Simati (Suing as the legal representative of the Estate of Liborio Masinde) v Simiyu; Shabram (Interested Party) (Environment and Land Appeal E007 of 2022) [2023] KEELC 21562 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21562 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL E007 OF 2022

EC CHERONO, J

NOVEMBER 9, 2023

BETWEEN

REDEMPTOR SIMATI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LIBORIO MASINDE ..... APPELLANT

AND

ANAREKO MASIKA SIMIYU ..... RESPONDENT

AND

HASSAN SHABRAM ..... INTERESTED PARTY

(being an appeal from the order/Ruling of Hon. C.A.S MUTAI, Senior Principal Magistrate in BUNGOMA CM-ELC NO. 469 of 1995 delivered on 19th March 2021)

JUDGMENT

Introduction.

1. By a plaint dated 15/05/1995, the Appellant/plaintiff, Liborion Masinde Simati(deceased) instituted SPMCC NO. 469 OF 1995 (herein after referred to as the former suit) against Aneriko Masika Simiyu, the respondent/defendant herein seeking orders for inter-alia Eviction and costs. The defendant/ respondent filed a statement of defence dated 29th June, 1995 denying the plaintiff/appellant's claim. The extract of the record of appeal does not show the proceedings of the trial court after the close of pleadings until 30th October, 2019 when Respondent through his hitherto firm of Advocates M/S Ocharo Kebira & Co. Advocates moved the trial court vide Misc. Application NO. 360 of 2019 seeking an order for the opening of a skeleton file in respect of the former suit SPM-ELC Case NO. 469 of 1995. The reasons given for the orders are that the original court file had gone missing and could not be traced. By a ruling delivered on 15th September 2020, the said application was allowed.

2. By a Notice of Motion application dated 29/9/2020, the plaintiff/appellant sought for orders inter-alia that plaintiff/appellant be allowed to substitute the original plaintiff, Liborion Masinde Smati (deceased). The proposed plaintiff/appellant also sought to add one Hassan Shabram as an Interested party to this suit. In addition, the plaintiff/appellant sought a temporary injunction order to restrain the proposed interested party and the defendant/respondent by themselves, their representatives, servants, agents and/or assigns from selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the suit properties known as Land Parcel No. East Bukusu/South Kanduyi/7029.

3. The defendant/respondent through the Firm of M/S J.W Sichangi & Company Advocatesfiled a replying affidavit as well as a Notice of Preliminary Objection in opposition thereto. The proposed Interested party instructed the Firm of M/S Makokha, Wattanga & Luyali Associates Advocatesto act for him.

4. By a ruling delivered on 19th March 2020, the trial Court upheld the Notice of preliminary objection and dismissed the former suit with costs for being res judicata Bungoma High Court Civil Appeal No.94 of 1999 and Court of Appeal No.227 of 2002.

5. The plaintiff/appellant was aggrieved and preferred the present appeal on the following seven grounds;

    1. The learned trial Magistrate erred in law and fact when he failed to appreciate the nature of the preliminary objection raised before him by the respondent.

    2. The learned trial Magistrate erred in law and fact when he totally misapprehended the preliminary objection raised by the respondent.

    3. The learned trial Magistrate erred in law and fact when he held that the case before him was res judicata, a position untenable in all the circumstances of the case.

    4. The learned trial Magistrate erred in law and fact when he misdirected himself by holding that a subsequent decision can retrospectively be res judicata an earlier and undecided suit.

    5. The learned trial Magistrate erred in law and fact when he absolutely ignored the well-argued submissions of the appellant to hurriedly uphold an objection that had no basis in law.

    6. The Learned trial Magistrate erred in law and fact when he casually and perfunctorily handled the said preliminary objection thereby failing to bring out the reasoning that would culminate in a reasoned decision.

    7. The learned trial Magistrate erred in law and fact when he failed to realize that the points taken up on appeal were interlocutory in nature and that whatever decisions made in the appeals arising therefrom could not render res judicata a matter whose substantive claim had not been heard and determined.

