



Chege v Minis & 6 others; Rinka (Plaintiff); Mwangi & 3 others (Defendant) (Environment & Land Case 10 of 2021) [2023] KEELC 22089 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEELC 22089 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 10 OF 2021
EM WASHE, J
NOVEMBER 29, 2023**

BETWEEN

IGNATIUS MWANGI CHEGE PLAINTIFF

AND

ADASON OLE MINIS 1ST DEFENDANT

OLE NANYOIKE LEMAYIAN ONYOKIE 2ND DEFENDANT

SHIROI KIMOKOTHO OLE NASHA 3RD DEFENDANT

MPOKE MATASI 4TH DEFENDANT

SAMSON MPATIAN RINKA 5TH DEFENDANT

AHAMED SALIM 6TH DEFENDANT

COUNTY GOVERNMENT OF NAROK 7TH DEFENDANT

AND

SAMSON MPATIANI RINKA PLAINTIFF

AND

IGNATIUS CHEGE MWANGI DEFENDANT

THE LAND REGISTRAR, TRANSMARA WEST DEFENDANT

THE DISTRICT SURVEYOR, TRANSMARA WEST DEFENDANT

MARY MERENE SIPARO DEFENDANT



RULING

1. The 4th Defendant in the Counter-Claim (hereinafter referred to as “the applicant”) has sought to have the Counter-Claim dismissed through a Preliminary Objection dated 4th August 2023 (hereinafter referred to as “the present P.O ”) on the following grounds; -
 - a. The Amended Counter-claim herein is res judicate as the matter before this Honourable Court has been heard and determined in *Samson Ole Rinka & another v Michael Otuma Ole Rinka & 5 Others* (2010) eKLR at Kisii.
 - b. The instant suit offends the provisions of Section 7 of the *Civil Procedure Rules*, 2010.
 - c. This Court lacks jurisdiction to hear and determine this Counter-claim by virtue of the cause of action being time barred having been filed after the lapse of the statutory period as set out in section 4 and 7 of the *Limitation of Actions Act*.
 - d. The Counter-claim is incompetent, bad in law and the same should be struck out with costs to the Defendant/Applicant.
 - e. The Counter-claim as drawn and filed is incompetent and fatally defective and therefore it should be struck out.
 - f. The Counter-claim is tantamount to trifling with the Court and is an abuse of the process of this Honourable Court.
 - g. That the Counter-claim against the Defendant should be dismissed with costs to the Defendant.
2. The present P.O was served on all the parties and the Honourable Court gave directions that it should be canvassed by way of written submissions.
3. The Applicant filed her submissions on the 6th of October 2023 while the Plaintiff in the Counter-Claim filed his submissions on the 24th of October 2023.
4. In addition to the above parties, the present P.O was also opposed by the 1st Defendant in the main suit by filing submissions on the 24th of October 2023.
5. The Honourable Court has duly perused the present P.O and the submissions filed by the parties thereby coming to the conclusion that the issues for determination are as follows;-Issue No.1- Whether Or Not The Counter-claim Herein Is Res Judicata To The Proceedings Known As *Samson Ole Rinka & another v Michael Otuma Ole Rinka & 5 Others* (2010) In Contravention Of Section 7 of The *Civil Procedure Rules*, 2010?Issue No. 2- Whether The Present P.O Is Merited?Issue No. 3- Who Bears The Costs Of The Present P.O ?
6. The Honourable Court having duly identified the above issues for determination, the same will now be discussed hereinbelow.



Issue No.1- Whether Or Not The Counter-claim Herein Is Res Judicata To The Proceedings Known As Samson Ole Rinka & Another v Michael Otuma Ole Rinka & 5 Others (2010) In Contravention Of Section 7 Of The Civil Procedure Rules, 2010?

7. The statutory provision of a claim of *Res Judicata* is Section 7 of the [Civil Procedure Rules](#), 2010 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 a former suit between the same parties or between parties to 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 Applicant who is the 4th Defendant in the Counter-Claim claims that it is Res Judicata to the proceedings known as [Samson Ole Rinka & another v Michael Otuma Ole Rinka & 5 Others](#) (2010).

