



**Maithya v Chief Land Registrar & another; Matolo & another (Proposed Interested Parties)
(Environment & Land Case 5 of 2019) [2023] KEELC 22595 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 22595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 5 OF 2019
TW MURIGI, J
MARCH 15, 2023**

BETWEEN

PETER NZESYA MAITHYA APPLICANT

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

LAND REGISTRAR MAKUENI 2ND DEFENDANT

AND

ROBERT MULI MATOLO PROPOSED INTERESTED PARTY

ROBERT MUTHIANI VULU PROPOSED INTERESTED PARTY

RULING

1. By a Notice of Motion application dated 16th June, 2022 brought under the provisions of Sections 3A and 63 (c) and (e) of the *Civil Procedure Act* and Order 40 Rules 2 and 3, Order 8 Rule 3(5) Order 51, Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the Applicant seeks the following orders:-
 1. Spent
 2. That this Honourable Court be pleased to enjoin the Applicant as an interested Party in this case.
 3. That this Honourable Court be pleased to review and/or set aside the Ruling delivered on 02/03/2021 and reinstate the restriction lodged on land parcel number Makueni/Kivani/1000 pending the determination of Appeal number 87 of 1995.
 4. The cost of the application be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The Applicant's Case

3. The Applicant averred that he is the legal representative of the Estate of Wallace M Mutiso and Philip Kilonzo Moki. He further averred that the Respondent applied for the removal of the restriction registered on land parcel No. Makueni/Kivani/1000 on the grounds that there was no pending appeal before the Minister.
4. He further averred that vide the Ruling delivered on 02/03/2021, the Court ordered for the removal of the restriction on land parcel No Makueni/Kivani/1000 on the grounds that there was no evidence that Appeal No. 87 of 1995 was still pending before the Minister. That although he is the legal representative of the Estate of Wallace M Mutiso and Philip Kilonzo Moki, the Appellants in the appeal No. 87 of 1995, he was not involved in the case.
5. He further averred that he was served with a letter by the Deputy County Commissioner Makueni notifying him that that Appeal No. 87 of 1995 was scheduled for hearing on 24th May, 2022 the Minister. He argued that the Court made a mistake by stating that there was no evidence to demonstrate that there was a pending Appeal before the Minister. He went on to state that the delay in prosecuting the Appeal was due lack of funds on the part of the office of County Commissioner to deal with Appeals from Kivani Adjudication Section.
6. He maintains that it is necessary to enjoin him in the suit because he has a legal stake in the outcome of the proceedings. He contended that the 2nd Interested Party should equally be enjoined in the proceedings because he is the registered owner of land parcel No. Makueni/Kivani/1000.

The Plaintiff's Case

7. In opposing the application, the Respondent vide his replying affidavit averred that the restriction on land parcel No. Makueni/Kivani/1000 was registered by the Chief Land Registrar and not by the 2nd Proposed Interested Party. He argued that the 2nd Proposed Interested party cannot be enjoined as he has no interest in the matter. He argued that the issue on whether Appeal No. 87 of 1995 is still pending before the Minister was not new since it was raised and determined in HCC No. 11 of 1990, Nairobi HCC No. 599 of 2013, Machakos ELC No. 193 of 2012, Makueni ELC No. 51 of 2017, Makueni ELC No. 5 of 2019 and Makueni Judicial Review No. 1 of 2020.
8. He further averred that after the Land Adjudication Officer delivered his decision on 18/06/1984, the Applicant filed Appeal No. 382 of 1984 to the Minister. That thereafter, the Applicant filed an application seeking for an order of Certiorari which was subsequently dismissed by Justice Mutungi. He further averred that Appeal No. 87 of 1995 does not exist and is a creation of the Applicant and the Deputy County Commissioner as it seeks to appeal against the decision that was made 6 years.
9. He further averred that the Court was not shown any appeal document nor was it served upon him. He argued that if there was such an appeal, it was time barred on account of the ruling delivered by Justice Osiemo in HCC No. 11 of 1990.
10. He maintains that the present application is res judicata because it raises the same issues which were raised by the District Land Registrar which were determined after the Court ordered the removal of the restriction registered on land parcel No Makueni/Kivani/1000.