Appellants Written Submissions

6. The appellant through the Firm of M/S Omagwa Angima & Co. Advocatessubmitted with an introduction that by a plaint dated 15/5/1995, the original plaintiff, then acting in person sought one substantive prayer for eviction of the 1st respondent from the suit property L.R No.e.bukusu/S.kanduyi/2029. The 1st respondent filed a statement of defence dated 29/6/1995 denying the claim. After the close of pleadings and before the suit would be set down for hearing, the trial court on

29/7/1995 its own motion referred the suit to Kanduyi land Disputes Tribunal which proceeded to hear the matter and gave the following verdict;

> '' The elders unanimously resolved that Mr. Liborio had proved his case right following the documentary evidence before the court which are here attached. The elders through the court ask the district Surveyor to go and resurvey the affected plots so that the portions that belong to Liborio are given to him. Mr. Aneriko Masika Simiyu to give alternative portions to Mr. Patrick Webo as the re-survey will affect Webo's parcels.''

7. He stated that the 1st respondent was aggrieved by the said award and preferred an appeal to the provincial Appeals Committee who agreed with the decision by Kanduyi land Disputes Tribunal. While upholding the Tribunal's award/decision, the Provincial Appeals Committee stated as follows;

> '' The appellant failed to raise transportation for elders to visit didputed land. We therefore concur with the Judgment of the Land Disputes Lower Court Kanduyi in respect Land Parcel E.bukusu/S.kanduyi/7029.''

8. The 1st Respondent was again dissatisfied with that decision and appealed to the High Court at Bungoma vide HCCA No. 94 of 1999 and on 8th August 2000, Hon Mr. Justice Mbito allowed the Appeal and stated as follows;

> ''In the result, I allow this appeal and set aside the orders of the Western Provincial Land Disputes Appeal Board and the Kanduyi Land Disputes Tribunal. In place thereof I enter orders dismissing the proceedings before them with costs to the appellant. I also award the costs hereof to the appellant.''

9. The Appellant further submitted that the judgment of the High Court in the appeal referred to hereinabove meant that the reference to the Tribunal was a nullity ab ititio since the Tribunal had no jurisdiction to handle the claim and therefore the proceedings which started with the reference to the Tribunal and ended with the appeal quashing the Tribunal award that had lasted for four years later had merely been an expensive diversion. He submitted that the immediate result was that the matter was back to the court which, instead of looking forward to adopting the Tribunal's award as its judgment, was now itself obligated to proceed with the hearing and determination of the claim. However, this is not what happened.

10. As if that was not enough, the appellant submitted that the respondent caused a vetting order dated 29/2/2000 to be generated in his favour with the substantive order(1) directing as follows;

> ''That the said portion of land parcel NO. E.bukusu/S.kanduyi/7029 and 15(added by hand) which the court ordered on 12th November 1999 to be delivered to the respondent be vested to the appellant Aneriko M. SIMIYU as the Tribunals are not empowered to deal with beneficial ownership of registered land nor can they entertain any dispute relating to land situated in municipality.''

11. He submitted that the 1st Respondent on the strength of the said vesting order which was not predicated on any legality, but on an application that had proceeded without notice to the appellant, went ahead to excise a portion of the appellant's land measuring 0.97 hectares comprised in E.bukusu/S.kanduyi/15 which was not the subject of the suit and the appeal and that the said vesting order was not founded on any valid judgment and/or order of the court. He stated that the said vesting order triggered a whole new set of proceedings in the Civil Appeal NO. 94 of 1999 where the appellant filed

an application to review the vesting order before Sergon J. and in his ruling delivered on 23/7/2004, the Judge held as follows;

> '' The record shows that the appellant/respondent has attempted on various occasions to extract and execute orders surreptitiously on the basis of the decision made on 13-12-2000. This has exposed the appellant/respondent in my mind as a person who is not honest to this court. A court of law cannot countenance such a conduct.

12. The upshot therefore is that the motion is allowed as prayed with costs to the respondent/applicant.''

13. The appellant submitted that the respondent challenged this finding of Sergon J. in the Court of Appeal vide Civil Appeal NO. 227 of 2004 at Kisumu and while dismissing the said appeal, the Court of Appeal observed as follows;

> '' From the factual background distilled from the pleadings it is clear to us that after the vesting order in favour of the appellant in respect of East Bukusu/South Kanduyi/15, the vesting order although quite rightly lifted afterwards by the court, had resulted in subdivision of East Bukusu/S. Kanduyi/8050excising therefrom a portion measuring 1.41 hectares making it part of East Bukusu/S.kanduyi/7029 measuring 0.41 hectares and 0.97 hectares of the deceased's parcel of land East BukusuSouth/Kanduyi/15 and the Land Registrar had caused title deed for East Bukusu/8057 measuring 1.41 to be issued consisting a combination of the two parcels...What emerges is that there was an error on the face of the record.....Accordingly, the appeal is hereby dismissed with costs to the respondent.''

