



REPUBLIC OF KENYA



**Ketere v Morintat & 4 others (Land Case E017 of 2024)  
[2025] KEELC 3549 (KLR) (6 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3549 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
LAND CASE E017 OF 2024  
MN MWANYALE, J  
MAY 6, 2025**

**BETWEEN**

**LEONARD LENANA KETERE ..... APPLICANT**

**AND**

**SIMON LEBOO MORINTAT ..... 1<sup>ST</sup> RESPONDENT**

**BENARD KETERE ..... 2<sup>ND</sup> RESPONDENT**

**JONATHAN KOIKAI KETERE ..... 3<sup>RD</sup> RESPONDENT**

**KORINGO OLE NGOLIAI ..... 4<sup>TH</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR KILGORIS ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Ruling is in respect of the Notice of Motion dated 12<sup>th</sup> November 2024 as well as the Preliminary Objections raised at paragraph 25 of the statement of Defence dated 12<sup>th</sup> November 2024.
2. Both the Preliminary Objection and the Notice of Motion application raise the same issues
  - i. that this suit is Resjudicata in view of the determinations made in previous suits to wit Kisii ELC No. 249/2013 and Kilgoris ELC Petition No. E004/2024 which suits decreed that the 2<sup>nd</sup> – 4<sup>th</sup> Defendants subdivided the original suit property procedurally hence the transfers and registrations of the subsequent subdivisions were lawful.
  - ii. That the suit herein is subjudice vide Kisumu Court of Appeal Civil Appeal No. 27 of 2021 whereby the Appellants therein appealed against the judgment and decree of Kisii ELC No. 249/2013.
  - iii. That the suit amounts to an abuse of the due process of the court, the suit is an appeal in disguise against the judgment and decree of Kisii ELC Case No. 249/2013.



- iv. That the suit is time barred by dent of provisions of Section 4 of the Limitations of Actions Act, and Section 3 of the *Public Authorities Limitation Act*.
3. Both the preliminary object and the Notice of Motion application sought for the dismissal of the instant suit.
4. In support of the application was the supporting affidavit of Korinko Ole Nkolai the 4<sup>th</sup> Defendant/Applicant who reiterated the grounds in support of the application, deposing interalia,
  - i. That the 2<sup>nd</sup> to 4<sup>th</sup> Defendant were officials of the defunct Olomismis group ranch who had been sued by some members of the group ranch over Transmara/Olomismis/1 in Kisii ELC Case NO. 249/2013, and the members filed an interlocutory appeal being Kisumu Court of Appeal Civil Appeal (Application No. 29 of 2014).
  - ii. That in the meantime Kisii ELC No. 249/2013 was heard and determined and a decree issued validating the process of subdivisions that had been carried on in respect of Transmara/Olomismis/1 based on the Area List; and an appeal against that decision is now pending before the Court of Appeal being Kisumu Civil Appeal No. 27/2021.
  - iii. That this instant suit is a replica of Kisii ELC Case No. 249/2013 as the suit herein is challenging the process of subdivision of the original suit property and registration of members of the defunct group ranch.
  - iv. Thus, this suit is Resjudicata in view of Kisii ELC Case No. 249/2013 and is subjudice in view of the pending Court of Appeal Civil Appeal NO. 27/2021.
5. In opposition to the application, a Replying affidavit by the Respondent Leonard Lenana Ketele was filed; who deposes that; -
  - i. there is no prejudice that has been demonstrated if evidence is allowed and the court adjudicates the matter.
  - ii. That the causes of action in this suit and ELC No. 249 of 2013 Kisii and Kilgoris Petition No. E004/2024 are different, separate and distinct in that in ELC No. 249/2013, was in respect of a permanent injunction against Defendants, from survey, subdivision allocation, while in the Petitioners sought for declarations that the 1<sup>st</sup> to 3<sup>rd</sup> Respondents were in office illegally and hence the transfers were null and void and therefore ought to be revoked and/or cancelled.
  - iii. That this suit involves fraudulent acquisition by the 1<sup>st</sup> Defendant with the assistance of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. That the suit land become private land after issuance of the title deeds, thus not Resjudicata.
  - iv. That the previous suits were not fully determined hence do not meet the criteria of Resjudicata.
6. The Respondent thus sought for a dismissal of the Application, and the preliminary objection.
7. The court directed that the application and the preliminary objection be canvassed simultaneously by oral submissions.