The 2nd Proposed Interested Party's Case

11. In his replying affidavit Robert Muthinai Vuli averred that he has no interest in the matter and hence, he should not be enjoined in the proceedings herein. He further averred that appeal No. 87 of 1995 is a creation of the Applicant and the Deputy County Commissioner. He maintains that he is the registered owner of land parcel No Makueni/Kivani/1000 and thus the instant application is overtaken by events. He contended that the Applicant lacks capacity to apply for the order of review or setting aside since he is not a party to the suit.
12. He argued that the application is res judicata as the issues raised herein have already been heard and determined in previous litigation.

The Response

13. The Applicant in his further affidavit averred that it will be unprocedural to proceed without enjoining the 2nd Proposed Interested Party since he is the registered owner of land parcel No. Kivani/Makueni/1000. He argued that the application seeks to review the orders of the ruling that there was no proof of an appeal pending before the minister which has now been presented before the Court.
14. He further averred that the Respondent has always been aware of the Appeal pending before the Minister since he is a party therein and was duly notified vide the letter dated 17/01/1995.
15. The Plaintiff/Respondent and the 2nd Proposed Interested Party filed a Notice of Preliminary Objection dated 10th September, 2022 on the following grounds:-
 1. That the Interested Party has no basis in law to join the 2nd Interested Party and the Application for the 2nd Interested Party should be struck out by this Court.
 2. The application if allowed would deal with the issue that was decided by the Court in the following cases:-
 - i. HCC No. 509 of 2013 Nairobi filed by the Applicant
 - ii. ELC No. 193 of 2012 Machakos filed by the Applicant
 - iii. ELC No51 of 2017 Makueni filed by the Applicant.
 - iv. ELC No 5 (OS) of 2020 filed by the Plaintiff
 - v. Judicial Review No 1 of 2020 Makueni filed by the Proposed Applicant.
 3. The would be application would be res judicata and is a waste of the Court's time.
 4. The pending Appeal is alleged to have come from the decision of the Land Adjudication officer for Makueni/Kivani/1000 which decision was made in 1989 in Objection No 342 of 1989 and the alleged Appeal was filed in 1995.
 5. The Appeal No 87 of 1995 was made 6 years from 1989 while the law requires the appeal to have been made within six months and if there is an appeal, the Minister has no jurisdiction to determine the matter.
 6. The application be struck out with costs.
16. The application and Preliminary Objection were canvassed by way of written submissions.



The Applicant's Submissions

17. The Applicant's submissions were filed in Court on 19th of January, 2023.
18. Counsel for the Applicant submitted that Article 10 and 47 of *the Constitution* and Section 4(3) of the Fair Administrative Actions Act guarantees every person the right to be heard if the decision is likely to affect them.
19. Counsel submitted that the ruling delivered by the Court lifted the restriction on land parcel No Makueni/Kivani/1000 on the grounds that there was no evidence to demonstrate that Appeal No. 87 of 1995 is still active. Counsel went on to submit that the Applicant has already been notified that the Appeal before the Minister is scheduled for hearing on 24th May, 2022
20. Counsel further submitted that the letter by the Deputy County Commissioner indicated that the main reason for the delay in hearing the Appeal was because the County Commissioner's Office did not have funds to deal with the Appeals in Kivani Adjudication Section. Counsel further submitted that the Court erred in stating that there was no evidence to demonstrate that the Appeal No. 87 of 1995 is pending before the Minister for hearing and determination.
21. Counsel argued that the Applicant ought to have been involved in the proceedings since he is the Legal Representative of the Estate of Wallace Matolo and Philip Moki which was not the case.

