



**Githaiga & another (Suing as the legal representatives of the
Estate of the Late James Githaiga Kuria) v Karanja (Tribunal Case
E687 of 2023) [2023] KEBPRT 1340 (KLR) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 1340 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E687 OF 2023
M MAKORI, MEMBER
OCTOBER 9, 2023**

BETWEEN

GRACE WANJIRU GITHAIGA 1ST TENANT

PAUL KURIA GITHAIGA 2ND TENANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
JAMES GITHAIGA KURIA**

AND

JOHNSON GITHII KARANJA LANDLORD

RULING

1. The Applicants approached this Honourable Court vide a Notice of Motion Application dated 11/7/2023 under Sections 1A, 1B, 3A of the [Civil Procedure Act](#), Order 51 Rule 1, Order 40 Rule 1 and 4 of the [Civil Procedure Rules](#), Section 57(4) and 75 of the [Land Act](#), Section 4(2) and 12(4) of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\)](#) Cap. 301 Law of Kenya.
2. The application was supported by the affidavit of Grace Wanjiru Githaiga who challenged the Notice to Vacate as issued by the Respondent.
3. The Respondent in opposition of the application filed a Notice of Preliminary Objection dated 23/8/2023 on the grounds the issues under investigation by this Honourable Court were canvassed and determined in Nairobi Environment and Land Court in ELC Case No. E059 of 2021.
4. The Respondent further contended that the issue under investigation was *res judicata* on the strength that there exist a Civil Appeal No. E213 of 2023 challenging the decision of Nairobi Environment and Land Court in ELC Case No. E059 of 2021.



5. That this Honourable has had the advantage of perusing the judgment of the Honourable Court in Nairobi Environment and Land Court in ELC Case No. E059 of 2021 and the following issues stand out;
 - i. The Plaintiffs were ordered and directed to vacate and hand over vacant possession in respect of suit properties namely LR No's 209/18279 and 18280 respectively within 90 days.
 - ii. That in default to vacate and hand over vacant possession of the suit properties to and in favour of the Defendant in terms of clause (a) hereof, the Defendant shall be at liberty to evict the Plaintiff either by themselves, agents, servants and or employees from the suit properties.
6. From the above background disposition, the only pertinent issue for determination by this Honourable Tribunal is whether the Notice of Preliminary Objection is merited and what is the fate of the present reference.
7. 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”
8. The [Black's law Dictionary](#) 10th Edition defines “*res judicata*” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
9. Kuloba J., in the case of *Njangu v Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), held that:

“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.....”

 - i. what issues were really determined in the previous Application;
 - ii. whether they are the same in the subsequent Application and were covered by the Decision.
 - iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.
10. A Decision of the court must be respected as fundamental to any civilized and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.
11. A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be ‘substantially undermined’ if the Court



were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.

12. Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute, that there exists an Order in Nairobi Environment and Land Court in ELC Case No. E059 of 2021 wherein the issue of Tenancy was heard and determined by the court wherein the matters are directly and substantially in issue as those in the application before this Court.
13. The Court of Appeal in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR (which decision was overturned by the Supreme Court) also, and so correctly, discussed the doctrine of res judicata at length. The Court stated in part as follows: -

“The rationale behind *res judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions...”

14. The Tribunal finds that the issue of Tenancy had already been determined by the Environmental and Land Court in Nairobi Environment and Land Court in ELC Case No. E059 of 2021.
15. This Court takes cognizant of the holding of court in *Caltex Case* Jurisdiction is the key upon which a tribunal can determine whether it can entertain any issue before it as presented by parties.
16. In the upshot I hold that I have no jurisdiction and even so, the matter is indeed Res Judicata as the issue of Possession has already been determined and orders thereto make to such effect, the entire application dated 11/7/2023 fails and is dismissed with costs.

DATED, SIGNED AT DELIVERED VIRTUALLY THIS 9TH DAY OF OCTOBER 2023.

HON. MIKE MAKORI (MR.)

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