### **Applicants submission**

8. The Applicant submits that the plaintiff vide paragraph 17 of the Plaint bases his Plaint in the manner of subdivision of the original suit property L.R No. Transmara/Olomismis/1 by the 2<sup>nd</sup> to 4<sup>th</sup> Defendants/Applicants.



9. The Applicant submits that the issue of subdivision and registration of Transmara/Olomismis/1 was dealt with substantively in Kisii ELC No. 249/2013, a suit filed by members of Olomismis Group Ranch. The said subdivision gave rise to parcels numbers 10 to 1699, the suit parcel herein being parcel No. 1411 was thus part of the parcels in the previous suit.
10. That the 2<sup>nd</sup> to 4<sup>th</sup> Defendants herein were also 1<sup>st</sup> to 3<sup>rd</sup> Defendants in the previous suit and that the matter was heard and determined and it was held that the subdivision was procedural legal and fair.
11. That a subsequent suit was filed being ELC Petition 004/2024 which raised similar issues with regard to procedure of subdivisions of parcels 1 to 1699, where the 2<sup>nd</sup> to 4<sup>th</sup> Defendants were sued in the said Petition which Petition challenged the 2<sup>nd</sup> to 4<sup>th</sup> Defendants capacity in the Olomismis Group Ranch and procedure of subdivision and registration of suit property to non-members, the Petition was struck out as being Resjudicata in view of Kisii ELC No. 249/2023.
12. The issue of non-members having been registered was also dealt with in Kisii ELC No. 249/2013 whose judgment was appealed against and is pending determination at the Court of Appeal in Kisumu.
13. The Applicant submits that the suit is time barred by virtue of Section 4 of Limitations of Actions Act as the 1<sup>st</sup> Defendant was registered in 2015.
14. The Applicant placed reliance on the first four decisions in their list of Authorities and argued the court to dismiss the application.

#### Respondents submissions

15. Mr. Mongeri for the Plaintiff/Respondent placed reliance on the Replying Affidavit deponed on 25.11.2024 and submitted that the dispute related to legal ownership of Transmara/Olomismis/1411 according to paragraph 7 of the Plaintiff; and that the particular suit property has never been subject of litigation as the previous suits dealt with the parent title.
16. The Respondent submitted that the suit was not on the subdivisions but was on fraud, and that rights keep on mutating and there has been no judgment on this particular parcel of land. That parties are different from the previous suit and in the Court of Appeal.
17. In a brief Rejoinder Ms. Ochwal learned counsel for Applicants, submitted that parties are bound by their pleadings and the plaintiff had pleading the issue of subdivision, she submitted further that Resjudicata could apply to parties that were not in previous suits, and that the issues of subdivision and transfers are still alive before the Court of Appeal rendering the suit subjudice.
18. Before framing issues for determination, it is common ground between the parties that they have been previous litigation in respect of the original parcel No. Transmara/Olomismis/1 and that the 2<sup>nd</sup> to 4<sup>th</sup> Defendants were defendants in the previous suits.
19. That in respect of the judgment in Kisii ELC No. 249/2013, there is a pending appeal before the Court of Appeal at Kisumu.
20. Having analysed, the pleadings, the preliminary objection, the application, affidavits and annexures and considered the law the court frames the following as issues for determination: -
  - i. Whether or not the suit is Resjudicata in view of the previous suits to wit Kisii ELC No. 249/2013 and Kilgoris Petition No. E004/2024?
  - ii. Whether or not the application is merited generally?
  - iii. What orders ought to issue?



- iv. Who bears the costs of the suit?

