. 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”

61. The doctrine of res judicata is important in adjudication of cases and serves two important purposes;

- i. it prevents multiplicity of suits which would ordinarily clog the Courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and
- ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

62. In order therefore to decide as to whether this case is res judicata, a Court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. What issues were really determined in the previous case;
- ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a Court of competent jurisdiction.

63. The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him/her to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other.

64. The Court of Appeal in the case of *James Njuguna Chui v John Njogu Kimani* [2017] eKLR held that;

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reagitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation.”



65. I have carefully considered the prayers sought in the current Plaintiff's Plaint dated the 18th October 2018 wherein it has sought that for the following orders:

- a. A permanent injunction to restrain the Defendants, their agents or employees, from trespassing, interfering, claiming or dealing in any way with the Plaintiffs properties namely L.R. No. 398/7 & 398/8 Naivasha.
- b. Orders of Vacant possession and eviction of the Defendants, their servants and agents from L.R. No. 398/7 & 398/8 Naivasha.
- c. The OCS Naivasha Police Station to ensure compliance with the Court Orders.
- d. An order compelling the Defendants to furnish a comprehensive account of the income derived from LR No 398/7 & 398 /9 Naivasha during their occupation and the handing over of the said income to the Plaintiff.
- e. Mesne profits,
- f. General damages for Trespass and loss of user
- g. Costs of the suit.
- h. Any other relief this court may deem fit to grant.

66. It is not in dispute that vide Nairobi ELC suit No. 901 of 2014 herein reported as Iganjo & another v Muriithi (Acting as the administrator and legal representative of the Estate of Mwangi Stephen Muriithi) & 6 others [2023] KEELC 20015 (KLR) 18 of 2018 (OS), the Plaintiffs therein had sought for a determination of the following;

- a. A permanent injunction do issue restraining 1st, 2nd, 3rd, 4th and 5th Defendants whether by themselves, their agents, servants, assigns, employees, persons claiming through them or otherwise howsoever from doing the following acts or any of them that is to say from offering for sale, selling, disposing of, transferring, charging, pledging, diluting, dealing, interfering with and/or intermeddling in any manner whatsoever with:
 - i. The shares and shareholding in and of the company which shares and shareholding is one share each for the estate of the late Francis Iganjo Mutahi, the estate of James Kanyotu and Mwangi Stephen Muriithi the 1st Defendant herein.
 - ii. All those properties situate in Naivasha known as Land Reference No. 398/7 measuring 131.5 acres or thereabout and Land Reference No. 398/8/ measuring 101 acres or thereabout.
- b. A declaration that 1st, 2nd, 3rd, 4th and 5th Defendants have whether by themselves, their agents, servants, employees or persons claiming through them unlawfully interfered with the shareholding, running and management of the company and an order do issue directing the said Defendants to restore all documents or any other property unlawfully taken from the company by the Defendants and the shareholding of the company be restored to one share



each in favour of the estate of Francis Iganjo Mutahi, the estate of the late James Kanyotu and Mwangi Stephen Muriithi.

- c. An order directing the Defendants to effect the necessary share transfer in favour of the Plaintiffs as the administrators of the estate of the late Francis Iganjo Mutahi.
- d. A declaration that the Board meeting purportedly held on 13th June 2013 and the subsequent appointments of Gitonga Mwangi Muriithi as Director of the company and one Zachariah Kamau Ngugi as the company secretary and any other Board meeting held contrary to the law was unlawful, null and void and of no legal consequence.
- e. An order compelling the 1st and 2nd Defendants to produce and show to the court and the Plaintiffs the books of accounts, share certificates and records of the company and to account for all the monies, records or assets of the company in their possession.
- f. That the parcels of land known as Land Reference No. 398/7 and 398/8 be amalgamated into one parcel and thereafter be divided equally among the Estate of the late Francis Iganjo Mutahi, James Kanyotu and Mwangi Stephen Muriithi with the estate of the late Francis Iganjo Mutahi acquiring the portion on which they reside and have developed.
- g. Damages for fraud and breach of trust.
- h. Costs of the suit plus interest.
- i. Such other relief that the court may deem just to grant in the circumstances.

67. The 7th Defendant (the Plaintiff in the current suit herein) had filed its defence and counterclaim wherein it had sought for the following orders:

- a. A permanent injunction to restrain the Plaintiffs, the agents or employees, from trespassing, interfering, claiming or dealing in any way with the 7th Defendant's properties there to wit LR No. 398/7 and 398/8 Naivasha.
- b. An order to evict the Plaintiffs, their servants and agents from LR No. 398/7 and 398/8 Naivasha.
- c. The OCS Naivasha Police Station to ensure compliance with the court orders.
- d. An order compelling the Plaintiffs to furnish a comprehensive account of the income derived from LR No. 398/7 and 398/8 Naivasha during their occupation and the handing over of the said income to the 7th Defendant.
- e. Mesne profits.
- f. General damages for trespass and loss.
- g. Costs of the suit.
- h. Any other relief that this court may deem fit to grant.

68. It is also not in dispute that the matter had been heard and determined via a judgment dated the 21st day of September 2023.