Distinction Between Civil Suit No. 469 of 1995 and HCCA No. 94 of 1999 and Court of Appeal No.227 of 2004

14. The appellant submitted that what went to the Court of Appeal was an appeal against the Ruling of Sergon J. He submitted that the Judge had allowed an application for review of the vesting order, which should never have been issued in the first place and that the proceedings which had started by erroneously issuing a vesting order in 1999 went all the way to the Court of Appeal which dismissed the appeal and upheld the ruling of the Superior Court delivered on 23/07/2004.

15. The appellant submitted that the third diversionary tactic by the respondent was the filing of a fresh suit being Bungoma ELC Case No.64 of 2015 which was dismissed forcing him to prefer an application dated 12/06/2018 in BUngoma ELCA Case No. 94 of 1999 in which his substantive prayers were;

> (c) That it pleases the Court to order the County Surveyor, Land Registrar Bungoma South to visit and erect the boundaries between the applicant's parcel namely E.bukusu/S.Kanduyi/7029 and the portion measuring 0.97 that was allocated to the respondent pursuant to the Court of Appeal Judgment in No. 227 of 2004 and
>
> (d) The respondent be permanently restrained by herself or her agents from trespassing or encroaching on the applicant's land.''

16. He submitted that while dismissing the application, Hon B.N Olao J. observed as follows;

> ''It is now beyond peradventure that the applicant is forum shopping. This Court mus remain vigilant and stop him in his tricks by informing him that this litigation has now reached at a cul de sac. There is no suit upon which any of the prayers sought by the applicant

can be granted. The upshot of the above is that the applicant's notice of motion dated 12-6-2018 is struck out with costs to the respondent."

17. He submitted that it is on the basis of this unfortunate argument that the trial Magistrate relied upon to find that the appellant's suit was res judicata, yet the judge in that matter was only referring to Civil Appeal NO.94 of 1999 which indeed was a spent and concluded litigation.

18. The learned judge further in the same Ruling observed thus;

> '' It follows therefore that where a dispute has been determined and no appeal is filed as contemplated vide section 8(1) of the repealed Act, the parties are to be governed by the Tribunal's award. If an appeal is filed and allowed or the Tribunal decision quashed, as happened in this case, then the parties revert to the position in which they were prior to the decision of the Tribunal."

19. He submitted that the trial Magistrate finally decided the preliminary objection on a very narrow parameter when he concluded that the parties in the former suit were the same in the BungomaHigh Court Civil Appeal No.94 of 1999 and Court of Appeal 227 of 2002(4) and that the subject matter which is E.bukusu/S.kanduyi/7029 also happens to be the same in all the suits in this case. He relied in the case of John Florence Maritime Services Limited & Another v Cabinet Secretary, Transport & Infrastructure & 3Others (2021) eKLR,

2nd Respondent's Written Submissions

20. The 2nd respondent through the Firm of Makokha, Wattanga & Luyali Associates Advocates submitted on the following three issues;

1. Whether the trial court exercised its discretion judiciously

21. On this issue, the 2nd respondent submitted that the decision rendered by the trial Magistrate regarding the preliminary objection dated 5th October 2020 filed by the 1st respondent herein in Civil suit No. 469 of 1995 was proper and in accordance with the law. They submitted that the lower court was not in error to allow the preliminary objection raised by the 1st respondent on grounds that the entire subject matter being land parcel No. E.bukusu/S.kanduyi/7029 was conclusively and substantively heard and decided in the Bungoma High Court Civil Appeal No.94 of 1999 and in the Court of Appeal in Civil Appeal No.227 of 2004. That the entire suit has been overtaken by events as was decided by the High Court and in the Court of Appeal hence any fresh litigation amounts to abuse of the court process. He also submitted that the appellant did not challenge the court of Appeal decision and cannot purport to do so before the lower court. He relied in the case of The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR.

