



**Mwachenga v Omondi & 3 others (Environmental and Land Originating Summons 005 of 2023) [2025] KEELC 3260 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3260 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 005 OF 2023**

**LL NAIKUNI, J**

**APRIL 3, 2025**

**BETWEEN**

**ATHUMAN MOHAMED MWACHENGA ..... APPLICANT**

**AND**

**FRED EVANS OMONDI ..... 1<sup>ST</sup> RESPONDENT**

**SARAH ACHIENG ONDIEGE ..... 2<sup>ND</sup> RESPONDENT**

**SARAH OMOLLO ONDIEGE ..... 3<sup>RD</sup> RESPONDENT**

**CHARLES ONDIEGE ADHOLA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

**I. Introduction**

1. Before the Honourable Court for its determination is the Preliminary Objection dated 14<sup>th</sup> January 2025 raised by the Applicant. Primarily, the objection sought to have the suit struck out for ostensibly offending the doctrine of “Res - judicata”.
2. As a matter of relevant information, it’s instructive to note that this suit was instituted by originating summons dated 1<sup>st</sup> February 2023 filed by the Respondents herein.

**II. The objection by the Applicant**

3. The preliminary objection raised the following grounds; -
  - a. That the suit herein is res judicata as the issues raised in this suit were directly and substantially in issue in MOMBASA ELC 220 of 2013 which was heard and finally determined by a court of competent jurisdiction and later in KWALE ELC 75 of 2021 which the court upheld a preliminary objection on Res - Judicata.



- b. That the matter has already been adjudicated upon and determined in the previous suits, no appeal, review or setting aside of the Judgement has been made
- c. That the present suit offends Section 7 of the *Civil Procedure Act* [Cap. 21 - Laws of Kenya] which bars the court from trying a matter that has already been decided between the same parties or parties claiming under them.
- d. That the suit amounts to an abuse of the court process and should be struck out with costs.

### III. Submissions

4. On 4<sup>th</sup> February 2025 while all the parties were present in Court, they were directed to have the preliminary objection disposed of by way of written submissions. Pursuant to that, all the parties obliged and a ruling date was reserved for 3<sup>rd</sup> April 2025.

#### A. The Written Submissions by the Defendants/Respondents.

5. The Learned Counsel for the Defendants/Respondents submitted that a preliminary objection could be brought at any time at least before the final conclusion of the case. That the gravamen of the preliminary objection raised was Section 7 of the *Civil Procedure Act*, Cap. 21 on Res - Judicata. The court is referred to the holding in the case of “Invesco Assurance Company Limited & 2 Others – Versus - Auctioneers Licensing Board; Kinyanjui Njuguna & Company Advocates & another [Interested Parties] [2020] eKLR” which sets the bar for Res - Judicata.
6. The Counsel for the Defendant submitted that the Plaintiffs originating summons comprises of parties that were in the former suits and the subject matter is the parcel of land Kwale/Mabokoni/353. That the decisions previously made by the court should be respected and the court should therefore not subject itself on hearing matters already determined by competent courts. The defendant maintains that the suit herein is res judicata and ought to be dismissed with costs.

#### B. The Written Submissions by the Plaintiffs/Respondents.

7. The Law firm of Messrs. Birir & Co Advocates filed the submissions dated 18<sup>th</sup> February 2025 on behalf of the Plaintiffs. Mr. Birir Advocate simply outlined three reasons why the preliminary objection had no basis;
  - a. The parties in MOMBASA ELC NO 220 of 2013 and KWALE ELC NO 75 of 2021 were different.
  - b. That the suit herein was brought by way of originating summons claiming Land adverse possession of the subject matter while in the aforementioned suits it was by way of Plaint.
  - c. The Plaintiffs had proved by documentation that they had a case against Defendant which ought to go for full trial.

### IV. Analysis and Determination

8. I have keenly considered the objection raised through the Notice of Preliminary Objection dated 14<sup>th</sup> January 2025 by the Defendant herein, the rival written submissions, the authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
9. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following three (3) issues for its determination. These are: -



- a. Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 14<sup>th</sup> January 2025 meets the threshold founded in Law and precedents.
- b. Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 14<sup>th</sup> January 2025
- c. Who will bear the Costs of the Objection?