The Plaintiff's and 2nd Proposed Interested Party's Submissions

22. The Plaintiff's and 2nd Proposed Interested Party's submissions were filed on 9th January, 2023.
23. The Plaintiff submitted that the 1st Proposed Interested Party has no legal basis to apply to enjoin the 2nd Interested Party since he has not been granted leave to be a party in the proceedings.
24. That moreover, the 2nd Proposed Interested Party has not applied to be enjoined as a party in the proceedings. Counsel further submitted that the 1st Proposed Interested Party was represented by the 1st and 2nd Defendants who on their own initiative registered the restriction on land parcel No. Makueni/Kivani/1000. Counsel submitted that the issue that Appeal No. 87 of 1995 is still pending for hearing and determination before the Minister is res judicata as it has been raised and determined in previous litigation.
25. He further submitted that the alleged appeal was filed against the decision of the Land Adjudication Officer in Objection No. 342 of 1989 six years after the decision was made. Counsel contended that the Minister has no jurisdiction to deal with a time barred appeal. Counsel argued that the Applicant has been filing and losing all manner of cases since 2013 to 2022 in relation to land parcel No Makueni/Kivani/1000 which he should be estopped.

Analysis and Determination

26. Having considered the application, the affidavits, the Preliminary Objection and the rival submissions, I will first determine whether the Preliminary Objection raised by the Plaintiff and the 2nd Proposed Interested Party is merited. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.



27. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

28. In *Oraro Vs Mbaja* (2005) eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

29. The Court of Appeal in *Nitin Properties Ltd Vs Singh Kalsi & Another* (1995) eKLR also captured the legal principle when its stated as follows;

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

30. I will first determine whether the Preliminary Objection raised by the Plaintiff and the 2nd Proposed Interested Party fits the description of a Preliminary Objection stated in the *Mukisa Biscuits* case Supra.

31. In summary, the Respondent based his Preliminary Objection on the grounds that the Applicant has no basis in law to enjoin the 2nd Proposed Interested Party in the proceedings herein and that the application is res judicata on account of Nairobi HCC No. 599 of 2013, Machakos ELC No. 193 of 2012, Makueni ELC No. 51 of 2017, Makueni ELC No. 5(OS) of 2019 and Makueni Judicial Review No. 1 of 2020 which have determined the issue of whether Appeal No. 87 of 1995 is still pending before Minister for hearing and determination.

32. On the issue of joinder of parties, the Plaintiff submitted that the 1st Proposed Interested Party/Applicant cannot apply to join the Proposed 2nd Interested Party as he has not been granted leave to be a party to the proceedings herein. The 2nd Proposed interested party averred that he should not be enjoined in the suit as he has no legal interest in the matter.

33. On the other hand, the Applicant argued that he has a legal stake in the proceedings as he is the legal representative of the Estate Wallace M Matolo and Philip Moki Kilonzo, while the 2nd Proposed Interested Party is registered owner of land parcel No. Makueni/Kivani/1000. In this regard he produced the Grant of Letters of Administration in respect of the Estate of Wallace M Matolo and Philip Moki Kilonzo and a copy of the certificate of title for land parcel No. Makueni/Kivani/1000. In addition, the Applicant averred that he should be enjoined in the suit since he was not involved in the present suit.



34. The law governing the joinder of parties is grounded on Order 1 Rule 10(2) of the Civil Procedure Rules which provides as follows;
- “The Court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”
35. The Black’s Law Dictionary (8th Edition) page 3548 defines an Interested Party as follows;
- “a party who has a recognizable stake and therefore a standing in the matter.”
36. In the case of Trusted Society of Human Rights Alliance Vs Mumo Matemo & 5 Others (2015) eKLR the Court held that;
- “An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made either way. Such a person feels that his interest will not be well articulated unless he himself or she herself appears in the proceedings and champions his or her cause.”
37. The Supreme Court of Kenya in the case of Francis Karoki Muruatetu & Another Vs Republic & 5 Others (2010)eKLR set out the key elements for consideration in an application for joinder of an Interested Party as follows:-
- a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.
 - b. The prejudice to be suffered by the proposed interested party in case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
 - c. Lastly, a party must, in its participation, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.
38. These are persuasive decisions that state the legal position with regard to joinder of Interested Parties.
39. Going by the above decisions, an Interested Party must therefore demonstrate that it is necessary for he/she be enjoined in the suit so that the Court may settle all the questions involved.
40. The proposed Interested Party must make a good case to be enjoined in the suit. The proposed Interested Party must demonstrate that it has an identifiable stake in the proceedings.
41. It is clear from the reading of Order 1 Rule 10(2) of the Civil Procedure Rules that a party is enjoined so to assist the Court to effectually and completely adjudicate the matter. Going by the above provisions a party can apply to be enjoined to a suit so that the Court can settle all the issues involved therein. In other words, a party can apply to be added in a suit before the issues arising therein are determined by the Court. That does not mean that a party cannot be joined in a suit after the delivery of the judgment.