2. Whether litigation must come to an end

22. As regards this second issue, the 2nd respondent submitted that it is trite law that litigation must come to an end and a successful party should be allowed to reap and enjoy the fruits of successful litigation. He stated that everything has its finality and that there is no room for endless litigation. He argued that in filing this appeal, the appellant is calling upon the court to sit on Appeal against its own decision and against the decision of the Court of Appeal and that this court has no such jurisdiction and should down its tools.

3. Whether this Honourable Court should dismiss this Appeal

23. On this last issue, the 2nd respondent submitted that the same matter has repeatedly found itself in various courts including the apex courts and decision has been rendered touching on the same subject matter and that this appeal is therefore a non-starter since the matter herein was fully and finally adjudicated upon by competent courts and final decision was made.

24. In conclusion, the 2nd respondent submitted that justice B.N Olao in his decision delivered on 4th October 2018 re-evaluated the history of the entire litigation on the suit parcel herein and arrived at a conclusion that the matter is res judicata and that no any other proceedings can be re-opened or sustained in any futile attempt or imaginary suit.

Legal Analysis and Decision

25. I have considered the memorandum of appeal, the extract of the record, the rival submissions by counsel and the relevant law. This appeal arises from the Ruling/order by Hon. C.A.S Mutai, SPM delivered on 19/3/2021 in Bungoma CM-ELC Case no. 469 0f 1995.

26. The doctrine or rule of Res judicata is founded on Section 7 of the *Civil Procedure Act* Cap 21 which provides 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.’’

27. The Black’s Law Dictionary 10th Edition defines ‘’res judicata’’ as follows;

> ‘’An issue that has been definitely settled by judicial decision….the three essentials are;
>
> i. An earlier decision on the issue;
>
> ii. A final Judgment on the merits; and
>
> iii. The involvement of same parties, or parties in privity with the original parties…’’

28. The doctrine seeks to stop a person from instituting more than one action between the same parties in respect of the same or a substantially similar cause of action and the court must attempt to resolve multiple actions involving a party and determine all matters in controversy in an action so as to avoid multiplicity of action.

29. In order to determine whether an issue in a subsequent Application or Suit is res judicata or not, a court should always look at the decision claimed to have settled the issues in question and the subsequent Application to ascertain the following ingredients;

i. What issues were really determined in the former/previous Application/Suit?

ii. Whether they are the same in the subsequent Application/Suit and were covered by the decision

iii. Whether the parties are the same or are litigating under the same title and that the previous Application/Suit was determined by a court of competent jurisdiction.

30. In Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR, the Supreme Court of Kenya while considering the said provision held;

> '' For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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
>
> 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 comtent to try the subsequent suit or the suit in which the issue is raised.''

31. I have looked at the Notice of Preliminary Objection raised by the Firm of M/S J.W Sichangi & Co. Advocates for the Defendant/Respondent which gave rise to the impugned Ruling/order dated 5th October 2020 which stated as follows;

32. Take Notice that the Defendant shall raise Preliminary points of law on the following;

a. That the suit herein is non-existent bad in law and incompetent.

b. That the entire subject matter was conclusively and substantially heard and decided upon in the Bungoma High Court Civil Appeal No.94 of 1999 and the Court of Appeal 227 of 2004 hence it is res judicata.

c. The purported plaintiff has never owned or been registered as owner of parcel No. E.bukusu/S.Kanduyi/7029 hence cannot sustain any proceedings or action or at all.

d. The entire suit has been overtaken by events that we have stated in the High Court and in the Court of Appeal hence any fresh litigation amounts to abuse of the Court process.

e. The plaintiff did not challenge the Court of Appeal decision and cannot purport to do so before this Honourable Court or disguise in the present pleadings.

