



**Chepngok v Metto & another (Sued as the administrators of the Estate of the Late Elizabeth Jepchoge Sirma) (Environment and Land Appeal E014 of 2024) [2025] KEELC 314 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 314 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT AND LAND APPEAL E014 OF 2024  
JM ONYANGO, J  
JANUARY 29, 2025**

**BETWEEN**

**REBECCA JEPTANUI CHEPNGOK ..... APPELLANT**

**AND**

**JOSHUA KIPKEMBOI METTO ..... 1<sup>ST</sup> RESPONDENT**

**KIPKEMBOI METTO ..... 2<sup>ND</sup> RESPONDENT**

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE  
ELIZABETH JEPCHOGE SIRMA**

**RULING**

1. The Respondents herein raised a Notice of Preliminary Objection dated 15<sup>th</sup> November, 2024, in response to the Application dated 11/11/2024 based on the following grounds: -
  - a. That the court is functus officio in so far as the instant application is concerned.
  - b. That this application be struck out/dismissed with costs to the Respondents.
2. This Court issued directions on the disposal of the Preliminary Objection by way of written submissions on 18.11.2024. The Appellant filed her submissions dated 3/12/2024 together with authorities while the Respondents filed their submissions dated 20/11/2024 together with authorities. I have read the rival submissions and taken the same into account in arriving at my decision.

**Appellant's Submissions**

3. Counsel for the Appellant submitted that a preliminary objection should be founded upon a settled point of law and its application to the undisputed facts should lead to the conclusion that the facts are incompatible with the point of law.



4. He thus submitted that the preliminary objection was raised on the fact that the court is functus officio but there were no specific provisions of law or statute for the court to conclude that the application dated 11/11/2024 offends any law.
5. That the P.O as filed lacks merit and has not been raised on pure points of law and that the same has been premised on facts which the court can only resolve after a full hearing of the application in question and a consideration of evidence tendered by the parties.
6. It was his submission that the objection is not a proper preliminary objection as it does not meet the threshold in the leading case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. That it is a vague objection that is neither based on law nor facts. He thus urged the court to dismiss the P.O. and relied on *Independent Electoral & Boundaries Commission vs Cheperenger & 2 Others* (2015) KESC 2 (KLR).
7. On whether this court is functus officio and thus unable to hear and determine the application dated 11/11/2024, counsel relied on the case of *Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR, and *Jersey Evening Post Limited vs A1 Thani* [2002] JLR 542 – 550. He also relied on the case of *Nguruman Limited vs Shompole Group Ranch & Ol Kiramatian Group Ranch* [2014] eKLR where it was held as follows: -

“An Order for dismissal for want of prosecution cannot fall into the category of orders granted in finality in any matter as the merit aspect of the particular matter affected is never interrogated before the court makes such an order. Such orders are therefore usually made purely on technicalities”. (emphasis mine)
8. He thus maintained that the application dated 23/4/2024 having been dismissed for want of prosecution, no orders were granted in finality with regards to the application and consequently, this court cannot be said to be functus officio with regard to the application dated 11/11/2024.
9. On the issue of res judicata, counsel outlined what the earlier application dated 23/4/2024 sought vis-a-vis what the application dated 11/11/2024 was seeking. He submitted that the former application was not heard and finally determined. He further submitted that the orders sought in the two applications are not similar and thus section 7 of the *Civil Procedure Act* is not applicable.
10. In conclusion, he urged the court to dismiss the preliminary objection for lack of merit and prayed that the application dated 11/11/2024 be heard and determined on merit.

### **Respondent's Submissions**

11. Counsel for the Respondent reiterated the law with regards to preliminary objections and relied on various case laws on what amounts to a preliminary objection. It was his submission that that the application dated 11/11/2024 is seeking a stay of execution and injunctive order whereas the same had already been dismissed by this court for want of prosecution.
12. It is his contention that the Appellant did not seek a review of the court's decision dismissing the earlier application or seek to reinstate the said application. Counsel thus maintained that the application dated 11/11/2024 is res judicata and that the court is functus officio and urged the court to strike out the said application.
13. The sole issue for determination before me is whether the Notice of Preliminary Objection dated 15<sup>th</sup> November, 2024 is merited and I will proceed to determine the following:-
  - a. Whether the application is Res Judicata



- b. Whether this court is functus officio
14. The law on what constitutes a preliminary objection is now well settled. A preliminary objection can only be raised on a pure point of law and must be premised on undisputed facts which need not be ascertained or require the exercise of judicial discretion. See the Supreme Court decision in *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR.
15. In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 E.A. 696, the Court defined a Preliminary Objection as follows;

“...it 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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

The question as to whether a matter is res judicata raises a pure point of law and it therefore passes the test of a preliminary objection.

