



REPUBLIC OF KENYA



**KENYA LAW**  
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**Syano & another v Syano (Environment & Land Case 80 of 2017)  
[2022] KEELC 15036 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15036 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 80 OF 2017**

**TW MURIGI, J**

**NOVEMBER 16, 2022**

**BETWEEN**

**SUSAN KIMENZE SYANO ..... 1<sup>ST</sup> PLAINTIFF**

**LAZARUS MUVUVA SYANO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BONIFACE NZYOKA SYANO ..... RESPONDENT**

**RULING**

1. By a notice of motion dated 26<sup>th</sup> of January, 2022 brought pursuant to the provisions of order 22 rule 29 (1), order 51 of the [Civil Procedure Rules](#) and section 1A, 1B & 3A of the [Civil Procedure Act](#), the applicant seeks for the following orders: -
  1. That the plaintiffs/respondents by themselves, their servants, agents and or employees or anyone whomsoever claiming under them be compelled by an order of eviction to deliver vacant possession of land parcel No Nzaiu/Mumbuni/677 to the defendant/applicant.
  2. That the O.C.S Wote police station to oversee and provide security for the eviction exercise so as to keep peace.
  3. That the cost of the application be awarded to the defendant/applicant.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the applicant sworn on the even date.

**The Applicant's Case**

3. It is the applicant's case that he is the legal owner of land parcel No Nzaiu/Mumbuni/677. The applicant averred that *vide* its ruling delivered on November 20, 2017, the court dismissed the plaintiff's suit with costs. That a decree was thereafter issued on October 30, 2020 and served upon the plaintiffs/



respondents. The applicant further averred that the respondents have deliberately refused to vacate the suit premises despite being served with the final decree of the court. The applicant maintains that the respondents have not appealed against the judgment nor filed an application for stay of execution.

### **The Respondent's Case**

4. Opposing the application, the plaintiffs/respondents filed a notice of preliminary objection dated 8<sup>th</sup> of June, 2022 on the following grounds: -
  - i. That the defendant/applicant had filed a similar notice of motion application dated 15<sup>th</sup> of February, 2021 which this honourable court determined vide a ruling delivered on 17<sup>th</sup> of November, 2021.
  - ii. The plaintiffs/respondents prays that the application dated 26<sup>th</sup> of January, 2022 be dismissed with costs.
5. The preliminary objection was canvassed by way of written submissions.

### **The Plaintiffs'/respondents' Submissions**

6. The Plaintiffs/Respondents submissions were filed on 23<sup>rd</sup> of August, 2022.
7. Counsel for the plaintiffs raised the following issues for the court's determination: -
  - i. Whether the notice of motion application dated 26<sup>th</sup> of March 2022 is *res judicata*.
  - ii. Whether the plaintiffs/respondents are entitled to costs for the notice of preliminary objection.
8. Counsel submitted that the principles governing preliminary objection are set out in the case of *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696 while the doctrine of *res judicata* is anchored on section 7 of the [Civil Procedure Act](#). Counsel argued that the present application is *res judicata* as the Applicant has raised the same issues as those which were considered and determined in the application dated 15<sup>th</sup> of February, 2021.

### **The Defendant/applicant's Submissions**

9. The defendant/applicant submissions were filed on 2<sup>nd</sup> September, 2022.
10. Counsel for the defendant submitted that the only issue for determination is whether the application is properly before the court.
11. Counsel admitted that the applicant had filed a similar application but the same was dismissed for lack of evidence that the applicant was the owner of the suit property. That in the present application the applicant has annexed a certificate of official search to demonstrate that he is the owner of the suit property.

### **Analysis And Determination**

12. Having considered the pleadings, the preliminary objection and the rival submissions, I find that the only issue that arises for determination is whether the application dated 26<sup>th</sup> of January, 2022 is *res judicata*.
13. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law.



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

“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.”

15. Further on Sir Charles Newbold JA stated;

“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 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.”

16. 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.”

17. The doctrine of *res judicata* is founded on 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.”



18. The doctrine of *res judicata* has been defined in the [Black's Law Dictionary](#), 9<sup>th</sup> 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.”

19. 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.”

20. From the foregoing, it is clear that for *res judicata* to suffice, a court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.

21. 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. 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.

22. The doctrine of *res judicata* applies to suits as well as to applications. Firstly, the matter in issue should be directly and substantially the same as in the former suit. The defendant/applicant, filed a notice of motion application dated 15<sup>th</sup> of February, 2021 where he sought for the following orders: -

1. That the plaintiff/respondents by themselves, their servants, agents and or employees or anyone whomsoever claiming under them be compelled by an order of eviction to deliver vacant possession of land parcel No Nzau/Muumbuni/677 to the defendant/applicant.
2. That the O.C.S Wote police station to oversee and provide security for the eviction exercise so as to keep peace.



3. That the costs of the application be awarded to the plaintiff/applicant.
23. The court in its ruling delivered on 17<sup>th</sup> of March, 2021 dismissed the application on the grounds that it was filed in a suit that had already been dismissed. It was the court's finding that the application had no legs to stand on.
24. Similarly, in the present application, the applicant has sought for similar orders. The applicant admitted that he had filed an application seeking for similar orders. The application presented to this court is an exact replica of the application that was dismissed on 17<sup>th</sup> of March, 2021.
25. In the present application, the applicant is seeking for an order of eviction against the respondents to deliver vacant possession of land parcel No Nzau/Mumbuni/677. The Applicant in the present application sought for similar orders as those in the application dated 15<sup>th</sup> of February, 2021 in respect to the same parcel of land. The orders sought in the previous application is wholly similar to the present application. Clearly, the application is founded on the issues that have been dealt with in the application dated 15<sup>th</sup> of February, 2021.
26. 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 the application dated 15<sup>th</sup> of February, 2021 were the defendant/applicant versus the plaintiffs/respondents. The applicant in the present application was also the applicant in the application dated 15<sup>th</sup> of February 2021 and so were the respondents. It goes without saying that the parties in both cases are similar and indeed litigating under the same title.
27. The applicant ought to have filed a suit against the respondents seeking for the orders sought herein instead of filing the present application.
28. 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 the application dated 15<sup>th</sup> of February 2021 had the requisite jurisdiction to determine the dispute therein. The application was heard and determined vide the ruling delivered on 17<sup>th</sup> March, 2021.
29. 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.”
30. It therefore follows that the preliminary objection raised by the plaintiffs/ respondents was based on a pure point of law, that is the doctrine of *res-judicata*, and did not require additional evidence to substantiate the objection. It is clear that the issues raised in this application are substantially the same as those determined in the application dated 15<sup>th</sup> of February, 2021. It is beyond argument that the plea of *res judicata* succeeds. This court is of the view that the issue of whether an order of eviction



compelling the respondents to deliver vacant possession of land parcel No Nzai/Mumbuni/677 to the applicant is therefore *res judicata*. This court finds and holds that this application is a clear abuse of the court process.

31. The upshot of the foregoing is that the preliminary objection is merited. Accordingly, the application dated 26<sup>th</sup> of January, 2022 is struck out with costs to the plaintiffs/respondents.

.....  
**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF NOVEMBER, 2022.**

**IN THE PRESENCE OF:**

Court Assistant – Mr. Kwemboi

Muthiani for the Plaintiffs/Respondents

And also holding brief for P.M. Mutuku for the Defendant/Applicant

