



REPUBLIC OF KENYA



**Busienei v Lenenguesi & another (Environment and Land Appeal  
E001 of 2025) [2025] KEELC 6739 (KLR) (6 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6739 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

**MN MWANYALE, J  
OCTOBER 6, 2025**

**BETWEEN**

**GRACE JEPKEMBOI BUSIENEI ..... APPELLANT**

**AND**

**ELIZABETH NARESAI LENENGUESI ..... 1<sup>ST</sup> RESPONDENT**

**NAMERAI ENE TANKI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Dissatisfied by the Ruling delivered on 18<sup>th</sup> December 2024, in Kilgoris CM ELC No. E065/2023 by Hon. W.C Waswa, the Appellant Grace Jepkemboi Busienei, filed a Memorandum of Appeal dated 31<sup>st</sup> December 2024, seeking the following orders; -
  - a. That the Appeal be allowed.
  - b. That the Ruling and Orders of Hon. W.C Waswa delivered on 18<sup>th</sup> December 2024, at Kilgoris Law Courts in ELC Case No. E065/2023 be set aside and substituted with orders dismissing the Respondents Notice of Motion application dated 12<sup>th</sup> November 2024.
  - c. That in the alternative the court do make such orders as it deems just to grant.
2. The Appellant in his Memorandum of Appeal penned 5 grounds of Appeal; as herefollows; -
  1. That the Learned Trial Magistrate erred in law and in fact by holding that KISII ELC NO. 414/2013 involved the same parties herein.
  2. That the Learned Trial Magistrate erred in law and in fact by holding that the plaintiff's claim of trespass against the Defendant should be addressed by the trial court Kisii ELC NO. 414/2013.
  3. That the Learned Trial Magistrate erred in law and in fact by holding that it cannot issue further orders on the aspect of trespass between the properties mentioned herein.



4. That the Learned Trial Magistrate erred in law and in fact by prematurely dismissing the Appellant's suit.
5. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Plaintiff suit in Kilgoris Law Courts in ELC Case No. E065 of 2023 was a claim of trespass on LR. NO. Transmara/Ololchani/1725 whereas judgment and orders in Kisii ELC No. 414 of 2013 relates to trespass on LR. NO. Transmara/Ololchani/299.
3. Upon admission of the Appeal pursuant to direction issued under Oder 42 Rule 13, the parties were directed to file and exchange submissions on the Appeal, which the court hereby summarizes.
4. Initially the firm of O.M Otieno Advocates acted for both Respondents but vide their application dated 04.03.2025 they applied and were allowed to cease acting on behalf of the 1<sup>st</sup> Respondent, Elizabeth Maresai Leneguesi.
5. The 1<sup>st</sup> Respondent did not appoint a new counsel nor file submissions in the Appeal, the Appeal proceeding as between the Appellant and the 2<sup>nd</sup> Respondent.

### **Appellant's Submission**

6. The Appellant framed and submitted on 3 issues, to wit,
  - i. Whether the plaintiff suit in ELC No. E065 of 2023 was Resjudicata.
  - ii. Whether the plaintiff's claim of trespass against the Defendant should be addressed by the trial court Kisii ELC No. 414 of 2013.
  - iii. Whether the trial court erred in striking out the plaintiff's suit prematurely?
7. It is the Appellant's submission that the previous suit being Kisii ELC No. 414/2013 was founded on the trespass on Transmara/Ololchani/3 by Daniel Ledama Ole Soya in 2013, while the suit before the trial court was a result of Trespass on Transmara/Ololchani/1725 sometimes in 2018, by the Respondents as legal representatives of the Estate of Francis Kisas Ole Soya
8. That the plaintiff's suit in Kisii ELC No. 2013 was struck out while the counter-claim proceeded to full trial.
9. The Appellant thus submits a new course of action arose once the Kisii suit was determined hence their suit before the trial court.

