



Omondi & 4 others (Suing on their Behalf and on Behalf of 1,495 Members of Oljorai Squatters Phase (III)) v Lands Limited & 3 others (Environmental and Land Originating Summons E002 of 2024) [2025] KEELC 3843 (KLR) (Environment and Land) (15 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2024**

MC OUNDO, J

MAY 15, 2025

BETWEEN

**JACTON OMONDI 1ST PLAINTIFF
OPAR OLE SERET 2ND PLAINTIFF
JOSEPH M KIPANGAS 3RD PLAINTIFF
PETER ELENG HEZRON 4TH PLAINTIFF
JOSEPH KIPNG'ETICH KIPKURUI OF OLJORAI SQUATTERS 5TH PLAINTIFF
SUING ON THEIR BEHALF AND ON BEHALF OF 1,495 MEMBERS OF
OLJORAI SQUATTERS PHASE (III)**

AND

**LANDS LIMITED 1ST DEFENDANT
SOLAI RUYOBEI FARM LIMITED 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT**

RULING

1. Pursuant to the filing of an Originating Summons dated 14th February, 2024 wherein the Plaintiffs sought to be declared as proprietors of land parcel L.R No. 20XX9/1, IR 67XX8 measuring 3,245 Hectares, S.W of Gilgil Township in the Nakuru District/County having acquired the same by way of Adverse possession. The 2nd Defendant in response filed a Notice of Preliminary Objection dated



- 2nd May, 2024 to the effect that based on the ground that the Originating Summons was res judicata, Nakuru HCC No. 87 of 2007 and Nakuru ELC No. 89 of 2013 which matters were subject of an appeal in Nakuru Court of Appeal Civil Appeal No. 29 of 2020-Peter Ndunguya Ole Sono & Others vs Lands Limited & Another hence the court had become functus officio and its jurisdiction to determine the instant suit was ousted.
2. That this being a representative suit, the same fell short of the provision of Order 1 Rule 8 of the Civil Procedure Rules since no application had been filed by the Applicants granting them leave to file the instant suit by the entire 1495 members of Oljorai Squatters Phase (III).
 3. In response and in opposition to the Preliminary Objection, the Plaintiffs sought for the dismissal of the Preliminary Objection because it did not meet the threshold of a true Preliminary Objection as had been set out in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696.
 4. That it could not be determined that the suit was res judicata without looking into the facts as to the existence of Nakuru HCCC No. 87 of 2007 and Nakuru ELC No. 89 of 2023 and whether the parties therein were the same parties. That the court would have to call for the pleadings and filings in the two mentioned cases to ascertain whether the said suits had existed, what had been the issues and who had been the parties thereto which facts could not be advanced through a preliminary objection on a point of law.
 5. That in any case, the facts as had been advanced by the Plaintiffs in the Originating Summons herein had been contested by the 2nd Defendant vide the Replying Affidavit of Cheruiyot Arap Chamngwony sworn on 18th April, 2024 and on record.
 6. They placed reliance in the decided case of EL-Busaid v Commissioner of Lands & 2 Others [2002] 1 KLR 508 to state that whereas no preliminary objection could be grounded on a disputed set of facts, the instant preliminary objection had not been based on a commonality of accepted set of facts.
 7. That equally, the issue on the court being functus officio was neither a pure point of law nor could it be ascertained without delving into the facts to satisfy the provisions of Section 7 of the [Civil Procedure Act](#).
 8. That the objection based on the court's jurisdiction to hear and determine the instant suit there being an appeal that was pending hearing and determination before the Court of Appeal in Civil Appeal No. 29 of 2020, was not a pure point of law since in order to determine as such, the court would have to delve on to the facts.
 9. That the issue that touched on lack of authority to institute the suit had overlooked and/or glossed over the fact that there had been a written authority on record and that the list of all the members had been attached and filed in court hence the Plaintiffs herein had the locus standi not only to institute the suit herein on their own behalf but on behalf of 1495 members of Oljorai Squatter Phase III. That in any case, in the decided case of Research International East Africa Ltd v Julius Arisi & 213 Others [2007] eKLR, the Court of Appeal had held that the court had a discretion instead of striking out the suit, to make any appropriate orders such as giving the plaintiffs the opportunity to comply with the rules.
 10. That subsequently, the issues that had been raised in the preliminary objection herein could be dealt with substantively in the originating summons herein. That preliminary objection was a distraction, a surmise, groundless, meritless and without any substance and an attempt to obstruct the originating summons from being determined substantively on its merits contrary to the overriding objectives under the provisions of Section 1A and 1B of the [Civil Procedure Act](#) and Section 3(1) of the



Environment and Land Court Act. That, the instant suit was competent and fit for determination on substantial grounds for which the preliminary objection herein ought to be dismissed with costs.

11. The Preliminary Objection was disposed of by way of written submissions wherein the 2nd Defendant vide its submissions dated 18th July 2024 summarized the factual background of the matter in detail before placing reliance in the Mukisa Biscuit Manufacturing Co. Ltd case (supra) to submit that grounds of their Preliminary Objection had touched on the jurisdiction of the court to hear and determine the instant suit wherein reliance was placed in the decided case of Owners of Motor Vessel “Lilian S” vs Caltex Oil Kenya Ltd (1989) KLR.
12. That indeed, there was a pending appeal before the Appellate Court in Nakuru, being Civil Appeal No. 29 of 2020 touching on the ownership of the suit property and although the trial court had on the 5th February 2020 issued interim orders of status quo pending the hearing and determination of the Appeal, the Plaintiffs herein filed suit seeking declaration of ownership of the suit property LR No. 20XX9/1, by adverse possession during the pendency of the Appeal.
13. That the suit property being the subject of an appeal before the Court of Appeal in Nakuru Civil Appeal No. 29 of 2020, were the court to proceed to hear and determine the instant suit, and issue a parallel order, the same would interfere with the substratum of the appeal. That further, the court was barred from entertaining the instant suit under the provisions of Section 6 of the Civil Procedure Act as the same would amount to sub-judice. It was thus its submission that the subject matter herein and the issues, that is, the ownership of LR No. 20XX9/1 were similar as those under litigation before the appellate court.
14. That in the instant case, as much as the parties herein had appeared not to be the same as those in the appeal save for the 1st and 2nd Plaintiffs, they shared one thing in common; litigating over the same subject matter, that is, the ownership of LR No. 20XX9/1 hence the expected outcome before the appellate court would automatically impact the instant suit and vice versa. The 2nd Defendant thus urged the court to down its tools by finding that it had no jurisdiction so as to avoid issuing conflicting orders.
15. Its reliance was placed on the provisions of Section 7 of the Civil Procedure Act and the decided case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) to maintain that the instant suit was res-judicata Nakuru HCC No. 87 of 2007 and Nakuru ELC No. 89 of 2013 (OS).
16. That in any event, the Superior Court had in its judgement dated 27th November, 2019 rendered itself by declaring the 2nd Defendant as the rightful owner of LR No. 20XX9/1 who was at liberty to apply for an order of eviction on all the occupants on the suit land. That subsequently, the court could not re-open the matter again for hearing as it was functus officio. That since there was an appeal touching on the ownership of the suit property, pending before the appellate court at Nakuru, that court would be the right avenue for the Plaintiffs to litigate on their interest on LR No. 20XX9/1, otherwise, any order issued in the appeal would have a direct impact on their interests. That since the appeal was yet to be heard and determined, the jurisdiction of the court was ousted. It thus urged the court to allow the Preliminary Objection and strike out the suit with costs.
17. In opposition to the Preliminary Objection, the Plaintiffs vide their undated written submissions, framed their issues for determination as follows:
 - i. Whether the 2nd Defendant’s Preliminary Objection has met the threshold for a Preliminary Objection as provided in law.



- ii. Whether the case of res-judicata has been proved.
18. On the first issue for determination as to whether the 2nd Defendant's Preliminary Objection had met the threshold provided for in law, reliance was placed in the Mukisa Biscuit Manufacturing Co. Ltd's case (*supra*) to submit that a Preliminary Objection consisted of pure points of law which had been pleaded or which had arisen by clear implication out of the pleadings and which if argued as a preliminary point would dispose of the suit.
19. That based on the decisions in the case of *Lemitei Ole Koros & another v Attorney General & 3 others* [2016] eKLR, *Oraro v Mbaja* [2005] KLR 141 and *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another* [2014] eKLR and as per their Replying Affidavit dated 21st June, 2024, they were strangers to the cases referred to by the 2nd Defendant hence the court ought to look into the contested facts therein for which reason they opined that the 2nd Defendant had subsequently invited both them and the court to scrutinize the contents of the two cases and/or argue on evidence and facts and not on points of law. That the Preliminary Objection thus consisted of contested facts to be ascertained, which was contrary to the law. That interestingly, the 2nd Defendant had also sought that the Plaintiffs join an appeal which they had not been parties to and which issues were different from the ones that had been raised herein.
20. On the second issue for determination as to whether the case of res judicata had been proved, they submitted that for such a claim to succeed, the 2nd Defendant should have attached the previous cases with names of the Plaintiffs and members of Oljorai Community as they had alleged. They placed reliance in a combination of decisions in the case of *Beach Villas Limited v Mogeni & 4 others* (Environment & Land Case 6 of 2020) [2022] KEELC 2547 (KLR) (18 July 2022) (Ruling) and *Veronichah Gathoni Ngige v Salome Wanjiku Karia* [2009] eKLR.
21. That whereas the present Preliminary Objection had raised points of facts and law, the 2nd Defendant had failed to provide specifically as required which would invite the court to look at the evidence outside the pleadings herein. Reliance was placed in the decided case of *D.T Dobie & Co. (Kenya) Ltd v Joseph Mbaria Muchina & Another* (1980) eKLR to submit that the instant Preliminary Objection did not meet the tenets of a preliminary objection and should be disallowed for failing to provide specific facts to help the court ascertain whether there had been similarities between the two suits. They sought that the Court disallows the preliminary objection as raised.