**Issue No. a). Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 14<sup>th</sup> January 2025 meets the threshold founded in Law and precedents.**

10. The starting point is to evaluate what constitutes a preliminary objection. A Preliminary Objection was described in the case of:- “Mukisa Biscuits Manufacturing Co. Ltd - Versus - West End Distributors Ltd (1969) EA 696” to mean: -

“So far as I am 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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

11. Further Sir Charles Nebbold, JA stated that: -

“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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

12. The Supreme Court addressed its mind on this issue in the case of “Aviation & Allied Workers Union Kenya – Versus - Kenya Airways Limited & 3 Others [2015] eKLR” and stated:

“Thus a Preliminary Objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

13. In the case of “Henderson – Versus - Henderson (1843) 67 ER 313” res judicata was described as follows: -

“.....where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”



14. From the above case law, it can be deduced that a Preliminary Objection raises pure points of law, which are argued on the assumption that all facts pleaded by the other side are correct. However, a preliminary objection cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.
15. The test for determining the application of “the doctrine of res-judicata” in any given case is spelt out under the provision of Section 7 of the Civil Procedure Act, Cap. 21. Section 7 of the Civil Procedure Act defines the principle of res – judicata to apply where the issues in the previous suit ought to have been “heard and finally decided.
16. Black’s Law Dictionary 10<sup>th</sup> Edition defines the terms “heard” and determined” as follows: -

“ of a case, having been presented to a Court that rendered Judgment.”.
17. The term “hearing” is defined in the same dictionary as follows: -

“ A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”
18. The South African High Court in the case of “Outeniqua Skydivers CC - Versus - Stephanus Petrus Hartzner & Another Case No H264/2019” had the following to say on what amounts to res judicata:-

“ It is trite that the expression res judicata means that the dispute raised for adjudication has already been finally decided. In terms of the common law, the three requisites of res judicata are: that the dispute to be adjudicated relates to the same parties, for the same relief and in relation to the same cause”
19. In the case of:- “Independent Electoral & Boundaries Commission – Versus - Maina Kiai & 5 Others [2017] eKLR”, the Supreme Court while considering the said provision 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.”
20. The Defendant has contended that the suit is Res Judicata, whereas the Plaintiffs/Respondents have disputed the said facts and stated that the issues raised in the former suits were different from what is before this court for determination. For the Court to be able to ascertain whether or not the matter is Res Judicata, it will have to ascertain the facts as pleaded by the Defendant/Applicant and those as raised by the Plaintiffs/ Respondent by also probing the judgements. In doing so, the Court will



be probing evidence. In the case of “Henry Wanyama Khaemba – Versus - Standard Chartered Bank Limited & Another (2014) eKLR”, the Court held that:-

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

21. Since a Preliminary Objection cannot be raised on disputed facts, it is clear that the question as whether or not the matter is Res Judicata, will require the probing of evidence, the Court finds and holds that what has been raised does not amount to a Preliminary Objection.

**Issue No. b). Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 14<sup>th</sup> January 2025**

22. Under this sub – title, after already making findings to the effect that the Preliminary Objection bears no legal basis, I need not belabour much on the said issues for determination. I however wish to note as an orbiter, that despite making allegations that the suit herein was similar to what was dealt with previously by the courts in MOMBASA ELC 220 of and later in KWALE ELC 75 of 2021, the Applicant did not annexe any of the pleadings from this courts for the court to ascertain the same.
23. I think this was rather odd and an error on the part of the applicant for the reason that the court cannot go on a fishing exhibition in search of material to back up any assertions raised by a litigant in terms of evidence.

**Issue No. c). Who will bear the costs of the Preliminary Objection?**

24. It is now well established the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action or proceeding in any litigation. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs follow the event. By the event it means the result or outcome of any such legal action.
25. In the instant case, the Preliminary objection raised by the Defendant has failed to sustain the fundamental threshold of such an objection in law and thus it is been defeated. It follows that the Plaintiff is entitled to the costs thereof.

**V. Conclusions & Disposition**

26. Consequently, upon causing an indepth analysis to the framed issues herein, the Honourable Court on Preponderance of Probabilities and the balance of convenience reaches at the following findings. These are:-
  - a. That the Notice of Preliminary Objection dated 14<sup>th</sup> January, 2025 be and is hereby found to lack merit and thus it is dismissed entirely.
  - b. That for expediency sake, there be a mention on 26<sup>th</sup> June, 2025 for purposes of conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules,



2010. There should be a hearing date of the matter on 29<sup>th</sup> October, 2025 through physical means.

c. That the costs of the Preliminary objection be awarded to the Plaintiff.

It is ordered accordingly.

**RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 3<sup>RD</sup> DAY OF APRIL 2025**

**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Birir Advocate for the Plaintiff/Respondent.
- c. No appearance for the Defendant/Applicant.

