



**Nadosoito v Nchoe & 3 others (Environment and Land Case E004 of 2023
& Environment and Land Appeal E003 of 2023 (Consolidated))
[2025] KEELC 7010 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CASE E004 OF 2023 & ENVIRONMENT
AND LAND APPEAL E003 OF 2023 (CONSOLIDATED)**

LN GACHERU, J

OCTOBER 16, 2025

BETWEEN

KILUSU OLE NADOSOITO APPELLANT

AND

KELENA OLE NCHOE 1ST RESPONDENT

RAPHAEL NCHOKO 2ND RESPONDENT

SOKOIPEI KIPILA 3RD RESPONDENT

REGISTRAR OF LANDS NAROK 4TH RESPONDENT

*(Being an Appeal from the Ruling and the Orders of Hon. P.L.
Shinyanda (SRM) in Narok CMELC NO. E063 of 2023 (Kilusu Ole
Nadosoito vs Kelena Ole Nchoe & 3 Others) delivered on 27th July 2023)*

JUDGMENT

1. This is an Appeal against the Ruling of Hon . P. L Shinyanda(SRM) in Chief Magistrates Court Narok, in MELC No EO63 OF 2022, which Ruling upheld the Preliminary Objection dated 4th October 2022, raised by the 1st and 3rd Respondents and struck out the Appellant’s (Plaintiff) suit on grounds of being Res judicata ELC JR APP E004 OF 2021.
2. The Appellant herein who was the Plaintiff at the lower court has challenged that finding of the trial court and has argued that the trial court misapplied the doctrine of res-judicata, failed to consider the substantive issues of fraud and ownership raised by the Appellant herein as the Plaintiff in the lower court’s case and thus the said suit was prematurely terminated the suit.



Factual Background

3. The Appellant, Kilusu Ole Nandosooito, had alleged in his Complaint that he was the original allottee of Land parcels Nos. 118 and 119, within Naisoya Land Adjudication Section, having been allocated by the Adjudication Committee. The said land comprised of 42 acres of land in Naisoya Adjudication Section, Narok North Sub-County.
4. It was the Appellant's case that in 1982, he was convicted and imprisoned following a dispute with the local Adjudication Committee Members. Further, that while in prison, his brother negotiated with the 1st and 2nd Respondents to pay his fine of Kshs. 17,500.
5. The Appellant contended that without his knowledge or consent, the Respondents fraudulently altered the Adjudication register, deleted his name, subdivided the land into two parcels, and reallocated the said land to themselves.
6. He further alleged that the 1st and 2nd Respondents allegedly allocated themselves 38 acres, out of the suit land and later sold 8 acres to the 3rd Respondent, leaving the Appellant with only 6 acres. Therefore, the Respondents' action was illegal, fraudulent and mischievous, and the reasons why he filed the suit that was before the trial court. He had particularized the illegality and fraud of the 1st and 2nd Respondents in his claim.
7. The Appellant has further claimed that the above illegal activities were done under the watch of the 4th Respondent, as the person in charge of the Land Registry in Narok. He also averred that he has been in possession of the 42 Acres of Land since 1980, when he was allocated the same by the Adjudication Committee, Narok.
8. He further claimed that for over decades, he has pursued remedies through various government channels, including the Commission of Inquiry into the Land Law System of Kenya (2000–2003) and the Office of the President. He attached Letters acknowledging his complaints as part of his List of Documents to be produced as exhibits. However, no final administrative resolution has ever been issued.
9. Therefore, at the trial court Suit NO MCM ELC No. 63 of 2022, the Appellant (as Plaintiff) has sought for these orders; a. Declaration that he is the rightful owner of LR Nos. 118 & 119. b. Order directing the 4th Defendant (Registrar) to delete the Respondents' names and reinstate his name in the adjudication register. c. Permanent injunction restraining Defendants from trespassing, alienating, or selling the land. d. Costs of the suit.
10. The 1st and 3rd Defendants appointed the Law Firm of Namunyak Nkurrurah Advocates to Appear for them on 19th September 2022. Further, on 4th October 2022, the 1st and 3rd Defendants filed a Preliminary Objection and argued that the suit was res judicata, having already been determined in the Judicial Review proceedings (ELC JR APP E004 of 2021), and therefore, it should be struck out with costs.
11. The trial Court directed the said Preliminary Objection be canvassed by way of written submissions, and the parties complied with the said directives. The 1st and 3rd Defendants (Respondents now) filed their written submissions on 15th November 2022, and relied on various decided cases and annexed a copy of the Judgment in ELC JR NO E004 OF 2021. They urged the trial court to uphold the Preliminary Objection.
12. The Appellant as the Plaintiff before the trial court filed his written submissions on 6th March 2023 and urged the court to dismiss the Preliminary Objection, arguing that the matter is not res judicata, as the



Judicial Review in question did not deal with the contested issues, which issues require interrogation by the court.

13. After consideration of the Preliminary Objection dated 4th October 2021, the rival written submissions, the trial court delivered its Ruling on 27th July 2023 and upheld the said Preliminary Objection. The trial court held that the suit was barred by Section 7 of the Civil Procedure Act, since the issues raised in the said suit had been previously determined in ELC Judicial Review No. E004 OF 2021.
14. The trial court proceeded to strike out the entire suit and awarded half costs to the 1st and 3rd Respondents, since the suit was determined preliminarily.
15. The Appellant as the Plaintiff before the trial court was aggrieved by the said decision and filed the instant Appeal vide a Memorandum of Appeal dated 16th August 2023, and urged the court to set aside the Ruling of the trial court dated 27th July 2023, and set the matter down for hearing to be determined on merit. They also sought for costs.
16. The summary of the Grounds of Appeal are as follows; The Appellant faulted the Ruling of trial court on the following:
 - a. Error in Law: That the trial court misapplied the doctrine of res judicata to judicial review proceedings, which only determine procedure, not ownership.
 - b. Premature Striking Out: That the trial court dismissed the substantive claims of fraud and ownership without trial.
 - c. Failure to Apply Authorities Correctly: That the trial court relied on case law out of context.
 - d. Ignoring Evidence and Submissions: That the trial court failed to consider documentary evidence and arguments filed by the Plaintiff.
 - e. Miscarriage of Justice: That by shutting out allegations of fraud and forgery, the trial court denied the Appellant(Plaintiff) a chance to ventilate issues on merit.
17. Therefore, the Appellant sought for the following reliefs; The ruling of the trial court dated 27 July 2023 be set aside, and the suit be reinstated for full hearing and be determined on merits, plus Costs, be provided for.
18. This Appeal was canvassed by way of written submissions. The Appellant filed his submissions through J. Martim & Co Advocates, who submitted that the Preliminary Objection was defective as it ought to have been filed through a formal Application. It was his submissions that the objection did not meet the criteria of what amount to a Preliminary Objection as settled in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969] EA 696
19. He submitted that even if the 1st and 3rd Defendants applied for the suit to be struck out for being res judicata ELC JR NO E004 OF 2021, that was a mere allegation as the said Judicial Review Proceedings and Judgment were not attached, and the Appellant was not given an opportunity to refute that allegation.
20. He argued that the trial court made a decision without looking at the pleadings and judgment of the referred Judicial Review, and it was not clear how the decision to strike out was arrived at. That the Appellant was simply ambushed and expected to defend a preliminary objection without the benefit of the documents referred to.



21. He also submitted that the trial magistrate misinterpreted the law on Section 7 of the [Civil Procedure Act](#), and struck out the suit which decision was erroneous. He reiterated that the Judicial Review challenged the process and not the substantive issues. Further, that the trial magistrate ought to have looked at the entire Plaint together with the attached evidence and she ought to have arrived at a finding that there were contested issues which ought to have been determined by calling of evidence and the same be determined on merit.
22. Therefore, it was the Appellant submissions that the suit before the trial court was not res judicata, and the trial court erred in allowing the Preliminary Objection, and striking out the entire suit. He urged the court to set aside the said Ruling, and set the suit down for full hearing.
23. The 1st and 3rd Respondents who filed the Preliminary Objection that culminated in this Appeal did not file the Submissions. However, on 16th December 2024, the 1st and 3rd Respondent filed a Notice of Preliminary Objection to the APPEAL on the ground that the Instant Appeal is res judicata ELC JR NO E004 OF 2021; and is also an abuse of the court process. They urged the court to dismiss the Appeal with costs on the point of law.
24. The court has considered the instant Appeal vide the Memo of Appeal, the Pleadings and evidence before the trial court as contained in the Record of Appeal and the impugned Ruling and renders itself as follows;
25. This being a first Appeal, the court will be guided by the provisions of sections 65 and 78 of the [Civil Procedure Act](#), wherein the this being a first appeal, the court is allowed to consider both the facts and law and the evidence presented before the trial court and then comes up with its own independent conclusion.
26. In the case of *Selle & Another vs Associated Motor Boat Co Ltd & Another* (1968) EA 123, the Court of Appeal held as follows;