9. The Applicant in his List of Documents dated 4th of August 2023 has listed the judgement in the proceedings known as [Samson Ole Rinka & another v Michael Otuma Ole Rinka & 5 Others](#) (2010) to be her main document.

10. On the other hand, the Plaintiff in the Counter-Claim is of the view that the Applicant is a necessary party in these proceedings because the property which she owns is situated in the same land as the Plaintiff's property on the ground.

11. Consequently therefore, if the Plaintiff in the Counter-claim is successful, then the property which will be affected will include that of the Applicant herein.

12. The Plaintiff in the Counter-claim further stated that the property known as L.R.No.Transmara/Ololchani/237 which he owns was not one of the properties under litigation in the proceedings known as [Samson Ole Rinka & another v Michael Otuma Ole Rinka & 5 Others](#) (2010) and therefore this suit can be *res-judicata*.

13. The Plaintiff in the main suit did not address the issue of *Res-Judicata* in his submissions filed on the 24th of October 2023.

14. The principles of considering a preliminary objection were settled in the case *Mukhisa Biscuits Manufacturing Limited v West End Distributors Ltd* (1969) EA 696 where the Court observed as follows:-

“A preliminary Objection Is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other sides are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

15. In evaluating if a matter is *Res Judicata*, the Honourable Court should evaluate such a claim on various ingredients.

16. In the case of [John Frence Maritime Services Ltd & another v Cabinet Secretary For Transport & Infrastructure & 3 Others](#) (2015) eKLR, made the following observation:-

The doctrine of *res judicata* has two main dimensions: cause of action *res judicata* and issue *res judicata*. *Res judicata* based on a cause of action, arises where the cause of action in



the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.”

17. To begin with, for the Applicant to raise the issue of a Res Judicata as a preliminary objection, the pleadings must point to an acceptance that the parties and cause of action in the present suit are similar to the parties and cause of action in the earlier case.
18. The basis of this understanding is that a Preliminary Objection can only be raised where the facts before the Honourable Court are assumed to be correct and are not in dispute.
19. In the present P.O , the Plaintiff in the Counter-Claim has denied that the property in issue in this suit known as L.R.NO.Transmara/Ololchani/236 was a subject issue in the proceedings known as *Samson Ole Rinka & another v Michael Otuma Ole Rinka & 5 Others* (2010) eKLR.
20. Secondly, the Plaintiff in the Counter-Claim who is a Respondent in the present P.O stated that he was not a party to the proceedings known as *Samson Ole Rinka & another v Michael Otuma Ole Rinka & 5 Others* (2010) eKLR.
21. The issue between the Plaintiff and the 4th Defendant in the Counter-Claim is whether both of them occupy one and the same title dispute being in possession of different title documents.
22. The exercise of evaluating the facts relating the cause of action and the parties between these two proceedings can not be handled through a Preliminary Objection which requires that facts are presumed to be correct and the only issue of determination is one of law.
23. The pleadings on record require the Honourable Court to verify the location of the both the properties known as L.R.No.Transmara/Ololchani/236 and L.R.No.Transmara/Ololchani/237 which are in dispute in the main suit and the Counter-Claim and how occupation should be achieved on the ground.
24. This is an issue that requires production of evidence and/or facts including possibly a ground report from Lands Department in Kilgoris to make a just decision.
25. To this end, the present P.O fails for not meeting the threshold of a Preliminary Objection due to the contradiction of facts by parties which require to be ascertained through a hearing.

Issue No. 2- Whether The Present P.O Is Merited?

26. The Honourable Court having decided that the present P.O does not meet the threshold of a Preliminary Objection, then the same is not merited and is hereby dismissed.

Issue No. 3- Who Bears The Costs Of The Present P.O ?

27. In the present P.O , the Applicant has not been successful.
28. Costs normally follow the event and, in this instance, the applicant will bear the costs of the present P.O .



**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 29TH
NOVEMBER 2023.**

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Mr. Ngeno

Advocate for the Applicant: Mr. Kiprotich

Advocate for the Respondents:

