



Kimata v Mburu (Sued as the Legal Representative of the Estate of Mbokotho Rubitu - Deceased) & 6 others (Environment & Land Case E023 of 2024) [2025] KEELC 3620 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E023 OF 2024**

JM MUTUNGI, J

MAY 8, 2025

BETWEEN

NJOGU KIMATA PLAINTIFF

AND

JULIUS MURIMI MBURU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MBOKOTHE RUBITU - DECEASED) 1ST DEFENDANT

ROSE NJERI MWANIKI 2ND DEFENDANT

EPHANTUS MWANIKI NGUNYU 3RD DEFENDANT

JOYCE WAMUYU MURIMI 4TH DEFENDANT

FAITH NJOKI MURIMI 5TH DEFENDANT

COMFORT WACHIRA MURIMI 6TH DEFENDANT

THE LAND REGISTRAR KIRINYAGA COUNTY 7TH DEFENDANT

RULING

1. This ruling relates to the Notice of Preliminary Objection [P.O.] filed by the 1st Defendant dated 30th October 2024. The Preliminary objection is premised on the doctrine of res judicata under Section 7 of the *Civil Procedure Act* Cap 21. The 1st Defendant contends that the issues in this suit have already been determined in Kerugoya CMCC No. 25 of 2019 which related to the same subject matter.
2. The 1st Defendant raised the preliminary objection in response to the Plaintiff's plaint dated 12th July 2024, vide which the Plaintiff sought the following orders:



- a. That the Honourable Court be pleased to make a declaration that L.R No. Mutira/Kiaga/2838, 2839,2840 were fraudulently transferred from the Plaintiff's name to the 2nd to the 6th Defendants by way of fraud.
 - b. That an order of eviction be issued against the 1st to the 6th Defendants, their agents, assigns, servants and/or heirs from L.R No. Mutira/Kiaga/2838, 2839, and 2840.
 - c. That the Honourable Court be pleased to authorize the 7th Defendant herein as follows:
 - I. The 2nd and 3rd Defendants' names be cancelled in the register of L.R No. Mutira/Kiaga/2838 and L.R No. Mutira/Kiaga/2839 and the title be reverted back to the name of Njogu Kimata, the Plaintiff herein.
 - II. The 4th, 5th and 6th Defendants' name be cancelled in the register of L.R No. Mutira/Kiaga/2840 and the title revert back in the name of Njogu Kimata, the Plaintiff herein.
 - d. That the 1st to 6th Defendants be condemned to bear the costs of the suit and interests arising therefrom.
3. The Plaintiff contends that the 1st Defendant was originally registered as the owner of Land Parcel L.R No. Mutira/Kiaga/523, through transmission in Kerugoya HC Succession Cause No. 205 of 1999. He contends that he, on the other hand, was the registered owner of L.R No. Mutira/Kiaga/402, which he acquired through a public auction in 1985. The Plaintiff asserts that there was a mutual agreement whereby the 1st Defendant, having occupied L.R No. Mutira/Kiaga/402, before the auction, would retain possession of it, while in exchange, he would surrender 3 acres from Land Parcel LR No. Mutira/Kiaga/523 to the Plaintiff.
 4. However, the Plaintiff alleges that the 1st Defendant reneged on this agreement. This led the Plaintiff to file Kerugoya CM ELC No. 25 of 2019, seeking an eviction order against the 1st Defendant from LR No. Mutira/Kiaga/402. The Plaintiff asserts that during the hearing proceedings, he discovered that the 1st Defendant had, through a certificate of confirmation of grant issued on 29th June 2001, obtained ownership of LR No. Mutira/Kiaga/523. The Plaintiff further claims that the 1st Defendant, without his knowledge or consent subdivided LR No. Mutira/Kiaga/523 into four portions – namely Mutira/Kiaga/2838,2839, 2840 and 2841 – and fraudulently transferred some of these parcels to the other Defendants. The Plaintiff alleges that, as a former Board member of the Land Control Board, the 1st Defendant exploited the Plaintiff's advanced age to execute the fraudulent transfers.
 5. The Plaintiff avers that the 1st Defendant continues to enjoy the benefits of the disputed properties while also remaining in possession of LR No. Mutira/Kiaga/402. As a result, the Plaintiff seeks to reverse these transfers and restore the land to his name.

1st Defendant's Written Submissions.