33. Looking at the extract of the lower court record including pleadings and proceedings, it is clear that the former suit CM-ELC 469 of 1995 was instituted by one Liborion Masinde Simati (now deceased) vide a plaint dated 15/5/1995 (herein referred to as the former suit) where he was seeking orders for inter-alia eviction and cost of the suit. The defendant, Aneriko Masika Simiyu filed defence dated 29/6/1995 denying the claim. The said Liborion Masinde Simati later passed on and was substituted by Redempta

Simati who is the widow. Before the former suit could be heard, the trial Court on 29th July 1995, without any prompting referred the suit to Kanduyi District Land Disputes Tribunal for hearing and determination. The said Tribunal proceeded to hear the dispute after which it rendered itself as follows;

> ''The Elders unanimously resolved that Mr. Liborion had proved his case right following the documentary evidence before the court which are here attached. The elders through the court ask the District Surveyor to go and resurvey the affected plots so that the portions that belong to Liborion are given to him. Mr. Aneriko Masika Simiyu to give alternative portions to Mr. Patrick Webo as the resurvey will affect Webo's parcels.''

34. Anariko Masika Simiyu, the defendant/1st respondent herein was aggrieved by that decision and preferred an appeal to the Provincial Appeals Committee who upheld the decision by Kanduyi Land Disputes Tribunal. While upholding that decision, the Provincial Appeals Committee stated as follows;

> ''The appellant failed to raise transportation for elders to visit disputed land. We therefore concur with the judgment of the land Disputes lower Court Kanduyi in respect land parcel E.bukusu/S.Kanduyi/7029.''

35. The defendant/1st respondent was again dissatisfied with the decision by the provincial Appeal Committee and appealed to the High Court at Bungoma vide Civil Appeal No.94 of 1999 and after hearing the said appeal, Mbito J (as he then was) rendered himself on 8/8/2000 as follows;

> ''In the result, I allow this appeal and set aside the orders of the western provincial land Disputes Appeal Board and the Kanduyi Land Disputes Tribunal. In place thereof I enter orders dismissing the proceedings before them with costs to the appellant. I also award the costs hereof to the appellant.''

36. The implication of the two appeals which was in favour of the defendant/1st respondent was that the order of referring the former suit to Kanduyi Land Disputes Tribunal by the trial Magistrate was a nullity as the tribunal was divested of the requisite jurisdiction to hear and determine the matter.

37. Even before the dust settled, the plaintiff/1st respondent caused a vesting dated 29/2/2000 to be extracted and registered in his favour with the substantive order (1) directing as follows;

> '' That the said portion of land parcel No. E.bukusu/S.Kanduyi/7029 and 15 (added by and) which the court ordered on 12th November 1999 to be delivered to the respondent be vested to the appellant Aneriko M. Simiyu as the Tribunals are not empowered to deal with beneficial ownership of registered land nor can they entertain any dispute relating to land situated in Municipality.''

38. On the strength of the said vesting order, the appellant filed an application to review the same before Bungoma High Court vide Civil Appeal No.94 of 1999. In his Ruling delivered on 23/7/2004, Sergon J. held as follows;

> ''The record shows that the appellant/respondent has attempted on various occasions to extract and execute orders surreptitiously on the basis of the decision made ex-parte on 13-12-2000. This has exposed the appellant/respondent in my mind as a person who is not honest to this court, A court of law cannot countenance such a conduct from a litigant.

39. The upshot therefore is that the motion is allowed as prayed with costs to the respondent/appellant.''

40. The record further indicates that the plaintiff/1st respondent challenged this finding by Sergon J. in the Court of Appeal vide Civil Appeal No. 227 of 2004 at Kisumu and while substantially agreeing with the Superior court, the Court of Appeal at Kisumu held;

> ''From the factual background distilled from the pleadings it is clear to us that after the vesting order in favour of the appellant in respect of East Bukusu/South Kanduyi/15, the vesting order although quite rightly lifted afterwards by the court, had resulted in sub-division of East Bukusu/South Kanduyi/8050 excising therefrom a portion measuring 1.41 hectares making it part of East Bukusu/South Kanduyi/7029 measuring 0.41 hectares and 0.97 hectares of the deceased's parcel of land East Bukusu/South Kanduyi/15 and the Land Registrar had caused title deed for East Bukusu/South Kanduyi/8057 measuring 1.41 to be issued consisting a combination of the two parcels...What emerges is that there was an error on the face of the record...Accordingly, the appeal is hereby dismissed with costs to the respondent.''

41. It is clear from the foregoing that what went to the Court of Appeal was an appeal against the Ruling by Hon. Sergon J. where he had allowed an application by the appellant herein for review of a vesting order.