Determination.

22. Having considered the Notice of preliminary objection herein dated the 2nd May 2024, the submissions and the authorities cited for and against the same thereof. I find that this matter arose as a result of an Originating Summons dated 14th February, 2024 filed by the Plaintiffs herein who had sought to be declared as proprietors of land parcel L.R No. 20XX9/1, IR 67XX8 measuring 3,245 Hectares, S.W of Gilgil Township in the Nakuru County, having acquired the same by way of Adverse possession. In response, the 2nd Defendant filed a Notice of Preliminary Objection dated 2nd May, 2024 opposing the Originating Summons on allegations that it was Res Judicata, Nakuru HCC No. 87 of 2007 and Nakuru ELC No. 89 of 2013 which matters were subject of an appeal in Nakuru Court of Appeal Civil Appeal No. 29 of 2020-Peter Ndunguya Ole Sono & Others vs Lands Limited & Another and hence the court was functus officio and therefore had no jurisdiction to determine the instant suit.
23. I thus find the issue that stands out for determination as being whether the Preliminary Objection raised is sustainable.



24. The all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA. 696 was clear as to the effect of raising an improper Preliminary Objection in that the court had held thus:-

“So far as I am aware, 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.”

25. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. The Supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 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.”

26. Thus in order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

- i. What issues were really determined in the previous case;
- ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
- iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

27. In order to so determine, the Applicant ought to place the pleadings, decision and/or judgements in respect of the previous suits so as to show clearly that the suit falls on all fours on the doctrine of res judicata for which the court then wouldn't have to look outside the pleadings before it can make a determination. It is therefore clear that a Preliminary Objection on the ground of Res Judicata cannot be raised as a Notice of Preliminary objection but rather by way of Notice of Motion where pleadings are annexed to enable the court to look at the decision claimed to have settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain whether the current suit is res judicata or not. In this case, the Applicant did not raise the issue of res judicata by way of Notice of Motion but by a Notice of Preliminary objection wherein there had been no decisions or the pleadings in respect of the case(s) that they claimed to be res judicata.



28. In this regard, I am guided by the holding by Sir Charles Newbold P. in Mukisa Biscuit case (Supra) which are applicable in the present circumstances wherein he had stated as follows;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner quite improperly by way of preliminary objection. 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 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 confuse the issues. This improper practice should stop”.

29. In a persuasive case in *Beach Villas Limited v Mogeni & 4 others* (Environment & Land Case 6 of 2020) [2022] KEELC 2547 (KLR) (18 July 2022) (Ruling) the Court at paragraphs 15, 16 and 18 observed as follows:

“The 2nd Defendant did not attach the consent or the pleadings in respect of the case that he claims to be res judicata. The consent also is not clear whether the Plaintiff is estopped by the said consent from pursuing any civil or criminal case or complaint against the Defendants or any other person over the suit property or any other property belonging to the Plaintiff.

Res judicata is one of the issues that can be raised as a Preliminary Objection but the Applicant must place the documents in respect of the previous suits and show clearly that the suit falls on all fours on the doctrine of res judicata. Where there is scanty information which forces the court to look outside the pleadings before it can make a determination, then it would be proper to deal with the issue at the hearing.

This was not the position in this case where the information was scanty. I therefore find that the Preliminary Objection has no merit and is dismissed with costs.”

30. In yet another persuasive case in *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another* [2014] KEELC 104 (KLR) the Court at paragraph 5 observed as follows:

“I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata’.

31. This said and done, I find that the Preliminary Objection raised via a Notice dated the 2nd May 2025 is unsustainable and the same is hereby struck out with costs.

DATED AND DELIVERED AT NAIVASHA VIA MICROSOFT TEAMS THIS 15TH DAY OF MAY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

