



Ogega & 12 others v Ayado & 10 others (Environmental and Land Originating Summons E003 of 2023) [2025] KEELC 5105 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023
FO NYAGAKA, J
JUNE 18, 2025**

BETWEEN

JULIUS OKUMU OGEKA & 12 OTHERS & 12 OTHERS & 12 OTHERS PLAINTIFF

AND

GEORGE ARUTI AYADO & 10 OTHERS & 10 OTHERS & 10 OTHERS DEFENDANT

RULING

1. By way of Preliminary Objection dated 23/09/2024 the Defendants raised an objection against the suit on seven points. When condensed, the objection is premised on the grounds that the suit is res judicata or sub judice as the matter had already been determined in Kisii HCCC No. 82 of 1988 and Kisii ELC No. 377 of 2014. Further, that the Plaintiffs were non suited, and the suit was an abuse of the court process.
2. The Preliminary Objection was argued by way of written submissions.
3. The Defendants submitted that there existed a suit in Kisii High Court Civil Suit No. 82 of 1988 which dealt with the suit property herein. Further, that the parties therein were the 1st Plaintiff herein and the parents of the remaining Plaintiffs. He additionally stated that in Kisii High Court ELC Civil Case No. 377 of 2014 are the same as the one in the Petition herein and so is the suit land to wit; LR No. Suna West/Wasweta 11/1054. Counsel for the Defendants cited Sections 5, 6, 7 and 8 of the Civil Procedure Act and urge that the suit is contrary to the said provisions. He cited the cases of Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya (2020) eKLR, John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport & Infrastructure & 3 Others (2015) eKLR among a plethora of authorities urging that the suit is contrary to the provisions of the law. He maintained that the suit is Res Judicata and urged the court to dismiss the same with costs to the Defendants.



4. Counsel for the Plaintiff submitted on the Objection, urging that the Defendants have not availed any decree or order as evidence that the suits raised by the Defendants, being Kisii HCCC No. 82 of 1988 and Kisii ELC No. 377 of 2014 were concluded. Further, that the said suits were dismissed for want of prosecution under Order 12 of the Civil Procedure Rules. Counsel submitted that Order 12 Rule 6(1) of the Civil Procedure Rules permits a party to bring a fresh suit if dismissal was not pursuant to Order 12 Rule 3 and when no law of limitation bars the same. He pointed out that the Objection requires this court to delve into issues of facts and proof of several issues which require further investigation and interrogation which fails the test designed by law for a Preliminary Objection. He urged the court to dismiss the Preliminary Objection with Costs.

Analysis & Disposition

5. I have considered the Preliminary Objection and submissions by counsel.
6. A Preliminary Objection was defined by Law J.A. in the case of Mukisa Biscuits Company Ltd vs West End Distributors (1968) E.A 896 in the following terms:-

“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 pleading, 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”
7. Further, Ojwang J (as he then was) expressed himself in Oraro vs Mbaja 2005 1 K.L.R 141 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 basis that all facts pleaded by the opposite side are correct”
8. A Preliminary Objection must therefore must only raise matters of law and must not contain matters of fact that require to be proved through evidence or matters that are in controversy.
9. The main point of objection is that the matter is res judicata or that it is sub judice. In order to determine whether this matter has already been heard and determined, it is not that difficult to ascertain that the same would require findings of fact and probing of evidence. I am guided by the holding in the case of George Kamau Kimani & 4 Others Vs County Government of Trans Nzoia & Another (2014), eKLR, where the Court held that: -

“I have considered the points raised by the 1st 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 issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.
10. Further, of all the seven points of objection, no single point of law emerges. They are all points of fact that would require drawn out arguments from facts to conclusively determine.
11. The Preliminary Objection is frivolous, and an abuse of the court process. The Preliminary Objection dated 23rd September 2024 is dismissed in its entirety and the Plaintiffs are awarded costs.



12. Mention on 29th September 2025 for compliance.

13. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIA THE TEAM PLATFORM THIS 18TH DAY
OF JUNE 2025**

HON. DR. IUR FRED NYAGAKA,

JUDGE

