



REPUBLIC OF KENYA



KENYA LAW
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Kasyoki (Suing as the Administrator and Legal Representative of the Estate of Kasyoki Maliti (Deceased)) v Kimuli (Suing as the Administrator and Legal Representative of the Estate of Kasyoki Maliti (Deceased)); Tuli (Applicant) (Suing as the Legal Representative of the Estate of Mary Kimuli (Deceased)) (Environment and Land Case 20 of 2018) [2025] KEELC 7006 (KLR) (14 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7006 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 20 OF 2018**

EO OBAGA, J

OCTOBER 14, 2025

BETWEEN

**AGNES KALUKI KASYOKI PLAINTIFF
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE
ESTATE OF KASYOKI MALITI (DECEASED)**

AND

**MARY KIMULI DEFENDANT
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE
ESTATE OF KASYOKI MALITI (DECEASED)**

AND

**NDAMBUKI TULI APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARY
KIMULI (DECEASED)**

RULING

1. This is a ruling in respect of a preliminary objection by the Plaintiff which is based on the following grounds:
 1. That the application herein is res judicata as the Applicant had filed a similar application dated 10th July, 2023 which was dismissed by this honourable court vide a ruling delivered on 6th November, 2024 and another application dated 24th August, 2022 which was struck out vide a ruling delivered on 26th April, 2023.



2. That the application herein is frivolous and an abuse of court process as this is the third time the Defendant herein has brought a similar application, pertaining the same subject matter and on all the previous occasions this court has dismissed and/or struck out the Applicant's application.
2. The Plaintiff filed a suit against the Defendant on 14th March, 2018 in which he sought the following reliefs:
 - a. A declaration that land parcel No. Nzai/Masumba/492 is the sole property of the Estate of Kasyoki Maliti.
 - b. A permanent injunction restraining the Defendant by herself, her agents and/or servants from entering onto and/or encroaching, trespassing, remaining on, and/or grazing on cutting down trees, cultivating on or in any other manner whatsoever interfering with land parcel No. Nzai/Masumba/492.
 - c. Cost of this suit and interests.
 - d. Any other relief that this honourable court deems fit to grant.
 3. The Defendant's lawyer indicated that he was not keen on pursuing the case in court as the Defendant had opted to use the Kamba Traditional oath known as "Kithitu". The court thereafter directed that the suit proceeds as an undefended cause.
 4. The case proceeded for hearing *ex parte* on 7th October, 2021. A judgment was delivered on 15th December, 2021 in favour of the Plaintiff. As at the time of delivery of judgment, the Defendant had long passed away. The Defendant passed away on 3rd February, 2020 and she was not substituted. The Defendant was previously represented by the firm of Munyasya and Co. Advocates.
 5. On 9th September, 2020 the firm of Stanley Nthiwa & Co. Advocates filed notice of appointment of advocates for the Defendant. He filed a notice of motion dated 24th August, 2022 in which he sought the following reliefs:
 1. That this application be certified as urgent and heard *ex parte* in the first instance.
 2. That pending the hearing and determination of this application, this court be pleased to issue an order staying the execution of the judgment issued on 15th December, 2021 by this court and all other consequential and or sub-sequential and or subsequent orders or decree.
 3. That the court be pleased to set aside all the proceedings, judgment dated 15th December, 2021 and all other consequential and or sub-sequential and or subsequent orders and/or decree.
 4. That a declaration do issue that the suit herein abated on the 3rd February, 2020, thus the proceedings herein the resultant judgment and decree are null and void and the file herein be closed forthwith.
 5. That cost of this application be awarded to the Applicant.
 6. The application dated 24th August, 2022 was struck out *vide* ruling delivered on 26th April, 2023 on the ground that the firm of Stanley Nthiwa & Co. Advocates was not properly on record for the Defendant. On 10th July, 2023 the Defendant's counsel filed an amended notice of motion purporting to amend the struck out notice of motion by adding a prayer seeking leave of the court to allow the firm of Stanley Nthiwa & Co. Advocates to come on record for the Defendant.



7. The Plaintiff filed a preliminary objection against the notice of motion dated 10th July, 2023 on the grounds that it was res judicata and the court was functus officio. The preliminary objection was dismissed vide ruling dated 7th March, 2024.
8. The amended notice of motion dated 10th July, 2023 was heard and was dismissed vide ruling dated 6th November, 2024. The Defendant filed a notice of motion dated 10th March, 2025 in which he sought the following reliefs:
 1. That leave do issue for the firm of Stanley Nthiwa & Company advocates LLP to come on record for the Defendant.
 2. That pending the hearing and determination of this application, this court be please to issue an order staying execution of the judgment on 15th December, 2021 by this court and all other consequential and or subsequent orders or decree.
 3. That the court be pleased to set aside all the proceedings, judgment dated 15th December, 2021 and all other consequential and or subsequent orders and/or decree.
 4. That a declaration do issue that the suit herein abated on the 3rd February, 2020 thus the proceedings herein, the resultant judgment and decree are null and void and the file herein be closed forthwith.
 5. That cost of this application be awarded to the Applicant.

Before this application could be heard, the Plaintiff raised the present preliminary objection.

9. The parties were directed to file written submissions on the preliminary objection. The Defendant filed his written submissions dated 30th April, 2025. As at the time of writing this ruling on 6th October, 2025, the Plaintiff had not filed her submissions.
10. The Defendant submitted that the application dated 10th March, 2025 is not res judicata. He relied on the definition of res judicata in Black's Law Dictionary 10th Edition which defines res judicata as follows:

“An issue that has been definitely settled by judicial decision the three essentials are (1) an earlier decision on the same issue (2) a final judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
11. The Defendant also relied on the case of Independent Electoral and Boundaries Commission v Maina Kiai & 5 others (2017) eKLR where the court of Appeal stated as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.



- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
12. I have considered the preliminary objection as well as the submissions by the Defendant. The only issue for determination is whether the application dated 10th March, 2025 is res judicata and whether the application is an abuse of the process of the court.
13. The principle of res judicata is predicated on Section 7 of the *Civil Procedure Act* which states 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 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”.
14. A look at the rulings in respect of the notice of motions dated 24th August, 2022 and 10th July, 2023 shows that the issues which the Defendant is raising in his application of 10th March, 2025 were not determined by the court. The application dated 24th August, 2022 was struck out as the firm of Stanley Nthiwa & Co. Advocates were found to have not been properly on record. They came to represent the Defendant after judgment without complying with Order 9 Rule 9 of the Civil Procedure Rules which required that an advocate seeking to represent a party post judgment has either to obtain a consent to do so from the previous advocate or seek leave of the court to come on record.
15. In the application dated 10th July, 2023 the court found that the application was improperly before the court as it purported to amend an application which had been struck out. In both rulings, the court was categorical that there was no need to delve into the other issues. This therefore clearly shows that the issues raised in the application dated 10th March, 2025 have never been determined on merits and therefore the application cannot be res judicata. I therefore find no merit in the preliminary objection which is hereby dismissed with costs to the Defendant.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF OCTOBER, 2025.

In The Presence Of:

Mr. Muthiani for Plaintiff

Court assistant – Steve Musyoki

