



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Masese v Mabil & 2 others (Environment & Land Case  
E011 of 2022) [2023] KEELC 17739 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17739 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E011 OF 2022**

**CG MBOGO, J  
MAY 30, 2023**

**BETWEEN**

**JOHN ALLAN ONCHIRI MASESE ..... APPLICANT**

**AND**

**REUBEN KIPNGETICH MABIL ..... 1<sup>ST</sup> RESPONDENT**

**JOEL KIPRONO MUTAI ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR, NAROK COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before this court for determination is a notice of preliminary objection dated February 28, 2023 and filed in court on March 1, 2023 by the 1<sup>st</sup> respondent challenging the suit herein on the following grounds:-
  1. That the current suit is *res judicata* as there exists a similar matter (Narok High Court ELC No 5 of 2019) between the parties, over the same subject matter and which was heard and determined by this honourable court.
  2. That the suit is frivolous, vexatious and an abuse of the court process.
2. This matter came up for mention on March 21, 2023 and both parties were absent. This court further gave directions and directed the Deputy Registrar to ensure service of the court's directions. An email was sent to tkruttoadvocates@gmail.com to ensure service of the directions.
3. This court's directions was that the preliminary objection be canvassed by way of written submissions and procedure was given for doing so. None of the parties filed their written submissions. Be that as it may, this court has considered the preliminary objection and the issue for determination is whether the instant suit is *res judicata*.



4. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts.
5. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the court stated as follows: -

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This was followed up by the judgment of Sir Charles Newbold in the same case:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"

6. In the case of *Lemitei Ole Koros & Another v Attorney General & 3 others* (2016) eKLR, Munyao, J stated as follows:

"Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection."

7. I am satisfied that based on the above description of what constitutes a preliminary objection, the issue before this court *-res judicata-* raises a pure point of law that merits consideration by this court.
8. The doctrine of *res judicata* is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
9. A close reading of Section 7 of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. I place reliance in the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR where the Supreme Court stated: -
  - i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.
  - iii. That those parties were litigating under the same title.
  - iv. That the issue in question was heard and finally determined in the former suit.



- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”
10. In determining whether the application is *res judicata*, I have perused the pleadings in ELC Case No 5 of 2019. In this matter, the plaintiff was John Allan Onchiri Masese and the 1<sup>st</sup> defendant was Reuben Kipngetich Mabil and the 2<sup>nd</sup> defendant was the Land Registrar, Narok County. The plaintiff filed a plaint dated February 6, 2019 seeking orders of injunction against the defendants with respect to the suit property known as LR No Cismara/Ilmotiok/464. As can be seen from the pleadings, there was a decree which the Principal Magistrates’ court adopted as judgment of the court in Misc Land No 11 of 2007 in the year 2007. It can also be seen that the plaintiff herein also filed a notice of motion application dated February 10, 2020 which was heard and determined vide a ruling delivered on November 30, 2021. In the said ruling, my brother Kullow J, while dismissing the application observed in paragraph 16 that the preliminary objection was allowed for the reason that the matter had already been heard and finally determined and the suit was dismissed for being *res judicata*.
11. A comparison with the instant suit reveals that parties are similar save for the addition of the 2<sup>nd</sup> respondent as a party. On October 21, 2022 the applicant herein filed a plaint dated October 5, 2022 alongside a notice of motion application under a certificate of urgency dated October 13, 2022. In the plaint, the applicant is seeking an order of permanent injunction against the 1<sup>st</sup> respondent and that the 3<sup>rd</sup> defendant mark the boundaries between the three parcels of land namely Narok/Cismara/Ilmotiok/ 464, 465 and 463. My attention has also been drawn to the admission by the applicant in his plaint in paragraph 18, 19 and 20 but contends that the claim here is that he is seeking implementation of the determination by the Tribunal dated June 20, 2007.
12. My analysis of the above is that the suit herein involves the same parties save for the addition of the 2<sup>nd</sup> respondent, the subject matter is also similar in ELC Case No 5 of 2019. There was determination in ELC Case No 5 of 2019 which in fact the court went ahead and determined the suit as *res judicata*.
13. More importantly, is that, the applicant filed a notice of appeal dated 19<sup>th</sup> December, 2019 which in my view, the applicant should be keen in pursuing.
14. In the case of *Republic v Ministry of Roads & Another Ex-Parte Vipingo Ridge Limited & another* [2015] eKLR the court held that for an order to operate as *res judicata*,
- “it must be shown to have been a determination of an aspect of the controversy before the court” (emphasis mine).
15. While I place reliance on the above cited authority, I am satisfied that the instant suit is *res judicata*. The applicant cannot now come to court in the guise of seeking an implementation of a decision of the tribunal which was dealt with previously. I find this an abuse of the court process.
16. For the reasons stated hereinabove, the notice of preliminary objection dated February 28, 2023 is hereby upheld. The instant suit is *res judicata* and is dismissed with costs to the 1<sup>st</sup> respondent. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 30TH DAY OF MAY, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

**30/5/2023.**

**In the presence of:-**