6. The counsel for the 1st Defendant submitted that both parties acknowledge that Kerugoya Chief Magistrate Court Civil Suit No. 25 of 2019 was between the Plaintiff and the 1st Defendant. The central issue in that case was the ownership of land parcels Mutira/Kiaga/402 and Mutira/Kiaga/523, which had been subdivided into Mutira/Kiaga/2838, Mutira/Kiaga/2839, and Mutira/Kiaga/2840. The 1st Defendant's Counsel submits the same issues raised in the previous suit are the same issues that have been raised by the Plaintiff in the present suit and that the parties are basically the same parties as in the previous case. The current dispute revolves around the exchange agreement concerning land parcels Mutira/Kiaga/523 and Mutira/Kiaga/402, with the Plaintiff again seeking eviction orders and the reversion of the titles of the subdivisions to the Plaintiff's name.



7. Counsel further submitted that as per the certificates of official searches exhibited by the Plaintiff, they reveal that the subdivision of land parcel Mutira/Kiaga/523 and registration of the subtitles was effected in 2018 while the previous suit was filed in 2019 and Judgment was delivered on 16th January 2024. In the premises the 1st Defendant's Counsel contended that the subdivision and transfer of the subtitles out of land parcel Mutira/Kiaga/523 was well within the Plaintiff's knowledge. Counsel therefore argued the instant suit was res judicata as the issues raised were considered and determined in a previous suit. To support his submission, Counsel relied on the Cases of Owala & Another v Odhiambo KEELC 20684] and Nancy Mwangi T/A Worthlin Marketers v Airtel Networks [K] LTD [formerly Celtel Kenya Ltd] & 2 others [2014] eKLR.

The Plaintiff's Written Submission.

8. The Plaintiff in response submitted that the 1st Defendant's Preliminary Objection did not meet the threshold of what constituted a Preliminary Objection as established in the Case of Mukhisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696 as it was not a pure point of law and would necessarily require examination and review of evidence which could only be appropriately done during the formal hearing when witnesses would adduce evidence and be cross-examined. The Plaintiff thus urged that the Preliminary Objection be dismissed.
9. The Plaintiff's Counsel further submitted that the subject matter of the current suit was LR. Mutira/Kiaga/523 and its resultant subdivisions, namely LR Nos. Mutira/Kiaga/2838, 2839, and 2840. In contrast, Counsel submitted what was directly and substantially in issue in Kerugoya CM ELC No. 25 of 2019 was land parcel LR No. Mutira/Kiaga/402. The Plaintiff's Counsel therefore contended, the subject matter in the two cases was different and further argued that the parties involved in both suits were not the same. Counsel submitted that in Kerugoya CM ELC No. 25 of 2019, the parties were the Plaintiff and the 1st Defendant whereas in the present, the parties include the Plaintiff, the 1st Defendant, and five other Defendants, among whom are the registered owners of the suit property and the Land Registrar, Kirinyaga. In the premises the Plaintiff's Counsel submitted the instant suit was not res judicata and urged that the Preliminary Objection be dismissed and the suit do proceed to be heard on its merit.

Issues for Determination

10. The singular issue for determination in this application is whether this suit is res judicata and thus barred by Section 7 of the *Civil Procedure Act* by reason of issues for determination in the suit having been directly and substantially in issue in Kerugoya CM ELC No. 25 of 2019 and having been finally determined.
11. Section 7 of the *Civil Procedure Act* provides that:

“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.”



12. The Court of Appeal in the Case of IEBC v Maina Kiai & 5 Others [2017] KECA 477 KLR set out conditions that have to be satisfied in order for the doctrine of res judicata to be held to be applicable. The Court held as follows:-

“Thus, for the bar of resjudicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

1. The suit or issue was directly and substantially in issue in the former suit.
 2. The former suit was between the same parties or parties under whom they or any of them claim.
 3. Those parties were litigating under the same title.
 4. The issue was heard and finally determined in the former suit.
 5. 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”.
13. The rationale for the res judicata doctrine is that litigation has to come to an end and that parties that have had litigation that has been concluded should not be allowed to open a new front of litigation before another Court on the same issues that have previously been litigated before another Court. If parties were to be allowed to file fresh suits on issues that have been determined and adjudicated before another Court, litigation would never come to an end, and a successful litigant would never take comfort and reap the fruits of his success as he would not be assured the litigation would not be resurrected in another Court. The Court in the Case of ET v Attorney General & Another [2012] eKLR stated as follows:-

“The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Ltd & Others [2001] EA 177 the Court held that, ‘Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit’. In that case the Court quoted Kuloba, J, in the case of Njangu v Wambugu & another HCCC No. 2340 of 1991 [unreported] where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata.’”

