



**Malemba v Mugun & 5 others (Environment & Land Case  
E009 of 2023) [2024] KEELC 14194 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 14194 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E009 OF 2023  
JM ONYANGO, J  
OCTOBER 16, 2024**

**BETWEEN**

**PAUL ONYANGO MALEMBA ..... PLAINTIFF**

**AND**

**CHRISTOPHER MAYO MUGUN ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MWANGI MUSHIRI ..... 2<sup>ND</sup> DEFENDANT**

**GRACE IMINZA ..... 3<sup>RD</sup> DEFENDANT**

**DONALD SAVALA ..... 4<sup>TH</sup> DEFENDANT**

**ROBERT TANZI ..... 5<sup>TH</sup> DEFENDANT**

**SILAS SHICHENI ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant/Applicant filed an Amended Statement of Defence dated 9<sup>th</sup> May, 2023 and at paragraph 13(b) and 20(b) of the Defence therein raised a preliminary objection on the following grounds: -
  - a. That the suit is res judicata in law that there is another case being ELC case No. 249 of 2012 formerly HCCC No. 48 of 2006 over the same subject matter.
  - b. That the suit is time barred under the law of *limitation of actions Act* Cap. 22 section 7 and the suit ought to be dismissed with costs.
2. This Court issued directions on the disposal of the Preliminary Objection by way of written submissions on 11<sup>th</sup> December, 2023. However on a perusal of the court record, I have noted that only the plaintiff filed his submissions dated 29/1/2024. Be that as it may, I will proceed to render my decision on the Preliminary Objection.



## Analysis and Determination

3. The sole issue for determination before me is whether the Notice of Preliminary Objection raised at Paragraph 13(b) and 20(b) of the 1<sup>st</sup> Defendant's Amended Statement of Defence and Counter-claim dated 9<sup>th</sup> May, 2023 is merited and I will proceed to determine whether the suit is
  - a. Res Judicata
  - b. Time barred.
4. The law on what constitutes a preliminary objection is now well settled. A preliminary objection can only be raised on a pure point of law and there should be no contest as to the facts which would require the exercise of discretion. See Supreme Court decision in *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR
5. In the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) E.A. 696; the Court defined Preliminary Objection 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”.

## Whether the suit is res judicata

6. The 1<sup>st</sup> Defendant's ground of objection is that the instant suit offends the doctrine of res judicata. It is his claim that the subject matter of the instant suit parcel No. Uasin Gishu/ Ngenyilel/798, was heard and determined in ELC Case No. 249 of 2012 formerly Eldoret HCC No. 48 of 2006 and that the plaintiff is trying to circumvent the issue of res judicata by introducing new parties despite the fact the claim was heard and determined by a court of competent jurisdiction.
7. The Plaintiff/Respondent on the other hand did not address the issue of the suit being res judicata or any other point raised in the preliminary objection in his submissions but mainly submitted on the issue of adverse possession and its elements.
8. Section 7 of the *Civil Procedure Act* defines the doctrine of Res Judicata 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.”
9. From the above section, the key elements that must be established for a claim of res judicata to succeed are; the matters raised in the present suit must directly and substantially be in issue as the matters raised in the previous suit that has been heard and finally determined, the same must be between the same parties litigating under the same title before a court of competent jurisdiction.
10. The Supreme Court in the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, while considering the provisions of section 7 of the *Civil Procedure Act*,



held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked, that is: -

- “(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.”

See also James Karanja alias James Kioi (Deceased) [2014] eKLR.

11. Guided by the above section and the case law the first point I have to determine is whether the matters directly and substantially in issue in the present suit are similar to the matters directly and substantially in issue in the previous suit.
12. I have carefully perused the court file in ELC Case No. 249 of 2012 and the judgment issued on 27<sup>th</sup> November, 2014 and I have noted that the issue of forceful entry into the suit parcel by the Defendant was directly and substantially in issue; and it is on that account that she sought orders of eviction. However, her cause of action arose as a result of a sale agreement and an alleged breach thereof, which I will not delve into at this point.
13. In the instant case; the Plaintiff's claim is mainly centered on the issue of trespass; it is his contention that the Defendants have without lawful justification and/or reason encroached into the suit parcel and refused to move away. He avers that upon being registered as the owner of the suit land vide transmission, the Defendants have refused to leave the land hence the need for eviction. His cause of action thus arose pursuant to his registration vide transmission as a beneficiary of the estate of Jane Mmbone, who was the Plaintiff in the previous suit.
14. From the above, even though it is clear that both suits touch on the issue of an alleged trespass and/or forcible entry into the suit land, the cause of action is not the same. In one, the main issue in dispute was the entry into the suit land subject to an agreement for the sale of land and an alleged breach thereof and in the other it is the registration vide transmission and the resultant trespass thereof.
15. Further, it is imperative to point out that both suits relate to the same subject matter being land parcel No. Uasin Gishu/ Ngenyilel/798 but as earlier stated, the cause of action and the matters directly and substantially in issue are not similar. The effect of the judgment in the previous suit was to dismiss the Plaintiff's claim but she still remained the registered owner of the land and in the absence of a counter-claim on adverse possession and a declaration made thereof, the suit land rightfully formed part of her estate and the registration of the Plaintiff vide transmission was rightful.
16. It is not in dispute that the court which heard and determined the previous suit was competent and had the requisite jurisdiction to determine the matter being ELC Case No. 249 of 2012 formerly Eldoret HCC No. 48 of 2006.
17. The last limb is on the parties; whether the parties in the previous suit were litigating under the same title and/or was between the same party or parties under whom they or any of them claim. It is the Applicant's claim that the Plaintiff is circumventing the doctrine of res judicata by introducing new parties.



18. Litigating under the same title may loosely be translated into the basis of acquiring a right. The Plaintiff in the instant case is the son of the Plaintiff in the previous suit, however, I must state that he has instituted the instant suit in his own capacity as the beneficiary of the estate of Jane Mmbone and not as an administrator of the said estate. The doctrine of res judicata does not therefore bar him from filing a claim over the same subject matter but where the cause of action is different.
19. The Court of Appeal in the case of Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR while explaining the rationale of the doctrine of res judicata held as follows: -
 

“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.”
20. The concept of res judicata operates to prevent issues from being relitigated once they have been determined on merit and as stated in the Supreme Court decision above, the elements thereunder must be satisfied conjunctively. For the above reasons; I find that section 7 of the *Civil Procedure Act* does not bar the institution of the instant suit and the same cannot therefore be struck out as being res judicata.

**Whether the suit is time Barred**

21. The 1<sup>st</sup> Defendant has also sought the dismissal of the suit as being time barred pursuant to section 7 of the *Limitation of Actions Act*. Section 7 on actions to recover land provides as follows: -
 

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
22. I have noted that the plaintiff in this case has solely based his claim on trespass from the date of his registration on 22<sup>nd</sup> February, 2022. He has however not stated the exact date when the defendants started their acts of trespass.
23. Section 4(2) of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.
24. The plaintiff’s cause of action accrued upon his registration as the owner of the suit land on 22<sup>nd</sup> February, 2022. This suit was filed in the year 2023, which period is within the three years within which an action based on trespass may be filed. I therefore find that the suit herein is not time barred.
25. In view of the foregoing, I accordingly find that the 1<sup>st</sup> Defendant/ Applicant’s Preliminary Objection contained at paragraph 13(b) and 20(b) of the Amended Statement of Defence dated May 9, 2023 is not merited and the same is hereby dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....



**J. ONYANGO**

**JUDGE**

In the presence of;

Mr. Matekwa for Mr. mwinamo for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Court Assistant: Brian

