



**Bonsa v Ngaruthi (Environment and Land Appeal E012 of 2024)  
[2025] KEELC 4383 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4383 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**JO MBOYA, J**

**JUNE 5, 2025**

**BETWEEN**

**ADAN HUQA BONSA ..... APPELLANT**

**AND**

**PATRICK MUNGANA NGARUTHI ..... RESPONDENT**

**JUDGMENT**

1. Before venturing to address the background facts underpinning the instant Appeal, it is imperative to reference the case of Kahoro & 2 others (Suing on their Behalf and on Behalf of Members of Twendane Company Limited) v Kanyamwi Trading Company Limited (Civil Appeal 62 of 2018) [2025] KECA 941 (KLR) (23 May 2025) (Judgment), where the Court of Appeal noted as hereunder;

“1. In the contemporary world, one animal known for changing its color to camouflage with its surrounding environment is the chameleon. It will be green in the morning, brown in the afternoon and yellow in the evening, depending on where its majestic walk has taken it. In the legal world, it is known that parties may attempt to approach the court in different shades, while remaining the same parties. To prevent this mischievous way of litigation, the doctrine of res judicata was developed to bar parties from bringing a litigious action once a final determination has been made on the merits of a similar previous suit.”

2. Interestingly, the quote and observation by the Court of Appeal [supra] aptly describes the scenario obtaining in the instant matter.
3. Back to the background facts underpinning the disputes beforehand. The Respondent herein [who was the Plaintiff in the original suit, namely ISIOLO CMC ELC E002 OF 2024] approached the subordinate court vide Plaint dated the 5<sup>th</sup> of Feb 2024; and wherein same sought diverse reliefs



- touching on and concerning LR. NO. Isiolo Township/Block 6/55 [hereinafter referred to as the suit property].
4. Contemporaneously, the Respondent filed an application dated the 5<sup>th</sup> of Feb 2024 and wherein same sought orders of temporary injunction to restrain the Appellant herein from levying a legal eviction, trespassing onto, and or demolition of the structures situated in all that property known as LR. NO. Isiolo Township/Block 6/55 pending the hearing and determination of the suit.
  5. The Appellant herein filed a replying affidavit sworn on the 19<sup>th</sup> Feb 2024 and wherein same [Appellant] contended that the dispute beforehand replicated the dispute which had been canvassed and disposed of vide ELC NO. 54 of 2018; and wherein the court found and held that the title in respect of the suit property did not legally exist. Furthermore, the appellant averred that the court found and held that the disputed ground constituted Plot No. Kambi Juu/1018 belonging to the Appellant. Moreover, the Appellant averred that the court thereafter proceeded to and decreed eviction against the current respondent and two [2] other persons who are not parties to the instant suit.
  6. The application by the respondent was heard and disposed of vide ruling rendered on the 11<sup>th</sup> of June 2024 whereupon the learned chief magistrate found and held that the Respondent had established a prima facie case and demonstrated a likelihood of irreparable loss arising if the orders of temporary injunction were not granted. To this end, the learned Chief Magistrate proceeded to and granted an order of temporary injunction.
  7. Aggrieved by and dissatisfied with the ruling and order of the learned Chief Magistrate, the Appellant approached this court vide Memorandum of Appeal dated 25<sup>th</sup> June 2024 and wherein same has canvassed the following grounds;
    - i. The learned chief magistrate erred in law and fact by failing to hold that the matter in dispute is res judicata and by disregarding the evidence placed before court by the Appellant.
    - ii. The learned chief magistrate erred in law and fact by failing absolutely to consider the issues raised by the Appellant in his submission.
    - iii. The learned Chief Magistrate erred in law and fact by issuing injunctive orders over a matter that is res judicata.
    - iv. The Learned Chief Magistrate erred in law and fact by reaching a decision that demonstrates an outright lack of impartiality in her ruling.
    - v. The Learned Chief Magistrate erred both in law and facts by entirely ignoring the appellant evidence on record and exhibits and injudiciously proceeded to grant orders that have no merits to the Respondent.
  8. The Appeal beforehand came up for directions on the 27<sup>th</sup> Feb 2025 whereupon the Advocates for the parties covenanted/ confirmed that the record of appeal had been duly filed and served. Furthermore, the advocates agreed that the record contained all the requisite pleadings, affidavits, and document to which had been deployed in the subordinate court. In this regard, the advocates confirmed that the appeal was thus ready for hearing.
  9. Arising from the foregoing, the court then ventured forward and issued directions pertaining to the disposal of the appeal. To this end, the court directed that the appeal be canvassed by way of written submissions to be filed and exchanged within the prescribed timelines.
  10. The Appellant filed written submissions dated 11<sup>th</sup> March 2025 and wherein the Appellant has highlighted and canvassed two [2] salient issues for consideration by the court. The issues canvassed by