14. In the instant case, both the Plaintiff and the 1st Defendant acknowledge that they had a mutual agreement whereby the Plaintiff was to exchange his land parcel Mutira/Kiaga/402 that he had purchased in a public auction, and on which the 1st Defendant was in occupation with a portion of 3 acres that was the 1st Defendant’s entitlement as benefit and which was to be excised out of land parcel Mutira/Kiaga/523 belonging to the 1st Defendant’s deceased father following succession proceedings. Apparently the mutual agreement appears was not honoured as envisaged, prompting the Plaintiff to file Kerugoya CM ELC No. 25 of 2019. The dispute in that case involved land parcels No. Mutira/Kiaga/402 and Mutira/Kiaga/523, which, according to the 1st Defendant’s Counterclaim, was subdivided into Land parcels Mutira/Kiaga/2838, 2839, and 2840. The Plaintiff sought the eviction of the 1st Defendant from LR No. Mutira/Kiaga/402. In his Counterclaim, the 1st Defendant sought



- to be registered as the owner of LR No. Mutira/Kiaga/402, claiming he had transferred a portion of 3 acres excised from LR No. Mutira/Kiaga/523 to the Plaintiff. It is in the premises evident that the suit before the Magistrate's Court involved both land parcels Mutira/Kiaga/402 and Mutira/Kiaga/523 and the resultant subdivisions thereof.
15. The instant suit without a doubt has its origin to the mutual agreement that the Plaintiff and the 1st Defendant agree they had to exchange their respective parcels of land. In the Case of Plaintiff his land was Mutira/Kiaga/402 that he had bought in a public auction and in which the 1st Defendant was in occupation and was using. As regards the 1st Defendant, he anticipated as a beneficiary of his late father to inherit a portion of Mutira/Kiaga/523 and it was from this portion the 1st Defendant was to transfer 3 Acres to the Plaintiff in consideration for the transfer of his said land to the 1st Defendant.
 16. In the statement of defence filed by the 1st Defendant in the earlier suit before the Magistrate's Court, the 1st Defendant pleaded the mutual agreement and specifically pleaded that he transferred a portion of 3 acres to the Plaintiff excised from land parcel Mutira/Kiaga/523. In the Amended Defence and Counterclaim in the suit, the 1st Defendant averred land parcel Mutira/Kiaga/523 was subdivided and the resultant titles were Mutira/Kiaga/2838 to 2840 and that he transferred 3 Acres to the Plaintiff. He sought an order for transfer of land parcel Mutira/Kiaga/402 to himself and a permanent injunction against the Plaintiff.
 17. The Learned Trial Magistrate in the Magistrate's ELC No. 25 of 2019 after hearing the parties made a finding that indeed the 1st Defendant had transferred the 3 Acres to the Plaintiff and it was his position that it would be unjust enrichment to allow the Plaintiff to keep both the land transferred to him and land parcel Mutira/Kiaga/402 which was also in his name. He ordered that the said land be transferred to the 1st Defendant. The Magistrate's Court that heard the matter and rendered its decision on 16th January, 2024 was a competent Court and had jurisdiction to deal with the matter. There is no indication that the decision has been appealed and/or reviewed and to that extent the decision constitutes a final determination of the issues that were raised by the parties in the suit.
 18. Whereas in a Preliminary Objection, a Court before which the Preliminary is taken is not expected to receive and/or review the evidence in order to determine the objection, where a plea of res judicata is raised the Court should and is expected to consider and review the pleadings in the previous case and to look at the Judgment in the case if the same have been availed as part of the documentation in the subsequent case to inform itself of the issues that were raised and determined in the previous case. I have consequently scrutinised the pleadings and the Judgment rendered in the previous case and it is clear that as between the Plaintiff and the 1st Defendant, the ownership of land parcels Mutira/Kiaga/402 and Mutira/Kiaga/523 [subdivisions Mutira/Kiaga/2838, 2839 and 2840] were in issue. In his Judgment the Learned Trial Magistrate made a finding that the 1st Defendant had transferred the land to the Plaintiff and therefore the Plaintiff should transfer land parcel Mutira/Kiaga/402 to the 1st Defendant. Indeed the exhibited abstracts of title [green Cards] for land parcels Mutira/Kiaga/2838, 2839 & 2840 each measuring 0.406 hectares show that the same were transferred to Njogu Kimata [the Plaintiff] on 26th January 2018. Parcels 2838 and 2839 are shown to have been transferred to the 2nd and 3rd Defendants on 3rd May 2018 while parcel 2840 is shown to have been transferred to Edward Muchira Munene on 17th September 2019 but was later on 25th September 2020 transferred to the 4th, 5th and 6th Defendants. The aggregate acreage of the three parcels of land is approximately 3 Acres which corresponded with what the Plaintiff and the 1st Defendant mutually had agreed.
 19. The Plaintiff filed the earlier suit in the Magistrate's Court on 28th February 2019. As at that time land parcel Mutira/Kiaga/523 had been subdivided and land parcels Mutira/Kiaga/2838, 2839 and 2840 transferred to the Plaintiff as per the abstracts of title. The 1st Defendant in the Amended Defence and



