



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngunjiri (As the Legal Representative of Ruth Wanjiru Ngunjiri) v Wainaina (Civil Suit E033 of 2023) [2025] KEHC 3647 (KLR) (Family) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3647 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL SUIT E033 OF 2023  
PM NYAUNDI, J  
MARCH 21, 2025**

**BETWEEN**

**MARGARET WANJIRU NGUNJIRI ..... PLAINTIFF  
AS THE LEGAL REPRESENTATIVE OF RUTH WANJIRU NGUNJIRI**

**AND**

**GEOFFREY NGUNJIRI WAINAINA ..... RESPONDENT**

**RULING**

1. Vide Notice of Preliminary Objection dated 28<sup>th</sup> February 2024, the Respondent herein has raised a preliminary objection, framed as hereunder;
  1. That some of the issues raised by the Plaintiff are res Judicata and have been heard, dealt with and determined by a court of competent jurisdiction in Machakos ELC No. 312/2017 Kennedy Wainaina Ngunjiri & 4 Others -vs- Geoffrey Ngunjiri Wainaina.
  2. That there is a judgment entered against the Plaintiff herein at the High Court Environment and Land Court (sic) Machakos ELC No. 312/2017 Kennedy Wainaina Ngunjiri & 4 Others -vs- Geoffrey Ngunjiri Wainaina which is in existence and the continue to be in existence a valid court issued in respect to L.R. No. 14812/3 and the same has not been appealed by the Plaintiff herein.
  3. That the Plaintiff's entire suit herein and application is just another attempt to forum shopping in court on issues and cause of action herein which have been the subject of previous determined suit.
  4. That the plaintiff's application is bad in law and is vexatious, frivolous and scandalous.



2. Both parties have complied with the Court's directions that the Preliminary Objection be canvassed via written submission. The Submissions of the Respondent are dated 29<sup>th</sup> January 2025.

### **Summary of the Respondent's Submissions**

3. He frames 2 issues for determination
  1. Whether the Defendant's preliminary objection has merit?
  2. Whether the Defendant should be awarded costs.
4. On the 1<sup>st</sup> issue he submits that the matter is res judicata and relies on Section 7 of the *Civil Procedure Act* and the decision by the Court of Appeal in Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR on elements that must be satisfied to find that a matter is res judicata.
5. It is his submission that the issue of ownership of LR No. 14812/3 (IR No.91442) was determined by a court of competent jurisdiction in the favour of the Respondent. The Plaintiff has not appealed against that judgment. The Respondent also relies on the decisions in Abok James Odera vs John Patrick Machira Civil Application No. NAI 49 of 2001; Lal Chand vs Radha Kishan, AIR 1977 SC 789; Lotta vs Tanaki [2003] 2 EA 556; Gurbachan Singh Kalsi v Yowani Ekori Civil Appeal No. 62 of 1958; Apondi vs Canuald Metal packaging [2005] 1 EA 12
6. On the 2<sup>nd</sup> issue it is submitted that costs should follow the event and in the event the Preliminary Objection is upheld the Plaintiff should meet the costs. Reliance is placed on the decision in Cicilia Karuru Ngayu v Barclays Bank of Kenya & Anor [2016] eKLR

### **Summary of the Applicant's Submissions**

7. The Applicant's submissions are dated 7<sup>th</sup> February 2025. It is submitted that the Preliminary Objection lacks merit. First the plaintiff states that the parties in the ELC matter are not the same as in the current matter.
8. Secondly it is submitted that in the ELC matter the plaintiff sought an order barring the Respondent from selling L.R. No. 14812/3. That in the current suit the Plaintiff is seeking a declaration of matrimonial property in respect of that parcel of land and two others; Plot No. 38 Wangige and Kabete/ Kabete/ T302.
9. It is further submitted that the ELC Court conceded that it did not have jurisdiction to determine whether or not L.R. No. 14812/3 comprised matrimonial property. Reference is made to the decision in N.W.N Versus L.N.M [2022] eKLR
10. The Plaintiff also relies on the decision in Esther Kabura Mwangi v Nairobi City County [2024] K.E.ELC 67858 (KLR) contends that the Preliminary Objection does not muster the test laid down on preliminary objection. It is submitted that the issues raised can only be ascertained by way of evidence.
11. It is therefore submitted that the Preliminary Objection should be dismissed.

### **Analysis and Determination**

12. Having analysed the Preliminary Objection and the respective submissions filed, I consider the following to be the issues for determination
  1. Whether the Preliminary Objection as framed is competent



2. Whether the Preliminary Objection has merit and should be upheld
3. Who should bear the costs herein
13. On the 1<sup>st</sup> issue; In Independent Electoral and Boundaries Commission v Jane Cheperenger and others (2015) eKLR, the Supreme Court stated;
  - (21) ...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection- against the profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on the merits.
14. In the instant case it is disputed that the ELC resolved the issue of whether the subject parcel of land was matrimonial property. Further there are 2 other parcels that were not part of the matter in the ELC.
15. I have seen the judgment in Machakos ELC No. 312/2017 Kennedy Wainaina Ngunjiri & 4 Others -vs- Geoffrey Ngunjiri Wainaina the Judge was categorical that she lacked jurisdiction to make a determination on whether the property was matrimonial property.
16. I find that the preliminary objection as presented does not meet the threshold set out in Mukhisa case which is that:

a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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.

17. The preliminary objection is disallowed
  18. Costs will be in the cause
- It is so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 21<sup>st</sup> DAY OF MARCH, 2025.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

In the presence of:

Kariu for Respondent

Auchi for Applicant

Kanja Court Assistant