- the Appellant are namely; whether the suit filed by the Respondent and by extension the application was res judicata; and whether the learned Chief Magistrate properly exercised her discretion in granting the orders of temporary injunction or otherwise.
11. Regarding the first issue, learned counsel for the Appellant submitted that the dispute which color the suit that was filed by the Responded had hitherto been canvassed and disposed of by the previous suit, namely ELC NO. 54 OF 2018 and wherein the court found inter alia that the Respondent's title was fictitious and non-existent.
  12. Furthermore, it was contended that the court proceeded to and decreed that the Respondent herein be evicted from the property in question, which was found to constitute Plot No. Kambi Juu/ 1018, belonging to and registered in the name of the Appellant.
  13. Additionally, learned counsel for the Appellant has submitted that following the delivery of judgement in ELC 54 OF 2018, the Respondent herein attempted to appeal but the application seeking leave to appeal was dismissed by the learned Judge in terms of the ruling rendered on the 16<sup>th</sup> October 2023.
  14. Flowing from the foregoing, learned counsel for the Appellant has therefore contended that the suit and the Application underpinning the ruling appealed against was therefore Res Judicata. To this end, it has been posited that the learned trial magistrate misapprehended the law as pertains to Res Judicata and therefore arrived at an erroneous conclusion.
  15. In respect of the second issue, learned counsel for the Appellant has submitted that the learned Chief Magistrate failed to appreciate that the imminent eviction that was being complained of arose from the decision of a court of coordinate jurisdiction. Furthermore, it was posited that the application which was granted by the learned magistrate was indeed intended to injunct the decision of a court of coordinate jurisdiction. In this regard, learned counsel has invited this court to find and hold that the Learned Chief Magistrate improperly and injudiciously exercised her discretion in granting the orders of temporary injunction.
  16. Arising from the foregoing, learned counsel for the Appellant has implored the court to find and hold that the ruling and consequential decision of Learned Chief Magistrate is wrought and replete with errors of commission and emission and thus same ought to be set aside.
  17. The Respondent filed written submissions dated 11<sup>th</sup> March 2025 and wherein same has raised and canvassed two [2] key issues namely; that the learned Chief magistrate correctly apprehended the issues in dispute and thus exercised her discretion judiciously; and that the previous dispute which was dealt with vide ISiolo Elc No. 54 OF 2018 concerned a separate and distinct property and not the one beforehand.
  18. Regarding the first issue, learned counsel for the Respondent has submitted that the Respondent herein procured and obtained a certificate of title over and in respect of the suit property and the same [respondent] therefore has lawful rights to the suit property. Nevertheless, it was contended that the Appellant was threatening to evict the Respondent from the suit property. In this regard, learned counsel has posited that the learned trial magistrate was therefore right in exercising her discretion by granting the orders of temporary injunction.
  19. Simply put, it was contended that the contention by the appellant that the magistrate exercised her discretion improperly and injudiciously is mistaken and misconceived.
  20. As pertains to the contention that the dispute leading to the filing of the suit and by extension the application had been canvassed in the previous suit, learned counsel posited that the previous suit



touched on and concerned a different property. Consequently, and in this regard, it has been submitted that the doctrine of res judicata therefore does not apply.

21. In a nutshell, learned counsel for the Respondent has therefore contended that the appeal beforehand is not only pre-mature and misconceived, but same is devoid of merit[s]. In this regard, learned counsel has invited the court to dismiss the appeal with costs to the Respondent.
22. Having appraised the record of appeal; having considered the evidence placed on record vide affidavit evidence, and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the appeal beforehand turns on two [2] key issues, namely; whether the suit filed by the Respondent and by extension the application birthing the impugned ruling was res judicata; and whether the learned chief magistrate properly/ judiciously exercised her discretion in granting the orders of temporary injunction or otherwise.
23. Before venturing to interrogate and address the pertinent issues that have been highlighted in the preceding paragraphs, it is imperative to state and observe that this being a first appeal, this court is tasked with the mandate and jurisdiction to undertake exhaustive review, scrutiny, appraisal and analysis of the entirety of the evidence that was placed before the trial court and thereafter to form and/or arrive at an independent factual and legal conclusion[s].
24. Suffice it to state that the court is not bound by the factual findings and conclusions that were arrived at by the trial court. For good measure, this court is at liberty to depart from the factual findings and conclusions arrived at by the trial court, where it is shown that the conclusions of the trial court were arrived at on the basis of no evidence; based on a misapprehension of the evidence tendered; perverse to the evidence on record; or better still, where it is demonstrably shown that the trial court has committed an error of principle, which vitiates the Judgment, or Ruling.
25. The Jurisdictional remit of the first appellate court while entertaining and adjudicating upon an appeal [first Appeal] has been the subject of various court decisions. The Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) expounded the same as hereunder:

“

- “ 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same.

We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses. In a nutshell, a first appellate court must proceed with caution in deciding whether to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them *Peters v Sunday Post Limited* [1958] EA 424, where the predecessor to this Court expressed itself as follows: “Apart from



the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution.

If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

26. Bearing in mind the dicta captured and highlighted by the Court of Appeal in the decision [supra], I am now disposed to revert to and consider the thematic issues, which had been highlighted elsewhere herein before. Suffice it to state that I shall address the issues sequentially.
27. Regarding the first issue, whether the suit filed by the Respondent and by extension the application birthing the impugned ruling was res judicata; it is imperative to recall and reiterate that the appellant herein had previously filed a suit namely; MERU ELC NO. 58 OF 2017, but which suit was transferred to Isiolo Chief Magistrates court and thereafter same was re-numbered as ISIOLO CMC ELC NO. 54 OF 2018.
28. Furthermore, it is important to underscore that the same suit was subsequently heard and disposed of vide Judgment rendered on 24<sup>th</sup> Jan 2023 whereupon the trial court found and held that the titles in respect of LR. Nos. Isiolo Township/ Block 6/53; 54, AND 55 were fictitious and non-existent.



Suffice it to state that the property that is of concern to this court and which impacts on the subject matter is LR. NO. Isiolo Township/Block 6/55 which is said to belong to the Respondent herein.

29. Having found and held that the property claimed by the respondent herein was fictitious and non-existent and having found and held that the disputed ground constitutes Plot No. 1018 Kambi Juu, the Respondent herein could only appeal against the said decision and not otherwise.
30. Moreover, it is not lost on this court that the Respondent herein filed an application dated the 16<sup>th</sup> August 2023 and wherein same sought diverse reliefs inter alia leave to file an appeal out of time against the Judgement and decree issued vide Isiolo CMC ELC NO. 54 OF 2018. However, there is no gainsaying that the said application was dismissed vide ruling rendered on 16<sup>th</sup> October 2023. [ See pages 43 to 45 of the record of appeal].
31. Following the dismissal of the Application for leave to appeal, it is instructive to observe that the Judgement which was rendered vide Isiolo Cmc Elc No. 54 OF 2018 remains in situ. Furthermore, the decision thereunder constitutes a Judgement in rem.
32. It is imperative to highlight that the judgement rendered vide Isiolo Cmc Elc No. 54 OF 2018 and the ruling of the learned judge rendered vide Isiolo Elc Misc. Application No. 1 OF 2021 were annexed to the replying affidavit filed on behalf of the appellant herein. For good measure, the said documents were placed before the learned Chief Magistrate.
33. Be that as it may, it is apparent that despite the foregoing document[s] being placed before her, the learned chief magistrate paid scant attention to same. In any event, it is crystal clear that the learned chief magistrate did not even interrogate the import and tenor of the Judgement under reference, in an endeavour to discern the content[s] thereof.
34. Back to the question as to whether the suit filed by the Respondent and by extension the application underpinning the ruling was res judicata. It is worthy to underscore that the Respondent herein upon being sued in respect of Isiolo Cmc Elc No. 54 OF 2018, indeed filed an amended statement of defense and counterclaim dated 25<sup>th</sup> March 2021; and whereupon same [Respondent] agitated the claims touching on and concerning ownership of plot no. 59[now Isiolo Township/Block 6/55].
35. Additionally, it is worthy to highlight that the learned magistrate [ the trial Court] interrogated the question pertaining to validity of inter alia plot number Isiolo Township/Block 6/55 and ultimately rendered a decision to the effect that the same parcel was fictitious and non-existent. [ see page 5 of the judgment].
36. Taking into the account the Judgment of the court rendered vide Isiolo Cmc Elc No. 54 OF 2018 and contrasting same against the claims highlighted at the foot of the Plaint dated 8<sup>th</sup> February 2024, it is evident that the issues are one and the same. Furthermore, there is no gainsaying that the parties are the same. In addition, it also explicit that the court that heard the previous suit was seized of the requisite jurisdiction. Simply put, the previous dispute touching on and concerning the current matter was heard and disposed of by a court of competent jurisdiction. [See Section 7 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya]
37. Can the respondent revert to the Chief Magistrates' court vide a fresh suit and seek to canvass/agitate the same issues? To my mind, the filing of the subsequent suit namely Isiolo Cmc Elc No. E002 Of 2024; constituted an endeavor to circumvent and escape the snares of the doctrine of res judicata.
38. Be that as it may, it is common ground that a party, the respondent not excepted, cannot disingenuously undertake a cosmetic facelift, nay, cosmetic surgery; and thereby seek defeat the doctrine of res judicate.



39. Suffice it to underscore that the issues being raised by the Respondent at the foot of the subsequent suit herein, namely, the latter suit, were dealt with and disposed of in the previous suit. To this end, it is my finding and holding that the subsequent [latter] suit and the application underpinning the impugned ruling are caught up by the doctrine of res judicata.
40. The import, tenor, and legal implications of the doctrine of res judicata have been elaborated in a plethora of decisions. Nevertheless, it is apposite to cite and reference the decision in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR) where the Court of Appeal stated as hereunder;

“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.

Those parties were litigating under the same title.

- (d) The issue was heard and finally determined in the former suit.

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.

The learned Judges were fully aware and applied their minds to these elements when, applying this Court’s decision in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] Eklr they rendered the elements as;

- “(a) the former judgment or order must be final;
- (b) the judgment or order must be on merits;  
it must have been rendered by a court having jurisdiction over the subject matter and the parties; an
- (d) there must be between the first and the second action identity of parties, of subject matter and cause of action.”

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”



41. Likewise, the Court of Appeal also re-affirmed the import and legal implications of the doctrine of res judicata and by extension the limb relating to constructive res judicata in the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] KECA 98 (KLR).

42. For coherence, the court stated as hereunder;

“Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by 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. In the case of Mburu Kinyua v Gachini Tutu (1978) KLR 69 Madan, J. Quoting with approval Wilgram V.C. in Henderson v Henderson (supra) stated:

“Where a given matter becomes the subject of litigation in, and of 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 in special circumstances) permit the same parties to open the same subject of litigation 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 plea 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 judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time” [emphasis added].”

43. Other than the Court of Appeal, the supreme of the Republic of Kenya [ the Apex Court] has also added its voice to the principle/doctrine of res judicata. In the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) the court stated as hereunder;

“59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, [2012] Eklr, thus:

The courts must always be vigilant to guard 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 Limited and 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 and another Nairobi 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.....”



59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former judgment or order which was final;
  - b) The judgment or order was on merit;
  - c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] Eklr and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011* (2013) Eklr)”
44. Bearing in mind the ratio decidendi espoused in the decisions [supra] and considering the facts of the instant matter, I come to the conclusion that the suit which was placed before the Chief magistrate and consequential application culminating into the impugned Ruling were barred by the doctrine of res judicata.
45. Moreover, I also conclude that the learned chief magistrate also failed to properly interrogate and internalize the ingredients that underpin the doctrine of res judicata including constructive res judicata and thus arrived at an erroneous conclusion in finding and holding that the suit under reference disclosed [sic] a prima facie case with a likelihood of success.
46. Regarding the second issue, namely; whether the learned Chief Magistrate properly/ judiciously exercised her discretion in granting the orders of temporary injunction or otherwise, it suffices to highlight that any applicant desirous to partake of and procure an order of temporary injunction is called upon to establish and demonstrate the existence of a prima facie case and thereafter to prove a likelihood of irreparable loss arising. Moreover, proof of the ingredients under reference is sequential.
47. As pertains to what constitutes a prima facie case, it is appropriate to cite and reference the decision of Court of Appeal in the case of *Mrao Limited vs first American Bank of Kenya Limited* [2003] eKLR. Furthermore, it is also worthy to reiterate that the definition of what constitutes a prima facie case was amplified by the Court of appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] KECA 606 (KLR).
48. Suffice it to underscore that a prima facie case is one that espouses a genuine and arguable case demonstrating that the right of the applicant [ in this case, the Respondent] has been breached or infringed upon and there is basis to warrant the adverse party being called upon to offer a rebuttal. Importantly, the starting point is that the applicant must espouse a genuine and arguable case. Instructively, a contrived case will not suffice to underpin a prim facie case.
49. The question that does arise and which this court must grapple with is whether the Respondent espoused a genuine and arguable before the Chief Magistrate? It is instructive to posit that the issues that were being canvassed before the Chief Magistrate, were issues that had been canvassed and adjudicated upon before a court of coordinate jurisdiction. Moreover, the court of coordinate jurisdiction had found and held that suit property was fictitious and non-existent. Simply put, the previous court found and held that the land claimed by the respondent and by extension the certificate of title attendant thereto was invalid.



