



Matunda & 2 others (Suing as the Registered Trustees/Officials of Christian Faith Church (Previously) Faith Ministries) v Mwenje & another (Environment and Land Case E115 of 2025) [2025] KEELC 6903 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E115 OF 2025
TW MURIGI, J
OCTOBER 3, 2025**

BETWEEN

**BISHOP EVANS MATUNDA 1ST PLAINTIFF
CHRISTANTUS, MUSIOMA 2ND PLAINTIFF
MECYLINE AGNETA OCHOLI 3RD PLAINTIFF
SUING AS THE REGISTERED TRUSTEES/OFFICIALS OF CHRISTIAN FAITH
CHURCH (PREVIOUSLY) FAITH MINISTRIES**

AND

**THE HONOURABLE MARK MWENJE 1ST DEFENDANT
BOARD MEMBERS, CDF EMBAKASAI WEST CONSTITUENCY 2ND
DEFENDANT**

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 2nd May 2025 raised by the Defendants on the following grounds:-
 - a. That the suit is res judicata as the issues raised herein were directly and substantially settled in Milimani ELC Case No. 449 of 2016, where it was declared that the suit property is a public utility plot for construction of a school.
 - b. That the suit property was allocated by the National Land Commission on behalf of the Nairobi City County Government to the Cabinet Secretary, Treasury, and earmarked for construction of Rena Primary School.



- c. That the Plaintiffs have no prima facie absolute and indefeasible claim to the suit property as it is intended for public utility.
 - d. That the suit is incurably and fatally defective, smacking of malice, and should be dismissed with costs.
2. The Preliminary objection was canvassed by way of written submissions.

The Defendants' Submissions

3. The Defendants filed their submissions dated 21st May, 2025.
4. On behalf of the Defendants, Counsel submitted that the main issue for determination is whether the instant suit is res judicata.
5. Counsel relied on Section 7 of the *Civil Procedure Act* to submit on the doctrine of res judicata.
6. Counsel further submitted that the ownership of the suit property was substantially determined in Milimani ELC Case No. 449 of 2016, and that no appeal has been filed against the decision. Based on the foregoing, Counsel asserted that the suit property is meant for public utility.
7. Counsel argued that the Plaintiffs unlawfully occupied the suit property which is meant for public utility. To buttress this point, Counsel cited Section 26 of the *Land Registration Act* to submit that the Plaintiffs are not the absolute and indefeasible owners of the suit property.
8. Counsel further submitted that the allocation of the suit property to the Plaintiffs was unlawful, as the property was designated for the construction of a school. Additionally, Counsel emphasized that the decision by the National Land Commission to revoke the title granted to the Plaintiffs is justified, and therefore, the construction of the school should proceed according to the original plan.

The Plaintiffs' Submissions

9. The Plaintiffs filed their submissions dated 9th June 2025.
10. On behalf of the Plaintiffs, Counsel outlined the following issues for the court's determination:
 - a. Whether this suit is res judicata?
 - b. Whether the allocation to the Cabinet Secretary, Treasury, was regular?
 - c. Whether the Plaintiffs have no prima facie absolute and indefeasible claim to the suit property by dint of it being a public utility?
 - d. Whether the suit is incurably and fatally defective?
11. Counsel submitted that the Defendants' preliminary objection is based on factual issues that will require evidentiary proof at a full trial. Counsel further submitted that the claim that the suit property is meant for public utility, the alleged allocation to the Cabinet Secretary, Treasury, and the assertion that the Plaintiffs lack a prima facie right to the suit property are disputed facts that should be determined in a trial.
12. On the first issue, Counsel submitted that the Defendants have not met the threshold outlined in Section 7 of the *Civil Procedure Act*, and established in the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* (2017) eKLR. Counsel further submitted that the Plaintiffs were not parties in ELC Case No. 449 of 2016 and therefore, their proprietary rights were not challenged or determined in that decision. To buttress this point, reliance was placed on the case



of John Florence Maritime Services Ltd & Ano v Cabinet Secretary for Transport & Infrastructure & 3 others (2015) eKLR, where the court stated that:-

“A litigant who was not a party to an earlier suit or had no right of audience therein cannot be shut out under the guise of *res judicata*”.