42. The circumstances under which a party may be joined in a suit after the delivery of the judgment was set out by the Court of Appeal in the case of *J.M.K Vs M.W.W & Another* (2015) eKLR as follows:-
- a. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough to stand apart from anything that is merely peripheral.
 - b. The prejudice to be suffered by the proposed interested party in case of non-joinder must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
 - c. Lastly, a party must, in its participation, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.
43. The Plaintiff commenced this suit by way of an Originating Summons dated 16th of February, 2019 and sought the following orders:-
1. Spent.
 2. The 1st and 2nd Respondents be ordered by this Honourable Court to remove the restriction that was registered against parcel of land known as Makueni/Kivani/1000 since there is no basis of keeping the restriction that was entered against the Registrar.
 3. The Court do order the 1st and 2nd Defendants to remove the restriction and in default be punished by the court for Contempt of Court.
 4. The Respondent do pay the cost of the application.
44. In the Originating summons, the issue for determination was whether the Chief Land Registrar should be ordered to remove the restriction on land parcel No Makueni/Kivani/1000. The Court vide its ruling delivered on 2nd March, 2021 allowed the application in terms of prayer No. 2 and 4 of the application.
45. In my opinion the Applicant ought to have presented the instant application when the proceedings were on going or before the Court rendered its decision. The matter is concluded and therefore does not fall in the category of proceedings that are ongoing.
46. The 1st Proposed Interested Party deposed that the 2nd Proposed Interested Party has an identifiable stake in the proceedings herein because he is the registered owner of land parcel No Makueni/Kivani/1000.
47. It is upon anyone interested in any proceedings to make a formal application to be enjoined as such and then demonstrate to the Court that he/she has an identifiable stake in the proceedings before the Court. This can only be done by the proposed Interested Party and not by any other party. In the present case the application has been made by the 1st Proposed Interested party on behalf of the 2nd Proposed Interested Party who averred that he has no interest in the matter.
48. It is therefore not proper for the 1st Proposed Interested Party to make an application to enjoin the 2nd Proposed Interested Party in the proceedings herein. I find that the application for joinder at this stage is of no use for the reason that the suit has already been concluded. The orders sought have already been granted and the restriction on land parcel No Makueni/Kivani/1000 has already been removed.



49. The Applicant is also seeking for an order of review and/or setting aside of the orders made on 2nd March, 2021 and to reinstate the restriction on the grounds that there is a mistake on the face of the record. The Applicant argued that the Court made a mistake in its ruling by stating that there is no evidence that Appeal No. 87 of 1995 is still before the Minister for hearing and determination.
50. In his supporting affidavit, the Applicant annexed a letter dated 10th May, 2022 by the Deputy County Commissioner Makueni Sub County summoning him together with the Plaintiff and the 2nd Proposed Interested Party to the hearing of the Appeal No. 87 on 24th of May, 2022. The Applicant contended that Appeal No 87 of 1995 was still active and pending before the Minister for hearing and determination.
51. The Respondent on the other hand averred that the application is re judicata as the issues raised have been dealt with in previous proceedings.
52. The doctrine of res judicata is anchored in Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides as follows:-

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. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it...

Explanation. - (4) Any 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. -(6) 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.

53. The doctrine of res judicata has been defined in the Black’s Law Dictionary, 9th Edition at page 1425 as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

54. The elements which must be present to succeed on a defence of res judicata were enunciated in Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR where the Court of Appeal held that: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.



- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

55. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.
56. The essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. That was the holding in Omondi Vs National Bank of Kenya Ltd and Others (2001) EA 177.
57. Firstly, the matter in issue should be directly and substantially the same as in the former suit. In their replying affidavit, the Plaintiff and the 2nd Proposed Interested Party annexed rulings in HCC No. 11 of 1999, Nairobi HCC No. 599 of 2013, Makueni ELC No. 51 of 2017, Machakos ELC No. 193 of 2012 Makueni ELC No. 5 of 2019 and Makueni Judicial Review No. 1 of 2020 to demonstrate that the present application is res judicata. From the ruling delivered on 15th of December, 1994 in HCC No. 11 of 1990, it is clear that the dispute revolving around land parcel No. Makueni/Kivani/1000 was heard from the Committee up to the Land Adjudicator Officer stage where the Applicant lost.
58. The Court in findings stated as follows in part:-
- “The Respondents having failed to appeal against the decision of the Land Adjudication Officer to the Minister within 60 days that right was on and therefore the decision of the Land Adjudication Officer stands undisturbed and shall be effected.”
59. In ELC No. 599 of 2013 the Applicant vide a Chamber Summons dated 7th August, 2012 sought for an order of Certiorari to remove into the High Court and quash the decision of the District Land Adjudication and Settlement Officer dated 07/08/2012 and the orders of the Chief Land Registrar dated 16/08/2012 directing the restriction imposed on the suit property removed to facilitate the issuance of title and re-opening of the road access.
60. The Applicant also sought or an order of Prohibition directed against the Defendant and Interested Party prohibiting them from whatsoever interfering with parcel No. Makueni/Kivani/100 and or adversely dealing with the land to the detriment or the rights of the applicant and his family members till the Minister’s Appeal No. 342 of 1989 is heard and determined and in particular the District Land Registrar Makueni be prohibited from visiting the land on 29/08/2012 to determine and indicate the proper access road.
61. On 07/08/2013, the Interested Parties filed a Notice of Preliminary Objection on the ground that the Applicant lacks locus standi to file the present application amongst other grounds. In its ruling the Court stated as follows in part:-
- “It is indeed a matter of grave concern that an appeal filed with the Minister more than 20 years ago has apparently not been finally disposed.In the further affidavit by the



applicant under paragraph 2 he states that the Director of Land Adjudication and settlement confirmed the Minister's appeal has been determined. In the letter the appeal is referred as land appeal case No. 87 and not 342 of 1989. The discrepancy has not been explained.....”

62. Although the issue of removal of the restriction was raised in the application the Court declined to pronounce itself on the same and stated as follows:-

“I will not pronounce my decision on the last issue as it is not abundantly clear to me what the actual state of affair is as regards the removal of the restriction and issuance of the title to the Interested Party.”

63. In its Ruling delivered on 21st of February, 2014, the Court upheld the Preliminary Objection and struck out the application on the grounds that the Applicant lacked the locus standi to institute the proceedings.

64. In Makueni ELC No. 51 of 2017 the Plaintiff herein and the 2nd Proposed Interested party were sued by the Applicant herein alongside the Attorney General and Kimeu Maithya. The Plaintiff and 2nd Proposed Interested Party filed a Notice of Preliminary Objection dated 10th March, 2014 against the Applicant's suit on the grounds that the Plaintiff has no locus to file the suit, the suit is time barred, the suit is res judicata there is no consent from the land adjudication officer amongst other grounds.

65. In its ruling delivered on 21st February, 2021, the Court found that the suit is res judicata on account of Nairobi HCC No. 599 of 2013 as the parties involved and the subject matter were the same as those in the present suit.

66. In Machakos Misc Application No. 193 of 2012 the Applicant vide an application dated 24th of March, 2014 sought to review and set aside the orders made on 21st of February, 2014 in Makueni ELC No. 51 of 2017 on the grounds that he had discovered new and important evidence which was not within his knowledge and that there was an apparent error on the face of the record. In dismissing the application, the Court held that the issues raised by Applicant could only be handled by the Appellate Court.