69. I have gained sight of the said judgment, wherein the trial Judge had considered the issues for determination as follows;
- i. Whether this court has jurisdiction to determine the issues relating to the shareholding of the 7th Defendant.
 - ii. If so, are the Plaintiffs entitled to the orders sought in the Plaint?
 - iii. Is the 7th Defendant entitled to the orders sought in the counter claim?
 - iv. Who should bear costs of this suit?
70. In determining these issues, the trial court had held as follows;
- ‘A look at the plaint, shows that the plaintiff’s case revolves around the shareholding of a limited liability company, the 7th Defendant herein. The prayers in the plaint are in relation to the shareholding of the company. It is also noted that prayer (f) in the plaint seeks to amalgamate and divide the suit property which the plaintiffs admit does not belong to them but to the 7th defendant, a limited liability Company.’
71. The court subsequently held that since the case related to contention on who were the legitimate shareholders of the 7th Defendant between the late Francis Iganjo Mutahi, the late James Kanyotu and the late Mwangi Stephen Muriithi and that it was not clothed with jurisdiction to determine the question of shareholding in a limited liability company which was the preserve of the High Court (Commercial Division), it proceeded to strike out the Plaintiffs’ suit with costs to the Defendants.
72. In regard to the 7th Defendant’s counter claim, the court had found that it had proved its counter claim as against the Plaintiffs on a balance of probabilities. That indeed the 7th Defendant was the exclusive owner of the two suit properties being LR No. 398/7 and 398/8 Naivasha, wherein the Plaintiff’s family were in illegal occupation and had no claim of right on the said properties. Accordingly, Judgement was entered for the 7th Defendant in its counter claim.
73. The test in determining whether a matter is res judicata as stated was summarized in Bernard Mugo Ndegwa -v- James Nderitu Githae and 2 Others (2010) eKLR, as follows that:
- i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
74. I am reminded that in an application based on the principle of Res judicata, the same being a point of law, it must not be blurred with factual details liable to be contested and or proved through the process of evidence. On the first limb as to whether matter in issue is identical in both suits, the answer would be in the affirmative having regard to the orders sought in the current suit vis a vis the orders sought in the previous suit by the Plaintiff herein who was the 7th Defendant in the previous suit.
75. In regard to the second limb as to whether parties in the current suit were the same as parties in the previous suit, I find that whereas the Plaintiffs in the former suit were Ruth Muthoni Iganjo and Ruth Muthoni Iganjo (suing as an administrator of the estate of Francis Iganjo Mutahi (deceased), the 4th and 5th Defendants herein are representatives of the estate of the late Francis Iganjo Mutahi (deceased)



whereas the 3rd Defendant herein Elizabeth Wangui Karungai, a joint representative of the estate of John Nyamu (deceased) deponed that the original 3rd Defendant was her late husband who had settled on the Plaintiff's land with the knowledge of the late Francis Iganjo Mutahi who had been at all material times a shareholder holding one share in the Plaintiff and was also a director of the Plaintiff.

76. That whereas the Defendants in the previous matter were named as follows;

Gitonga Mwangi Muriithi (Acting as the administrator and legal representative of the Estate of Mwangi Stephen Muriithi) (1st Defendant), Gitonga Mwangi Muriithi (2nd Defendant), Jane Gathoni Kanyotu (3rd Defendant), Margaret Nyakinyua Murigu (4th Defendant), James Kanyotu (Deceased) (5th Defendant), The Registrar of Companies (6th Defendant) and, Kamuta Ltd (7th Defendant), the Plaintiff in the current suit was the 7th Defendant in the previous suit and in whose favor judgment had been delivered. There has however been added to the current suit the Defendants.

77. Explanation. — (6) of Section 7 of the *Civil Procedure Act* is as follows;

Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

78. I therefore find that there was sameness in the parties, both in the previous suit and the current suit.

79. As to whether there was sameness in the title/claim, I find that in both suits the subject parcel of the suit was LR No. 398/7 and 398/8 Naivasha. There is nothing useful to add on this limb.

80. On the third issue as to whether there was concurrence of jurisdiction, I find that the judgment delivered in Nairobi ELC suit No. 901 of 2014 had been by this same court which had jurisdiction to hear and determine the matter and whose determination had been appealed against.

81. On the last issue as to whether the orders issued in the previous court were of a nature of finality, the answer is affirmative to the effect that the proprietorship of the suit parcels of land had been determined as herein above captioned. There having been a Judgment from a Court of competent jurisdiction, the same could only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in appropriate proceedings.

82. It was held in the case of *E.T v Attorney General & Another* [2012] eKLR that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, ‘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 v 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 face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’”



83. In *Dina Management Limited v County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) At paragraphs 8 and 9 the Supreme Court observed as follows:

“The doctrine of res judicata was founded on public policy and was aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment had been delivered, subsequent proceedings were estopped. Where res judicata was pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounted to an allegation that all the legal rights and obligations of the parties were concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact, that was a form of action estoppel. Res judicata, was embodied in section 7 of the [Civil Procedure Act](#).

The elements to be proven before a court could arrive at the conclusion that a matter was res judicata were to be conjunctive rather than disjunctive before a suit or an issue was to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and had identical parties, subject and cause of action.”

84. In reference to the counterclaim raised by the 3rd Defendant, the court is guided by the decision of the English Court of Chancery in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 where it had been held that a party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action. This case remains good law, and is still cited as authority for the original principle today. The upshot of the foregoing is that this suit and Counterclaim lacks merit, the matter having been heard and conclusively decided vide the Judgment of 21st September 2023. I find that the current suit herein filed by the Plaintiff is therefore res judicata Nairobi ELC suit No. 901 of 2014 and an abuse of the court process. 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. This being the determination of the first issue slated for determination, I see no need to venture into the other issues that had been slated for determination since at it stands, there is no suit before me as the Plaintiff’s suit and 3rd Defendant’s Counterclaim are herein dismissed with costs, the interim orders issued herein are set aside.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 27TH DAY OF MARCH 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

