



**Karatu & 21 others v Njuguna & another (Sued as the administrators of the Estate of David Nganga Njuguna); Njenga (Defendant) (Environment & Land Case E42 of 2022) [2023] KEELC 842 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 842 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E42 OF 2022  
LA OMOLLO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**ELIJAH KARATU & 21 OTHERS ..... PLAINTIFF**

**AND**

**JAQUEELINE NJERI NJUGUNA ..... 1<sup>ST</sup> DEFENDANT**

**JUDY WAIRIMU NJUGUNA ..... 2<sup>ND</sup> DEFENDANT**

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF DAVID NGANGA  
NJUGUNA**

**AND**

**DAVID NJOROGE NJENGA ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Preliminary Objection dated 5<sup>th</sup> October, 2022. The objection is on the following ground:
  1. That under section 7 explanations (1) (4) (6) of the *Civil Procedure Act*, this suit is res judicata Nakuru H.C ELC No. 390 Of 2016 Jaqueline Njeri Njuguna & Judy Wairimu Njuguna Vs Bishop Zablon Mbugua Karanja & 4 Others (Judgment delivered by His Lordship Hon. D.O Ohungo J on 24<sup>th</sup> June, 2021, subject matter being L.R Number 1556/5 – South East of Naivasha).
  2. That flowing from the above, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall urge this court to find that the Plaintiffs' suit is unavailable to them, is misconceived, incompetent and qualifies to be struck out with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.



3. That this Honourable Court lacks jurisdiction to entertain a res judicata matter.

### **Factual Background.**

2. This suit was commenced by way of a Plaint dated and filed on 6<sup>th</sup> July. The Plaintiffs sought for the following orders:
  - a. A declaration that the Plaintiffs are the legal proprietors of their respective plots.
  - b. An order in the nature of a Permanent injunction restraining the Defendants, their agents, employees, servants, administrators, assigns, legal representatives or any other persons from dealing with the said properties in anyway detrimental to the Plaintiffs proprietary rights and interests. An order of Specific Performance requiring the Defendants to acquire all the necessary documents including subdivision plans, sketch maps, mutation forms and to conduct survey and proper subdivision and to further execute all the necessary conveyance documents and acquire necessary consents and to ensure the subdivided portions are registered in the names of the Plaintiffs, corresponding to their individual entitlements.
  - c. That in the event that the Defendants fail, neglect and or refuse acquire all the necessary documents including subdivision plans, sketch maps, mutation forms and fail to conduct survey and proper subdivision and to execute all the necessary conveyance documents and acquire necessary consents and fail to ensure the subdivided portions are registered in the names of the Plaintiffs, the Executive Officer to perform all the above contemplated acts including execution of all conveyance instruments.
  - d. That in alternative to orders (1) - (4) hereinabove, the 3<sup>rd</sup> Defendant be ordered and directed to refund all the sums being purchase prices of all the parcels of land sold to the Plaintiffs on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, subject to preparation of a Report detailing all sums paid and sums refundable at current market value.
  - e. Costs of this suit and interest at court rates.
  - f. Any other orders this court may deem just to issue.
3. The 3<sup>rd</sup> Defendant on the other hand filed his Defence dated 24<sup>th</sup> August, 2022 wherein he states that there are conservatory orders in place and the Plaintiffs' proprietary interest in the respective parcels is protected in Nakuru ELC 390 of 2016.
4. With regard to the preliminary objection raised by the 1<sup>st</sup> & 2<sup>nd</sup> Defendant, only the Plaintiffs responded. The 3<sup>rd</sup> Defendant did not file a response or submissions despite intimating that he would.

### **Response.**

5. The 21<sup>st</sup> Plaintiff filed his Replying Affidavit sworn on 3<sup>rd</sup> November, 2022. He states that he has authority from the other Plaintiffs to swear the replying affidavit on their behalf.
6. It is his deposition that the Preliminary Objection is marred with falsehood and misrepresentation of material facts.
7. He deposes that that the 3<sup>rd</sup> Defendant was an agent of the 1<sup>st</sup> & 2<sup>nd</sup> Defendant and is the one who sold the suit parcel to the Plaintiffs adding that on account of this relationship he is a party to the present suit.



