



**Musyoki v Musyoki (Environment & Land Case E010 of 2024)
[2025] KEELC 3633 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E010 OF 2024**

EO OBAGA, J

MAY 8, 2025

BETWEEN

MICHAEL MUSAU MUSYOKI PLAINTIFF

AND

JOSEPHNE KANINI MUSYOKI DEFENDANT

RULING

Background

1. The Plaintiff filed a notice of preliminary objection dated 13th December, 2024 in which he raised the following grounds:
 1. That the intended interested party is a third party purchaser for value without notice, and the Defendant/Respondent has no locus standi to enjoin him in this suit.
 2. That the key reliefs sought in the notice of motion are substantially the same issue contained in the Plaintiff's notice of motion dated 29th April, 2024 and hence re sub-judice, and an abuse of the court process.
 3. The Defendant herein sought the same orders and reliefs in suit No. ELC 200 of 2017 Makueni (formerly ELC No. 79 of 2015 Machakos), which suit was dismissed and the court became factus officio.
 4. That the application herein is therefore Res Judicata, and an attempt by the Defendant/Applicant to re-litigate the same issues through backdoor, without recourse to legally recognizable avenues, namely review or appeal.
2. The Defendant in this case had filed Machakos ELC No. 78 of 2015 against the Plaintiff in this case. The Defendant in the Machakos case was seeking orders that she was entitled to six acres out of LR. No.



Mbooni/Ilani/45. This property was later subdivided and it resulted into LR. No. Mbooni/Ilani/1196 and 1197. The Defendant herein had sought cancellation of the resultant titles.

3. The Machakos suit was later transferred to Makueni ELC where it became No. 200 of 2017. This suit was dismissed on 18th July, 2017 for want of prosecution. The Plaintiff then filed the present suit against the Defendant. The Defendant filed a defence and raised a counterclaim. The Defendant contemporaneously filed a Notice of Motion dated 14th November, 2024 in which she sought to enjoin one Patrick Mumo Kilonzo and also sought injunctive orders against the Plaintiff from interfering with LR. No. Mbooni/Ilani/1196 and 1197.
4. The person sought to be joined in this suit is Patrick Mumo Kilonzo who purchased LR. No. Mbooni/Ilani/1197 from the Plaintiff. The Defendant's daughter in law passed on on or about 26th November, 2024 which prompted the Plaintiff to file a Notice of Motion dated 29th November, 2024 in which he sought injunctive orders restraining the Defendant from interring the remains of her daughter in law on LR No. Mbooni/Ilani/1196. This application is still pending.

The Preliminary Objection

5. The Preliminary Objection is targeting the Defendant's Notice of Motion dated 14th November, 2024. The parties were directed to file written submissions in respect of the Preliminary Objection. As at the time of writing this ruling on 29th April, 2025, it is only the Plaintiff who had filed submissions.
6. The Plaintiff contends that the Notice of Motion dated 14th November, 2024 is res judicata as the matters raised in it are the same matters which were raised in Makueni ELC No. 200 of 2017 which was dismissed and there was no appeal against the dismissal order or review of the order. The Plaintiff further contends that the issues raised in the application are the same matters raised in the application dated 29th November, 2024 which is still pending.
7. I have considered the submissions by the Plaintiff in relation to the Preliminary Objection. There are two issues which stand out for determination. The first is whether the Notice of Motion dated 14th November, 2024 is sub-judice. The second is whether the same motion is res judicata.
8. On the first issue, it is clear that the Notice of Motion dated 29th November, 2024 sought to restrain the burial of the Defendant's daughter in-law on LR. No. Mbooni/Ilani/1196. On the other hand, the Notice of Motion dated 14th November, 2024 seeks to join Patrick Mumo Kilonzo and also restrain the Plaintiff from interfering with LR. No. Mbooni/Ilani/1196 and 1197. The Notice of Motion dated 14th November, 2024 was the first in time to be filed and there is no way the principle of subjudice can be stretched to affect it. The Notice of Motion dated 29th November, 2024 was filed later and in any case the two applications are seeking totally different reliefs.
9. On the second issue, Makueni ELC No. 200 of 2017 was dismissed for want of prosecution. There was nothing placed before court to show that there was an application made in that suit which was determined on merit which will have rendered the application of 14th November, 2024 res judicata. The suit in ELC 200 of 2017 was not determined on merit.
10. In the case of Mukisa Biscuit Manufacturing Ltd –vs- West End Distributors Ltd (1969) EA 696, it was held as follows:

“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 has 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, confusion issues. This improper practice must stop.”

11. In light of the decision in Mukisa Biscuit Manufacturing Ltd (Supra), it is clear that there is nothing raised in the Preliminary Objection which will qualify as a pure point of law. I find no merit in the Preliminary Objection which is dismissed with costs to the Defendant.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF MAY, 2025.

In the presence of:

Ms. Okinyi for Mr. Kivindy for Plaintiff.

Court assistant – Steve Musyoki.