### **Res Judicata**

16. The Respondents’ main ground of objection is that the application dated 11/11/2024 offends the doctrine of res judicata and consequently, this court is functus officio. It is their claim that the said application is similar to the application 23/4/2024 which had been dismissed for want of prosecution. They thus maintained that the court having determined the earlier application is now functus officio.
17. Section 7 of the *Civil Procedure Act* defines the doctrine of Res Judicata 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.”

18. The Supreme Court in the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, while considering the provisions of section 7 of the *Civil Procedure Act*, held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked, that is: -

- “(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.”

19. Guided by the above section 7 and the case law, I will proceed to determine the elements of the doctrine of res judicata in respect of the previous application dated 23/4/2024 and the instant application dated 11/11/2024. It is not in dispute that both applications were between the same parties litigating under



the same title, by the Appellant against the Respondent, and the previous application was determined by a court of competent jurisdiction.

20. What however appears to be in contest is whether the matters directly and substantially in issue in the present application are similar to the matters directly and substantially in issue in the previous application dated 23/4/2024 and whether the previous application was heard and finally determined.
21. I have critically looked at the application dated 23/4/2024 vis-à-vis the application dated 11/11/2024 and I do note that the previous application dated 23/4/2024 sought orders of stay of execution of the judgment issued in CM ELC No. E095/2022, setting aside the ex-parte judgment and an order of permanent injunction against the Respondent. The instant application dated 11/11/2024 is seeking orders of temporary injunction restraining the Respondent from evicting the appellant from the suit land, an order of status quo and an order of stay of proceedings in CM ELC Case No. E095 of 2022.
22. Having looked at both applications, while I acknowledge that both applications stem from the ex-parte judgment delivered in CM ELC Case No. E095 of 2022 on 19.08.2022, it is my considered view that the matters raised in the application dated 11/11/2024 are not directly and substantially the same as the matters raised in the previous application dated 23/4/2024. The two applications sought significantly different orders and the same cannot therefore be said to be offending the doctrine of res judicata.
23. It is also important to determine whether the previous application was heard and finally determined on merit. It is not in dispute that the application dated 23/4/2024 was dismissed for want of prosecution. The question that follows is whether a dismissal for want of prosecution amounts to an order granted in finality and on merit.
24. In the case of Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97 the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.

See also the Court of Appeal decision in Michael Bett Siror Vs Jackson Koech [2019] eKLR.

25. In view of the foregoing, it is the finding of this court that the application dated 23/4/2024 having been dismissed for want of prosecution does not amount to an application that has been heard and finally determined and does not therefore satisfy the requirements of section 7 of the *Civil Procedure Act*.
26. Consequently, having held that the application dated 11/11/2024 does not offend the doctrine of res judicata, it follows that this court cannot be said to be functus officio.
27. The Supreme Court of Kenya in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Mala Pretorius



entitled “The Origins of the functus officio Doctrine, with Special Reference to its Application in Administrative Law”, in South African Law Journal, Vol. 122 (2005), at p. 832, stated that:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision- making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

28. In view of the foregoing, it is my finding find that the Respondent’s preliminary objection dated 15/11/2024 is not merited and the same is hereby dismissed with costs to the Appellant.

29. The application dated 11<sup>th</sup> November, 2024 shall be fixed for inter-partes hearing.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF JANUARY, 2025.**

**J. M. ONYANGO**

**JUDGE**

Ruling delivered in the presence of: -

Ms. Nasongo for the Appellant

Ms. Warigi for the Respondents

Court Assistant: Hinga

