



Chelogoi (Suing on behalf of the Estate of Francis Kimeli Arap Chelogoi - Deceased) v Byegon & another (Environment & Land Case E020 of 2024) [2025] KEELC 3860 (KLR) (13 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E020 OF 2024**

**LA OMOLLO, J
MAY 13, 2025**

BETWEEN

GRACE CHELOGOI (SUING ON BEHALF OF THE ESTATE OF FRANCIS KIMELI ARAP CHELOGOI - DECEASED) PLAINTIFF

AND

ROBERT KIPKEMOI BYEGON 1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION 2ND DEFENDANT

RULING

1. This ruling is in respect of the 1st Defendant’s preliminary Objection dated 20th September, 2024. The ground on the face of the preliminary objection is as follows;

“Take Notice that at the hearing of the suit hereof, Counsel for the 1st Defendant shall raise a preliminary objection on the whole suit for the reason that the suit is Res Judicata the same subject matter having been disposed off by this Honourable Court in ELC No. E006 of 2023 (O.S) and therefore the suit offends the provisions of Section 7 of the Civil Procedure Act 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 can 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.”



Factual Background.

2. The Plaintiff commenced the present proceedings vide the Plaint dated 21st August, 2024 where she seeks the following prayers;
 - a. A declaratory order that the judgement dated and delivered on the 2nd day of May, 2024 which was obtained by the 1st Defendant in ELC Case No. E006 of 2023-Robert Kipkemoi Byegon vs Agricultural Finance Corporation, was procured by fraud, misrepresentation, and/or deceit.
 - b. An order setting aside the said judgement.
 - c. That this Honourable Court be pleased to order the rectification of the lands register by directing that any registration in favour of the 1st Defendant that led to the 1st Defendant obtaining title to the same be cancelled for reasons that the registration was obtained by fraud.
 - d. A permanent order of injunction restraining the Defendants from interfering with the Plaintiff's occupation and possession of the suit property, Kericho/Kipchorian/Lelu/Block 5(Kebeneti)71.
 - e. An order restoring possession of the suit property to Plaintiff (sic) and her family by virtue of continued uninterrupted possession for twenty (20) years.
 - f. An eviction order to be issued against the 1st Defendant to vacate the land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)71.
 - g. That this Honourable Court be pleased to order the 2nd Defendant forthwith to execute all necessary documents to facilitate the transfer of that entire land parcel of land known as Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 in the name of the Plaintiff and failure to which the Deputy Registrar of the Environment and Land Court shall have power and mandate to do so.
 - h. Mesne profit.
 - i. Special and general damages for unlawful eviction and delayed transfer.
 - j. Costs of this suit.
 - k. Any other relief that this Honourable Court deems fit to grant.
3. The Defendants had not filed their Statements of Defence as at the time of writing of this ruling.
4. The preliminary objection came up for directions on 11th November, 2024 when the Court directed that it be heard by way of written submissions.
5. On the 9th of December, 2024, the matter was mentioned to confirm filing of submissions and then reserved for ruling.

Issues for Determination.

6. The 1st Defendant filed his submissions on 5th December, 2024 while the Plaintiff filed her submissions on 10th December, 2024.
7. The 1st Defendant submits on whether the present suit is res judicata and relies on Section 7 of the *Civil Procedure Act*, the judicial decisions of Henderson v Henderson (1843) 67 ER 313 and The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR.