13. Counsel further submitted that the subject matter in ELC Case No. 449 of 2016 pertains to the legality of land allocated by Nairobi City County to another entity, whereas the subject matter in this suit concerns the validity and protection of the lease certificate issued to the Plaintiffs. Counsel emphasized that issues of ownership and constitutional protection of property rights are central to this case.
14. Regarding the second issue, Counsel submitted that the alleged allocation of the suit property to the Cabinet Secretary, Treasury, is invalid and does not oust the court's jurisdiction to examine the legality and constitutionality of the allocation.
15. Counsel further submitted that the alleged reallocation of the suit property violates Articles 40 and 47 of *the Constitution*, as the Plaintiffs were not served with a notice of revocation, repossession, or acquisition, nor given an opportunity to be heard.
16. Counsel argued that the Defendants failed to prove that they complied with the procedure set out for acquiring the suit property.
17. On the third issue, Counsel submitted that the issue of whether the suit property is intended for public use or if the Plaintiffs' title is indefeasible is a factual matter that can only be determined during trial. Counsel emphasized that the Plaintiffs' claim raises important issues that should be heard and determined.
18. Finally, Counsel contended that the Plaintiffs' suit is properly before the court and is founded on violations of the right to property, the right to a fair hearing, and protection from arbitrary eviction; consequently, the Defendants' claims are unsubstantiated, speculative, and devoid of supporting evidence.

Analysis And Determination

19. The law on Preliminary Objection is well settled. A Preliminary Objection must be based on a pure point of law.
20. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, Law JA stated;
 - i. “So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
21. Further on, Sir Charles Newbold JA stated;
 - a. “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 point of law which is argued on the 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 issue. The improper practice should stop.”

22. In *Oraro v Mbaja* (2005) eKLR Ojwang J (as he then was), described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood 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. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

23. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & Another* (1995) eKLR also captured the legal principle when it stated as follows; “A preliminary objection raises a pure point of law, which is argued on the 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.”

24. Having considered the Preliminary Objection and the rival submissions, the issue that arises for determination is whether the instant suit is *res judicata*.

25. The issue of *res judicata* can resolve the matter preliminarily without the necessity of determining the facts. The preliminary objection raised by the Defendants aligns with the description of a preliminary objection as outlined in the *Mukisa Biscuits* case *supra*.

26. The Defendants argued that the issue of ownership of the suit property was determined in *Milimani ELC Case No. 449 of 2016* and as such, this suit is *res judicata*.

27. The doctrine of *res judicata* is founded on Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, 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.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question, whether or not it was instituted before it...

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit... Explanation. -(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

28. The doctrine of *res judicata* is defined in *Black’s Law Dictionary*, 9th Edition, on page 1425, as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions, and that could have been but was not raised in the first suit.”



29. The elements necessary to succeed in a defense of res judicata were outlined in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, where the Court of Appeal stated that: -

“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;

The suit or issue was directly and substantially in issue in the former suit.

That former suit was between the same parties or parties under whom they or any of them claim.

Those parties were litigating under the same title.

The issue was heard and finally determined in the former suit.

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.”

30. The doctrine of res judicata is founded upon public policy. It seeks to accomplish two primary objectives: to ensure the finality of litigation and to safeguard individuals from being subjected to repetitive legal proceedings concerning the same dispute.

31. The essence of the doctrine of res judicata is to bring an end to litigation, and a party should not be vexed twice over the exact cause. That was the holding in Omondi v. National Bank of Kenya Ltd and Others (2001) EA 177.

32. The Plaintiffs denied any involvement in Milimani ELC Case No. 449 of 2016. They asserted that their proprietary rights were not determined in that suit.

33. The Defendants did not produce the pleadings and decision in the said suit to demonstrate that the matter in issue is directly and substantially the same as in previous suit, the previous suit involved the same parties or parties under whom they claim, and the parties must have litigated under the same title.

34. Based on the foregoing, I find that the Defendants have not demonstrated to the satisfaction of this court that the suit herein is res judicata.

35. Ultimately, I find that the Preliminary Objection is devoid of merit and the same is hereby dismissed with costs to the Plaintiffs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF OCTOBER, 2025.

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T. MURIGI JUDGE

In The Presence Of:-

In the absence of the parties Ahmed – Court assistant

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