8. He further deposes that the Plaintiffs did not take part in the suit between the 1<sup>st</sup> & 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant. Further, that the present cause of action is different from that of the 1<sup>st</sup> & 2<sup>nd</sup> Defendant against the 3<sup>rd</sup> Defendant in Nakuru HC No. 390 of 2016.
9. The 21<sup>st</sup> Plaintiff deposes that the 1<sup>st</sup> & 2<sup>nd</sup> Defendant intentionally failed to reveal that the judgment delivered on 24<sup>th</sup> June, 2021 had been reviewed and set aside. A copy of the judgment in ELC No. 390 of 2016 and the ruling setting aside the judgment are annexed to the replying affidavit.
10. He goes on to state that the parties in the cited suits by the 1<sup>st</sup> & 2<sup>nd</sup> Defendant are not litigating under the same capacity and/or title as in the present case, the cause of action is different and that the parties are also different.
11. In conclusion, he states that there is no tangible evidence that the present suit is res judicata save for the misleading information and urges the court to disregard the preliminary objection and dismiss it with costs.

### **Issues for Determination.**

12. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their submissions on 26<sup>th</sup> October, 2022. They relied on Section 7 of the *Civil Procedure Act* and submit that the matter revolving around land parcel no. 1556/5 and all its subdivisions has been decided in a former suit between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant in Nakuru HC ELC No. 390 of 2016.
13. They submit that the issues being litigated now are deemed to have been a matter directly and substantially in issue in the former suit. They add that a similar suit had been filed in Naivasha CMCC No. 540 of 2008 David Njoroge Vs Jemimah Njuguna and had been struck out on 4<sup>th</sup> August, 2009. Further, that an application to file additional documents out of time had been filed in Nakuru H.C Civil Appeal No. 94 OF 2009 David Njoroge V Jemimah Njuguna where the court dismissed the same.
14. They further submit that the 3<sup>rd</sup> Defendant herein filed Nakuru H.C Civil Case No 15 OF 2010 against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' mother Jemimah Njuguna over the same subject matter. They submit that the suit was then dismissed for want of prosecution on 2<sup>nd</sup> April, 2019.
15. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants cited the cases in Nakuru HC ELC NO 114 of 2016 Gilbert K Kabage Vs Richard Maina Mutungi and Civil Appeal; No. 29 of 2015 Njue Ngai Vs Ephantus Njiru Ngai & Another [2016] eKLR in support of their submissions.
16. In conclusion, they urge the court to uphold the Preliminary Objection and strike out the suit with costs to them.
17. The Plaintiffs' filed their submissions on 7<sup>th</sup> November, 2022 where they gave a brief background of the case and identified the following issues for determination:
  - a. Whether the present suit is res judicata
  - b. Who should bear the costs of this suit.
18. On the first issue, they relied on Section 7 of the *Civil Procedure Act*, Section 28 of the *Environment and Land Court Act*. They cite the judicial decisions in Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR on the conditions that must be satisfied before a suit is found to be res judicata.



19. They submit that in Nakuru HC ELC 390 of 2016 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had sued the 3<sup>rd</sup> Defendant in a matter wherein the 1<sup>st</sup> & 2<sup>nd</sup> Defendant sought for orders of vacant possession and damages for trespass. They add that in the present suit is for specific performance.
20. The Plaintiffs further submit that the questions raised by the 1<sup>st</sup> & 2<sup>nd</sup> Defendant in the former suit are wholly and substantially different in form and relief compared to the ones sought in the present suit. Further, that the parties are not litigating under the same title and that the reliefs sought are different.
21. The Plaintiffs submit that the judgment in Nakuru HC ELC No. 390 OF 2016 was reviewed vide a ruling delivered on 10<sup>th</sup> March, 2022 and the matter set for fresh hearing. They further argue that as a result of the above, the matter is still under adjudication and the only contention, if at all, would be on account of the sub judice rule.
22. In conclusion, they urge this court to dismiss the Preliminary Objection with costs to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

### **Analysis and Determination.**

23. Upon perusal of the submissions, it is this court's view that the main issue for determination, other than costs of the Preliminary Objection, is:
  - a. Whether the instant suit is res judicata
  - b. Who shall bear the cost of the Preliminary Objection.

#### **A. Whether the instant suit is res judicata**

24. Section 7 of the [Civil Procedure Act](#) Cap 21 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”

Explanation.— The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

(1) Explanation.— For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation.— The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

(3) Explanation.— A matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation.— Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

(5) Explanation.— 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.