67. Similarly, in Makueni ELC No. 5 (OS) of 2019 the Plaintiff herein sued the Chief Land Registrar and the County Land Registrar Makueni and sought for the following orders:

- i. Spent.
- ii. An order directing the 1st and 2nd Respondents to remove the restriction registered against land parcel No. Makueni/Kivani/1000 since there is no basis for keeping the restriction.
- iii. The court do order the Defendants to remove the restriction and in default they be punished for contempt of court.
- iv. The Respondents do pay the costs of the Application.

68. Both parties participated in the application by filing their respective submissions. The Court vide its ruling delivered on 2nd March, 2021 allowed the application in terms of prayers No. 2 and 4 of the application. In its ruling the Court stated as follows in part:-

“I have seen no evidence of an ongoing appeal before the Minister. Had there been any by now it ought to have been concluded. There must be an end to the 30 year charade that has kept the Applicant in and out of Court as well as the lands offices in an attempt to secure justice.”



69. The Applicant wants this ruling reviewed and/or set aside on the grounds that the Court made a mistake in stating that there was no evidence of a pending Appeal before the Minister. He produced a letter dated 10th May, 2022 written by the Deputy County Commissioner Makueni Sub County to demonstrate that the Appeal No. 87 of 1995 was still pending before the Minister for hearing and determination.
70. In Judicial Review No. 1 of 2020 the Applicant pursuant to leave granted sought for an order of Certiorari to quash the decision of the 1st Respondent made on 8th May, 2019. The application was dismissed with costs.
71. This application is purely about reinstating the restriction on land parcel No. Makueni/Kivani/1000 on the grounds that appeal No. 87 of 1995 is still pending before the Minister. The issue of whether Appeal No. 87 of 1995 is still pending before the Minister for hearing and determination has already been determined in Makueni ELC No. 51 of 2019, Nairobi HCC No. 599 of 2019 and Makueni ELC No. 5(OS) of 2019. In the present application, the Applicant is seeking to be enjoined for the reason that Appeal No. 87 of 1989 is still pending before the Minister. The cause of action and the reliefs sought in the previous suits is wholly similar to the instant application.
72. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in Nairobi HCC No. 599 of 2013 and were the Applicant versus the Director of Land Adjudication, the Plaintiff herein and the 2nd proposed Interested party herein, while in Makueni ELC No. 51 of 2017, the Applicant herein had sued the Attorney General, Peter Nzeysa Maithya (the Plaintiff herein), Kimeu Maithya and Robert Muthiani Vuli (the 2nd Proposed Interested party herein). In the present suit (Makueni ELC No. 5(OS) of 2019), the Plaintiff and the 2nd Proposed Interested Party sued the Chief, Land Registrar and the County Land Registrar herein. It goes without saying that the parties in all the cases are similar and are indeed litigating under the same title.
73. Lastly for res judicata to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided. It is not in dispute that the Court seized with HCC No. 11 of 1989, Nairobi HCC No. 599 of 2013, Makueni ELC No. 51 of 2017 and ELC No. 5 of 2019 had the requisite jurisdiction to determine the dispute therein. The rulings delivered in HCC No. 11 of 1989, Nairobi HCC No. 599 of 2013, Makueni ELC No. 51 of 2017 and Makueni ELC No. 5(OS) of 2019 have neither been appealed against nor set aside.
74. In the case of John Florence Maritime Services Limited & Another Vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR the Court of Appeal pronounced itself 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 unravelling uncontrollably.”



75. It follows therefore, that the Preliminary Objection raised by the Plaintiff and the 2nd Proposed Interested Party was based on pure points of law, that is the doctrine of res-judicata, and did not require additional evidence to substantiate the objection.
76. From a perusal of the rulings, it is clear that the issue of whether Appeal No. 87 of 1995 is pending before the Minister for hearing and determination and the issue of reinstatement of the restriction on land parcel No. Makueni/Kivani/1000 was dealt with in previous litigation and is therefore res judicata.
77. The upshot of the foregoing is that the preliminary objection is merited. Accordingly, the application dated 16th June, 2022 is struck out with costs to the Plaintiff and the 2nd Proposed Interested Party.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF MARCH, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Masika for the Plaintiff and 2nd proposed Interested Party.

Kithuka for the Applicant.