### **2<sup>nd</sup> Respondent's Submission**

10. The 2<sup>nd</sup> Respondent did frame and submitted on a single issue; to wit whether the suit before the trial court was Resjudicata.
11. It is the 2<sup>nd</sup> Respondent submission that the previous suit to wit Kisii ELC No. 414/2013 filed by the Appellant's husband against the 2<sup>nd</sup> Respondent's father was heard and determined on its merits and the same involved a trespass claim in respect of Transmara/Ololchani/299 and Transmara/Ololchani/3, where the boundaries were fixed.
12. That Transmara/Ololchani/3 was subdivided into interalia Transmara/Ololchani/1725 and the Appellant now claims trespass on the said parcel. The 2<sup>nd</sup> Respondent submits that the change by way of subdivision does not create a new cause of action.



13. The 2<sup>nd</sup> Respondent submits that the rights and interests of the parties herein, were settled rendering the claim Resjudicata hence statute barred by virtue of section 7 of the Civil Procedure Act, and by virtue of the conclusivity of the previous judgment by virtue of section 44 of the Evidence Act.
14. Before framing issues for determination, the court notes the following undisputed facts
  - i. It is common ground that the Appellant herein was registered as owner of Transmara/Ololchani/1725 on 03.11.2001 and was issued with a title on 24.08.2023, and
  - ii. It is also common ground from the letter dated 07.09.2023 from Messrs Tawo, Maito & Co. Advocates that Transmara/Ololchani/1725 is what was formerly known as Transmara/Ololchani/3.
  - iii. It is also common ground that the trespass dispute in Kisii ELC No. 414/2013 involved parcels number Transmara/Ololchani/3 and Transmara/Ololchani/299.
15. Having analyzed the Record of Appeal, the rival submissions as well as considered the law the court frames the following as issues for determination
  - i. Whether or not the Appeal is merited? In determining this the court shall analyze whether or not the learned trial magistrate reached the correct finding that the suit before him was Resjudicata?
  - ii. What reliefs ought to issue?
  - iii. Who bears the costs of the Appeal.

### **Analysis and Determination**

16. In order to determine the Appeal and issue number 1, the court has to fulfil its duties stated in the case of *Selle & Another Vs. Associated Motor Boat Limited & 3 Others* which duties were held to be as follows; -

“An appeal to this court from a trial by the High Court is by way of retrial by and the principles upon which this court is such an appeal are well settle. Briefly put they are that this court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.....”

17. The Appellant’s case as plaintiff before the trial court is captured at paragraphs 4, 5 and 6 of the Plaintiff dated 14<sup>th</sup> September 2023 and appearing at page 9 of the Record of Appeal. For context, I will reproduce the said paragraph.

“4 The plaintiff herein is the registered and beneficial owner of a portion of land measuring 723 Ha forming part of parcel number Transmara/Ololchani/1725 (hereinafter referred to as “the suit property”)

5. Sometimes in 2018, the Defendants wrongfully entered and took possession of the suit property, and have thereafter, unlawfully remained in possession thereof and have thereby trespassed and continue to trespass thereon.

Particulars of trespass

- a. Wrongfully entering upon plaintiff’s property without reasonable excuse.



- b. Consciously and deliberately erecting fences and other barriers on the suit property.
  - c. Remaining, cultivating and/or growing crops upon his suit land without the consent of the plaintiff.
  - d. Denying the plaintiff entry, usage and peaceful enjoyment of the suit land.
  - e. Remaining on the suit property, despite notice to vacate and intention to sue being served.”
18. Pursuant to the application dated 14.09.2023, the court on 5<sup>th</sup> December 2023 ordered the sub-county surveyor and Land Registrar, Transmara East, West and South to ascertain the boundaries of Transmara/Ololchani/299 and Transmara/Ololchani/1725.
19. In response to that order for the ascertaining and determination of the boundaries of Transmara/Ololchani/299 and Transmara/Ololchani/1725, Mr. O.M Otieno Learned Counsel for the Respondents as Defendants filed an application dated 13<sup>th</sup> November 2024, in which he sought orders of striking of the suit for being Resjudicata. The Ruling in respect of that application has provoked this appeal.
20. Was the application dated 13<sup>th</sup> November 2024, merited, and was the suit Resjudicata?
21. In the supporting affidavit to the application dated 13.11.2024, the deponent exhibited the Plaint Kisii ELC No. 414/2023, together with a judgment and decree dated 26.02.2016.
22. That deponent held that there was no appeal against the said Judgment and decree hence the rights of the parties and their interests were concluded thereon as provided for section 44 of Evidence Act.
23. The doctrine of Resjudicata is provided under section 7 of the Civil Procedure Act and for it to apply, the Supreme court decision in the case of John Maritime Florence Vs. Cabinet Secretary set the following as the elements to be proved.
- “for the doctrine to apply the following must be demonstrated
- a. There is a former judgment or order which is final.
  - b. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.
  - c. There must be between the first and second suits, identical parties, subject matter and cause of action”.
24. The court shall examine each of the above elements to see whether it applies herein.
25. On the issue of same cause of action, subject matter and same parties
26. The cause of action pleaded in both cases relates to trespass on two adjoining properties to wit Transmara/Ololchani/299 and Transmara/Ololchani/3. The cause of action in the former suit was pleaded to have occurred in 2018, - by that time the suit parcel Transmara/Ololchani/1725 was not in existent the register thereof having been opened in 2021 but Transmara/Ololchani/3 existed, hence when the cause of action arose, the subject matter were same being Transmara/Ololchani/3 and Transmara/Ololchani/299.
27. The parties herein are the legal representatives of the parties in the previous suit.