42. By a plaint dated22nd May 2015 and Amended on 22nd September 2015, the defendant/1st respondent filed a suit against the plaintiff/appellant in Bungoma High Court NO.64 of 2015 seeking orders for inter-alia injunction and a declaration that the Appellant's invasion of the suit parcels named therein was illegal, unlawful and outright violation of his constitutional protected proprietary rights. The appellant filed defence and a notice of Preliminary objection. That suit was subsequently dismissed. The 1st respondent theereafter filed an application in Bungoma High Court Civil Appeal NO. 94 of 1999 dated 12/6/2018 seeking the following substantive orders;

a. (spent)

b. (Spent)

c. That it pleases the Court to order the County Surveyor, Land Registrar Bungoma South to visit and erect the boundaries between the applicant's parcel namely E.bukusu/S.kanduyi/7029 and the portion measuring 0.97 that was allocated to the respondent pursuant to the Court of Appeal judgment in No.227 of 2004 and

d. The respondent be permanently restrained by herself or her agents from trespassing or encroaching on the applicant's land.

43. While dismissing the said application, Hon.B.N Olao J. observed as follows;

> ''It is now beyond peradventure that the applicant is forum shopping. This court must remain vigilant and stop him in his tracks by informing him that this litigation has now reached at a cul de sac. There is no suit upon which any of the prayers sought by the applicant can be granted. The upshot of the above is that the applicant's notice of motion dated 12-6-2018 is struck out with costs to the respondent.''

44. Coming to the impugned order/Ruling delivered on 19/3/2021, the trial magistrate at page 2 stated as follows;

> ''I have fully considered arguments raised for and against the preliminary objection. I have considered that the in this present suit are the same parties in the Bungoma High Court Civil

Appeal No. 94 of 1999 and Court of Appeal No.227 of 2002. The subject matter which is E.Bukusu/S.Kanduyi/2029 also happens to be the same in all the suits in this case.''

45. Based on that, the trial Magistrate upheld the Preliminary objection and dismissed the suit.

46. In the case of John Florence Maritime Services Limited & Another v Cabinet Secretary, Transport and Infrastructure & 3 Others(2021) eKLR, the Supreme Court of Kenya held as follows;

> ''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.''

47. In the present case, the trial magistrate in his analysis did not demonstrate the existence of a final judgment or order based on merit between the parties. The Trial Court did not also establish that the cause of action, the parties and subject matter in the first and the subsequent action are identical in every aspect. The suit which was instituted by the appellant being CM-ELC No.469 of 1995 in which he is seeking judgment for order of inter-alia eviction is yet to be heard and determined on merits.

48. The upholding of the preliminary objection by the trial magistrate on grounds that the parties in the former suit were the same parties in the Bungoma High Court Civil Appeal NO.94 of 1999 and Court of Appeal No.227 of 2002 and the same subject matter being E.bukusu/S.Kanduyi/2029 was based on a narrow understanding of the doctrine of res judicata. The judgment by the superior Court in Bungoma High Court Civil Appeal No.94 of 1999 and the Court of Appeal No.227 of 2004(Kisumu) were successful Appeals preferred by the Appellant herein on interlocutory orders and/or directions, some of which were given by the trial court suo moto. The two Appeals did not determine the merits of the former suit which has remained largely unheard for almost thirty years now.

48. In view of the matters aforesaid, I find decision by the trial magistrate in upholding the preliminary objection was a position untenable in all the circumstances of the case.

49. The upshot of my finding is that this Appeal is merited and the same is hereby allowed as follows;

1. The order allowing the preliminary objection dated 5th October, 2020 is hereby set aside/ vacated and substituted with an order reinstating the former suit NO.495 of 1995.
2. The original Court file being Bungoma CM-ELC Case No.469 of 1995 is reverted back to Bungoma Chief Magistrate's Court for hearing and determination before any authorized Judicial Officer other that C.A.S Mutai, SPM.
3. The costs of this Appeal shall be borne by the 1st respondent
4. Mention before the Chief Magistrate, Bungoma on 16/11/2023 for directions and fixing a hearing date on priority basis.

READ, DATED DELIVERED AND SIGNED AT BUNGOMA THIS 9TH NOVEMBER, 2023.

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Oira H/B for Angima for the Appellant

2. Mr. Sichangi for the Respondent

3. Okwaro C/A