Counterclaim dated 3rd January 2023 and filed in Court on 10th January 2023 under paragraph 11 of the Counterclaim pleaded that he had transferred land parcels Mutira/Kiaga/2838, 2839 & 2840 in furtherance of the mutual agreement with the Plaintiff. The suit in the Magistrate's Court was heard on 15th June 2023 and Judgment was delivered on 16th January 2024.

20. As I have observed herein the 1st Defendant had in the previous suit vide the Counterclaim pleaded that he had in furtherance of the mutual agreement with the Plaintiff caused the transfer of land parcels Mutira/Kiaga/2838, 2839 and 2840 [subdivisions from land parcel Mutira/Kiaga/523] to be effected to the Plaintiff and it was on that account he sought the Plaintiff to transfer land parcel Mutira/Kiaga/402 to him. If the Plaintiff had any issues with that averment by the 1st Defendant, he had the opportunity to raise the same with the Trial Court. A party in a suit is expected to plead its entire case and to raise all relevant issues before the Court that is seized of the matter. The doctrine of resjudicata bars trial by instalments as litigation between the same parties on similar issues must come to a close once a competent Court has heard the parties and determined the issues finally. This principle was aptly put in the English Case of Henderson v Henderson [1843] 67 ER 313 where Wigram V-C stated 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 in the litigation to bring forward their whole case, and will not [except under special circumstances] permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of resjudicata 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”.

21. Nearer home in the Case of George W.M. Omondi & Another v National Bank of Kenya Ltd & 2 Others [2001] eKLR A. G. Ringera, J [as he then was] commenting on the application of the doctrine of res judicata stated as follows:-

“----However as this Court is not the final Court, I am obliged to express my findings on all the issues raised for determination. And so I must deal with the issue whether the suit is res judicata. In that regard, I accept the submission by Counsel for the Defendant that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are forbidden from litigating in instalments. I wholly agree with the opinion of Kuloba, J in Mwangi Njangu v Meshack Mbogo Wambugu [supra] where he said:-

“If as litigants were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case a cosmetic face lift every occasion he comes to a Court then I do not see what use the doctrine of res judicata plays.”



It cannot be otherwise if the doctrine is to serve the two public policy objectives for which it was fashioned, namely that it is desirable that there be an end to litigation and that a person should not be vexed twice in respect of the same matter.”

22. In the present case, it is clear that issues touching on the mutual agreement that the Plaintiff had with the 1st Defendant relating to the exchange of land parcel Mutira/Kiaga/402 with a portion measuring 3 Acres out of land parcel Mutira/Kiaga/523 are raised. These are the same issues that were raised and were determined in Kerugoya CM ELC No. 25 of 2019. As between the Plaintiff and the 1st Defendant, it is my view that these issues were finally determined by a competent Court and with jurisdiction. The records show that land parcels Mutira/Kiaga/2837, 2839 & 2840 were transferred to the Plaintiff and thereafter were transferred to the 2nd to 6th Defendants. The Plaintiff as per the mutual agreement was entitled to the 3 parcels of land. If he was not the one who transferred the land to the Defendants, then he has a distinct action against the 2nd to 6th Defendants for unlawfully and illegally acquiring titles to his land. The 1st Defendant affirms he transferred the titles to the Plaintiff. How did the Defendants acquire their titles, if the Plaintiff who the register shows was the registered owner did not transfer the titles? That would be the issue for the Court to determine as between the Plaintiff and the 2nd to the 7th Defendants. The 2nd to 6th Defendants would have to prove the root of the titles they hold by adducing evidence to prove how they acquired the titles.
23. As regards the claim against the 1st Defendant by the Plaintiff the claim is not sustainable as it res judicata having been determined by the Magistrate’s Court and against which decision there has been no appeal and/or review. The Judgment rendered has not been set aside and binds the Plaintiff and the 1st Defendant.
24. I accordingly uphold the Preliminary Objection by the 1st Defendant. The suit as against 1st Defendant is hereby struck out. The Plaintiff is at liberty to proceed with the suit as against the 2nd to 7th Defendants. The costs of the Preliminary Objection are awarded to the 1st Defendant as against the Plaintiff.
25. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 8TH DAY OF MAY 2025.

J. M. MUTUNGI

ELC - JUDGE