28. It follows thus the alleged trespass in 2018 after the boundaries had been fixed through the judgment could not constitute a new cause of action.
29. The Learned trial magistrate also rightly observed that Transmara/Ololchani/1725 being a subdivision of Transmara/Ololchani/1696 a subdivision of subdivision of Transmara/Ololchani/3 was bound by the previous decree.
30. The findings and conclusion of the Learned Trial Magistrate that Transmara/Ololchani/1725 being a subdivision of Transmara/Ololchani/1696 which was a subdivision of Transmara/Ololchani/3 is in tandem with Explanation 3 of section 7 of *Civil Procedure Act*,  
Explanation 3 provides “The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly by the other.”
31. In respect of the trespass and overlap in the boundary between Transmara/Ololchani/3 and Transmara/Ololchani/299, the same was pleaded in the former suit and the judgment in the former suit made a finding on the same.
32. With regard to the issue of Administrators of the Estate of the deceased proprietors been parties herein while in the previous suit the deceased were the parties, the same is Resjudicata by dint of Explanation 6 of section 7 of the *Civil Procedure Act* – which provides – “where person litigate Bonafide in respect of a public right or a private right claimed in common for themselves and others, all persons interests in such right shall, for purposes of this section be deemed to claim under the persons so litigating...”
33. As explained above, the court finds in respect of the subject matter, cause of action and parties, that they are the identical and the same.
34. On the existence of a final judgment, indeed a final judgment exists in Kisii ELC No. 414/2013 which was a judgment by a court of competent jurisdiction, and no appeal was preferred. It thus remains final.
35. The judgment in Kisii ELC 414/2013 determined the rights and interests of the parties therein as well as their legal representatives, and in so far as Transmara/Ololchani/1725 is what formerly known as Transmara/Ololchani/3, the Judgment issued upheld the boundaries features fixed by the Transmara District Surveyor between the two parcels Transmara/Ololchani/3 and Transmara/Ololchani/299; and issued a permanent injunction in that respect.
36. Having reached the same conclusion that Transmara/Ololchani/1725 could not exist independent of Transmara/Ololchani/3, and the court in Kisii ELC 414/2013 having conferred rights and interests by affirming the previous boundaries as fixed, I do find that the Appellants suit before the trial magistrate was Resjudicata, and the Learned Trial Magistrate was right in finding and holding so.
37. In the result, I find that the Learned Trial Magistrate correctly applied the law and reached the correct conclusions of dismissing the Appellant’s suit as Resjudicata.
38. Having found that the plaintiff’s suit was Resjudicata, it follows that the Appeal herein is not merited and that the same is destined for fail as it hereby does.
39. The upshot is that the Appeal herein is dismissed with costs to the 2<sup>nd</sup> Respondent, and the trial court’s Ruling dated 18<sup>th</sup> December 2024 is hereby affirmed.
40. Judgment accordingly.

**DATED AT KILGORIS THIS 6<sup>TH</sup> DAY OF OCTOBER, 2025.**

**HON. M.N MWANYALE**



## **JUDGE**

In the presence of

CA – Emmanuel/Sylvia/Sandra

Mr. Tawo for the Appellant

Mr. O.M Otieno for the Respondent