50. Moreover, evidence was placed before the Learned Chief Magistrate that the Judgment of the previous Court had not been appealed against and hence same remained in force. To this end, it is apparent that the suit which was filed by and on behalf of the Respondent which clearly intended to defeat a lawful Judgment and decree. Quite clearly, the suit was barred by the provisions of Section 34 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
51. The foregoing facts were placed before the learned Chief Magistrate. Furthermore, the learned Chief Magistrate was privy to and knowledgeable of the legal position that same [ Chief Magistrate] cannot sit on appeal on the decision of another Magistrate. [ See the decision in the case of Kenya Hotel Properties Limited versus Attorney General [2022] KESC at paragraph 50 and 55 thereof]
52. Nevertheless, there is no gainsaying that the learned chief magistrate concluded that the respondent had established a prima facie case with a likelihood of success. Certainly, had the learned Chief Magistrate addressed her judicial mind to the plea of res judicata; the provisions of Section 34 of the *Civil Procedure Act* [supra]; and the fact that same could not overturn the decision of another magistrate, same would have arrived at a different conclusion.
53. I am afraid that the learned Chief Magistrate did not correctly apply her judicial mind to the totality of the issues that were placed before her. To this end, I conclude that the learned chief magistrate improperly and injudiciously exercised her discretion. Further and in any event, it is evident that there is an error of principle that colors and vitiates the impugned ruling of the learned chief magistrate.
54. Suffice it to underscore that the first appellate court must exercise caution and circumspection before departing from the findings of the trial court. Furthermore, where the decision under reference is anchored on exercise of discretion, then the first appellate court can only depart subject to proof that the impugned decision was arrived at on a misapprehension of facts; failure to consider relevant material, or considering the extraneous material [See the decision in Mbogo vs Shah [1968] EA 93].
55. Based on the ratio decidendi espoused in the case of Mbogo vs Shah supra, I conclude that the learned chief magistrate improperly/ injudiciously exercised her discretion and thereby arrived at an erroneous conclusion that the Respondent had established a prima facie case. For good measure, no prima facie case was discernable from the facts of the dispute. Certainly, not on the basis that the purported suit property had been found to be fictitious and non-existent by a Court of co-ordinate Jurisdiction.
56. Absent proof of prima facie case, the claim for an order for temporary injunction collapses. Instructively, a court of law is not called upon to venture forward and discern whether there is a likelihood of irreparable harm arising, the moment the Court comes to the conclusion that no prima facie case has been established. [see the holding in Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] EA 86;].

### **Final Disposition:**

57. Flowing from the analysis highlighted in the body of the judgement, it must have become crystal clear that the learned Chief Magistrate grossly misapprehended the legal implications of the doctrine of res judicata; failed to comprehend the import of Section 34 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; and failed to properly exercise her judicial discretion in discerning the existence of a prima facie case.
58. To this end, I conclude that the appeal is meritorious.
59. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;



- i. The Appeal be and is hereby allowed.
- ii. The Ruling and consequential orders of the learned chief magistrate dated 11<sup>th</sup> June 2024; be and is hereby set aside.
- iii. The Application dated 5<sup>th</sup> February 2024 be and is hereby dismissed.
- iv. Furthermore, the orders of temporary injunction issued at the foot of the impugned Ruling be and are hereby discharged.
- v. In addition, the suit vide Plaintiff dated the 5<sup>th</sup> February 2024 be and is hereby struck out for being Res Judicata.
- vi. Costs of the Appeal be and are hereby awarded to the Appellant.
- vii. The Appellant shall also have costs of the suit and application in the subordinate court.

60. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 5<sup>TH</sup> DAY OF JUNE 2025.**

**OGUTTU MBOYA, FCI Arb, CPM [MTI].**

**JUDGE.**

In the presence of:

Mutuma/Mukami – Court Assistant.

Mr. Lekoona for the Appellant.

Mr. Joshua Mwiti for the Respondent