8. It is his submission that the main issue in the present suit is the proprietorship of land parcel No. Kericho/Kipchorian/Lelu/Block 5(Kebeneti)/71.
9. The 1st Defendant also submits that the Court delivered judgement on 2nd May, 2024 in ELC Case No. E006 of 2023 (OS) where it found that he (1st Defendant) had acquired land parcel No. Kericho/Kipchorian/Lelu/ Block 5 (Kebeneti)/71 by way of adverse possession.
10. The 1st Defendant further submits that the parties in the said suit are the same as the parties in the present suit except for the Plaintiff herein who has been allegedly introduced to distort the similarities between the present suit and ELC Case No. E006 of 2023 (OS).
11. The 1st Defendant relies on the judicial decisions of Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another [2020] eKLR, E.T vs Attorney General & another [2012] eKLR and submits that the Plaintiff is a stranger and has no claim in the present suit.
12. The 1st Defendant relies on Section 26 of the *Land Registration Act* and submits that he has attached a copy of his title deed issued on 4th July, 2024 to his Replying Affidavit sworn on 7th November, 2024. The Replying Affidavit was filed in response to an application that had been earlier filed by the Plaintiff where she contends that the judgement that had been delivered in his favour, was obtained through fraud and misrepresentation.
13. The 1st Defendant relies on the judicial decisions of Kimitei Arap Chirchir v Kimutai Arap Kirui & another [2020] eKLR, Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] and urges the Court to uphold the preliminary objection and strike out the suit for being res judicata.
14. The Plaintiff submits on the following issues;
 - a. Whether a preliminary objection is limited to pure points of law.
 - b. Whether the instant suit is barred by the doctrine of res judicata.
15. On the first issue the Plaintiff relies on the judicial decision of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 and submits that res judicata involves factual inquiries and therefore goes beyond the scope of a preliminary objection.
16. The Plaintiff relies on Order 51 Rule 1 of the Civil Procedure Rules, the judicial decisions of Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others [1996] eKLR, Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] and submits that a party alleging res judicata must present evidence such as pleadings and proceedings in support of his or her claim. She adds that this cannot be achieved through a preliminary objection.
17. The Plaintiff relies on the judicial decisions of Kenya Broadcasting Corporation vs Kensko Agro Produce Limited & 2 Others (Environment & Land Case 196 of 2021) [2023] KEELC 20105 (KLR) (28 September 2023) (Ruling), George Kimani & 4 Others vs County Government of Trans Nzoia & another [2014] eKLR and submits that the issue of res judicata is best raised through a formal application and not a preliminary objection.
18. It is the Plaintiff's submissions that the 1st Defendant has not proved the elements set out under Section 7 of the *Civil Procedure Act* which are as follows;
 - a. The issue in both suits must be directly and substantially the same.



- b. The parties in both suits must be the same or litigating under the same title.
 - c. The matter must have been heard and finally decided by a Court of competent jurisdiction.
19. The Plaintiff submits that the issue raised in the present suit is whether the 1st Defendant acquired title to the suit property through fraud while the main issue in ELC Case No. E006 of 2023 was on the doctrine of adverse possession.
20. The Plaintiff also submits that the issue of fraud was not raised in ELC Case No. E006 of 2023 and neither was she a party to the said suit.
21. The Plaintiff concludes her submissions by urging the Court to dismiss the 1st Defendant’s preliminary objection with costs.

Analysis and Determination

22. I have considered the 1st Defendant’s preliminary objection and the rival submissions. It is my view that the only issue that arises for determination is whether the preliminary objection dated 20th September, 2024 has merit.
23. The Judge in *Ushago Diani Investment Limited v Abdulwahab* (Environment & Land Case 12 of 2023) [2023] KEELC 20213 (KLR) (27 September 2023) (Ruling) cited with approval the decision in *Oraro v Mbaja* [2005] eKLR 141 where the Court on the nature of preliminary objections held as follows;
- “A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
24. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
25. The only ground on the 1st Defendant’s preliminary objection is that the Plaintiff’s suit is *res judicata*.
26. The 1st Defendant submits that there was a previous suit i.e. ELC Case No. E006 of 2023 (OS) where the Court found that he had acquired land parcel No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71, the suit parcel by way of adverse possession.
27. The 1st Defendant also submits that even though the Plaintiff herein was not a party to the said suit, her presence in the present suit is meant to distort the similarities between the present matter and ELC Case No. E006 of 2023 (OS).
28. In response, the Plaintiff submits that in order for *res judicata* to be proved, a party must present evidence such as pleadings which cannot be achieved through a preliminary objection.



29. The Plaintiff also submits that in determining whether a suit is res judicata, the Court has to make factual inquiries which inquiries go beyond the scope of a preliminary objection.
30. In the judicial decision of Henry Wanyama Khaemba Vs Standard Chartered Bank Ltd & Another [2014] eKLR the Court held as follows;

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of law have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly”.(Emphasis mine)

31. The Court in George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014] eKLR also held 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. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection.” (Emphasis mine)

32. Taking into consideration the above cited judicial decisions, this Court is inclined to agree with the Plaintiff’s submissions that the issue of res judicata cannot be raised by way of a preliminary objection as it requires the examination of evidence.

Disposition

33. Taking the foregoing into consideration, I find that the 1st Defendant’s preliminary objection dated 20th September, 2024 lacks merit and it is hereby dismissed with costs.
34. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 13TH DAY OF MAY, 2025.

L. A. OMOLLO

JUDGE.

In the presence of:*

Mr. Kirui for Motanya for the Plaintiff.

Miss Cherono for the 1st Defendant.

Mr. Maunya for the 2nd Defendant.



Court Assistant; Mr. Joseph Makori.