### **Analysis and determination**

21. The plaintiff has sought for a declaration that he is the legal owner of Transmara/Olomismis/1411 as well as a permanent injunction and a declaration that the actions of the 2<sup>nd</sup> to 4<sup>th</sup> Defendants were illegal.
22. Both parties have argued divergently on paragraph 17 of the Plaint, and the court feels it needs to reproduce the same for clarity purposes.
- “17 – The Plaintiff contends that due process was not followed in registration and the defendants have colluded against him in an attempt to deny his rights as the legal owner of the subject parcel of land”.
23. Resjudicata is provided for under Section 7 of the *Civil Procedure Act* while subjudice is provided for under Section 6 of the *Civil Procedure Act*.
24. The elements to be proven in the case of a plea of Resjudicata were restated by the Supreme Court in its decision in the case of John Maritime Florence Services Limited and Another Vs. Cabinet Secretary and Transport and Infrastructure 2021 (KESC) 39 where the court held interalia
- “for the doctrine to apply the following must be demonstrated
- a. There is a former judgment or order which is final.
  - b. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.
  - c. There must be between the first and second suits, identical parties, subject matter and cause of action”.
25. The court shall apply each of the elements above to the suit herein.
26. On the issue of the identical parties, subject matter and cause of action, the plaintiff herein was different from the plaintiff in the Kisii ELC matter. On this point the Applicant submits that although a party may be different a suit can be held to be resjudicata and places reliance on authority No. 2 of their list of Authorities to wit, Bank of Africa Kenya Limited and Another Vs. TSS Investment Limited and 2 Others Civil Appeal E055 of 2022 (2024) KECA 410 (KLR) where at paragraphs 33 and 40 the court held as follows
- “However, it is trite the mere addition of parties in a subsequent suit does not necessarily render the doctrine of Resjudicata in application since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit; the doctrine will still be involved since the addition of the party would in that case be for the sole purpose of decoration and dressing nothing else...”
27. The Respondent submission on this limb, is that the Plaintiff is a different party; and hence the suit is not Resjudicata.



28. At paragraph 35 of the judgment in Kisii ELC No. 249/2013, the learned Judge found that the suit was not a representative suit on behalf of the Plaintiff themselves and on behalf of members of Olomismis Group Ranch.
29. Had the Kisii ELC matter being found to be a Representative suit it would have fallen squarely under explanation 6 of Section 7 of the *Civil Procedure Act*.
30. The Plaintiff herein is litigating on the registration of the 1<sup>st</sup> Defendant as proprietor of Transmara/Olomismis/1411 with regard to the issue that the parcel No. Transmara/Olomismis/1411 was not litigated in the previous suit, at paragraphs 51 and 53 of the previous judgment the court noted that there was subdivisions of 1699 parcels, all from the original title number Transmara/Olomismis/1, and parcel number 1411 is thus deemed to be part of the subdivisions.
31. On the issue of the cause of action, the Plaintiffs suit herein as can be glared at paragraph 17 of the Plaint is that due process in registration was not followed.
32. In its judgment in Kisii ELC No. 249/2013, at paragraph 53 the court found the subdivision to have been valid and procedurally and that the registration was in accordance with the area list.
33. It follows from the above that the cause of action, and subject matter in the present suit is identical to the previous suit. Though the plaintiff herein is different, it has been held by various dictas, that the mere addition and/or substitution of parties does not make it a fresh suit. In the decision in the case of Diocese of Eldoret Trustees (Registered) Vs. Attorney General (On behalf of the Principal Secretary Treasury and Another (2020) eKLR the court observed as follows: -  
  
“ Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of resjudicata.  
  
Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”
34. Having found the cause of action, and subject matter to be similar, and guided by the decision in the Diocese of Eldoret Registered Trustees as well as Court of Appeal decision in the Bank of Africa Kenya Limited and Another Vs. TSS Investment Limited, the court finds no hesitation in making a finding that the parties, subject matter and cause of action are the same between this case and the previous suit. More so because vide Section 43 of the *Evidence Act*, the judgment in Kisii ELC Case No. 249/2013 conferred ownership to the owners thereof, and save for an Appeal, before the Court of Appeal this court cannot make a contrary finding.
35. On the remaining elements of Resjudicata as espoused in the John Florence Maritime Case, the judgment in Kisii ELC Case NO. 249/2013 was delivered by a court of competent jurisdiction and although the said judgment is on appeal, it suffices being a final judgment for purposes of Resjudicata under Explanation 2 of Section 7 Explanation 2 provides “for the purposes of this Section the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court”.
36. The court is thus satisfied that this suit is Resjudicata and the court is barred from hearing and determining the same, the issues of ownership of the registration and ownership of the subdivisions of Transmara/Olomismis/1 being Transmara Olomismis 10 to 1699 having been heard and determined in Kisii ELC No. 249/2013.



37. The inevitable conclusion is that this suit is thus Resjudicata and court shall not determine the other issues as the same is hereby struck out with costs to the 1<sup>st</sup> to 4<sup>th</sup> Defendants.

**DATED AT KILGORIS THIS 6<sup>TH</sup> DAY OF MAY 2025.**

**HON. M.N MWANYALE**

**JUDGE**

In the present of

CA – Emmanuel/Sylvia

Ms. Esang h/b for Mr. Mongeri for the Plaintiff

Mr. Mulisa for the 1<sup>st</sup> to 4<sup>th</sup> Defendants