25. There are numerous decisions that offer insights on this legal doctrine. Independent Electoral and Boundaries Commission Maina Kiai and 5 others, Nairobi CA No. 105 OF 2017 [ 2017] eKLR is one of them. This decision sets out the elements that must be satisfied for a bar of Res judicata to be effectively raised and upheld. They are:
  - a. The 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 doctrine of Res judicata is intended to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent.
27. In Uhuru Highway Development Ltd Vs Central Bank of Kenya [1999] eRLK it was held that the elements of res judicata are as follows:
  - (a) The former judgment or order must be final;
  - (b) The judgment or order must be on merits;
  - (c) It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
  - (d) There must be between the first and the second action identity of parties, of subject matter and cause of action.
28. Therefore, in order for a bar of res judicata the Defendant Applicant must meet the criteria set out in section 7 of the *Civil Procedure Act* read together with numerous decisions that have been rendered by the Kenyan courts on this matter.
29. In the instant suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim that the present suit is res judicata. They cite Nakuru H.C ELC no. 390 OF 2016 Jaqueline Njeri Njuguna & Judy Wairimu Njuguna vs Bishop Zablon Mbugua Karanja & 4 Others as the former suit.
30. The Plaintiffs on the other hand contend that the judgment in Nakuru HC ELC No. 390 OF 2016 was set aside vide a ruling delivered on 10<sup>th</sup> March, 2022 and the scheduled for fresh hearing. They further argue that the parties in the said suit are different from the ones in the present suit.
31. The first element is that matters directly and substantially in issue in the former suit must be directly and substantially in issue in the present suit.
32. On perusing paragraph 2 of the judgment in ELC No. 390 of 2016, it is evident that it is a suit founded on trespass. In summary, the Plaintiffs therein are seeking orders of vacant possession, eviction and permanent injunction in respect of land reference No. 1556 against the Defendants. The suit was withdrawn as against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants. Ultimately, judgement was entered as against the 4<sup>th</sup> Defendant one David Njoroge Njenga.



33. In the present suit, the Plaintiffs are seeking a declaration that they are the legal owners of the suit parcels, an order of permanent injunction and specific performance against the Defendants. The specific performance prayer relates to completion of the agreement for the sale of the suit parcels to them.
34. The import of this is to show that matters directly and substantially in issue in the former suit are not directly and substantially in issue in the present suit. To this end, the first element to successfully raise a bar of res judicata has not been fulfilled.
35. The second and third elements are closely intertwined and I will decide them together. i.e. that former suit was between the same parties or parties under whom they or any of them claim and that those parties were litigating under the same title.
36. The parties in ELC 390 of 2016 were Jaqueline Njeri Njuguna and Judy Wairimu Njuguna Vs Bishop Zablon Mbugua Karanja, Mary Wanjiku Munga, Tabitha Njeri Mwangi, David Njoroge Njenga and John Mbugua Wachira.

None of the Plaintiffs participated in the former suit.

The Plaintiffs and 4<sup>th</sup> Defendant in the former suit are the Defendants in the present suit. Needless, therefore, to say that the parties in both suits are different. On this second and third elements, the bar of res judicata as raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants also fails.

37. The fourth and fifth elements relate to finality of judgment in the former suit and that the judgments must be on merits. The finality of the decision in ELC 390 of 2016 or the fact of it having been rendered on merit is not in doubt; save that it does not affect the claims by the plaintiffs in the present suit. Consequently, on these elements the bar of res judicata as raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant fails.
38. Another element is that judgement must have been rendered by a court having jurisdiction over the subject matter and the parties. The question of jurisdiction of this court in the former suit has not been challenged.

#### **B. Which party shall bear the cost of the preliminary objection?**

39. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

#### **Disposition.**

40. For the reasons set out in the foregoing paragraphs, I find that this suit is not Res judicata.
41. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's Preliminary Objection dated 5<sup>th</sup> October, 2022 is hereby dismissed with costs to the Plaintiffs.
42. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16<sup>th</sup> DAY OF FEBRUARY, 2023.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -



Mr. Karanja Mbugua for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

Mr. Kibet for the Plaintiffs.

Mr. Karuga for 3<sup>rd</sup> Defendant