“ An Appeal to this court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind it has neither seen nor heard the witness and should make due allowance in this respect. In particular, the court is not bound to follow the trial judge’s findings of fact if it appears that either he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence”
27. Therefore, this court has a duty to re-evaluate, re-consider, re-analyse and re-assess the evidence tendered before the trial court, and then come up with its own independent conclusion. This is an Appeal from an Interlocutory Ruling, and therefore the trial court could not have observed the demeanor of the witnesses.
28. Having considered the Memo of Appeal, the Record of Appeal, the written submissions by the Appellant herein and the Preliminary Objection by the 1st and 3rd Respondents, the court finds the issue for determination are;
 1. Whether the Preliminary Objection as raised by the 1st and 3rd Defendants(Respondents) met the criteria of what constitute a Preliminary Objection.
 2. Whether ELC Judicial Review App. No. E004 OF 2021 proceedings constituted a final determination on the merits of ownership and fraud.



3. Whether the Appellant's allegations of fraud and illegal tampering with adjudication records warranted a substantive hearing.
4. Whether the Appellant's suit before the trial court should be reinstated and the said suit be set down for a full hearing.
5. Who should bear costs of this Appeal and the PO before the trial court.

I. Whether the Preliminary Objection as raised by the 1st and 3rd Defendants(Respondents) met the criteria of what constitute a Preliminary Objection.

29. In his submissions, the Appellant argued that the Preliminary Objection raised before the trial court did not meet the criteria of what amounted to a proper Preliminary Objection because the issue of res – judicata ought to have been raised through a notice of Motion Application but not through a preliminary objection. The Appellant relied on the case of Mukisa Biscuit Manufacturing Co Ltd(supra) on the description of what amount to a preliminary Objection.
30. However, the court has noted that this is not one of the grounds of Appeal. Further, the said issue had not been raised before the trial court. The Appellant submitted that the 1st and 3rd Defendants did not attach the pleadings of the ELC JR NO E004 OF 2021, in the proceedings and it was strange how the trial court arrived at a finding that the suit was res- judicata without the proceedings of the referred JR.
31. Strangely, the advocate who filed this Appeal was not the one who filed the suit before the trial court. It is clear from the 1st and 3rd Defendants(Respondents) submissions that the said Judgement of Narok ELC JR E004 OF 2021, was attached and the said submissions were served upon the counsel who was on record for the Appellant then Onindo& Onindo Associates.
32. The Appellant as the Plaintiff filed his submissions on 6th March 2023, and made reference to the said Judgment in ELC JR E004 of 2021. The Appellant cannot therefore be heard to say that they were ambushed and did not have an opportunity to see the referred ELC JR.
33. It is evident that a Preliminary Objection raises pure points of law. The Preliminary Objection before the trial court was on the doctrine of Res judicata, and it was argued that the suit was Res Judicata ELC JR E004 OF 2021.
34. Though the issue of previous suits would require ascertainment of facts, it is evident that where facts necessary to establish res judicata are undisputed and those facts can be determined from the existing court documents, then the said objection can be a pure point of law. There is no dispute that the ELCJR E004 OF 2021, was filed and determined in this court. That is undisputed fact, and thus the objection is a pure point of law.
35. Courts have severally held that objection on the grounds of res judicata is generally considered a pure point of law, but only if the facts are not disputed and can be determined solely from the pleadings and previous court records. If the objection requires a court to examine evidence outside of the pleadings to determine whether the facts of the case meet the requirements for res judicata, it is not a pure point of law and cannot be decided as a preliminary objection. See the case of Shah v Kenya Canvas Limited & another (Civil Suit E252 of 2022) [2023] KEHC 25428 (KLR) (Commercial and Tax) (17 November 2023) (Ruling)
36. Therefore depending on the circumstances, the objection on res judicata involves questions of fact or mixed questions of law and fact, and the fact that the trial magistrate determined the objection as a



Preliminary Objection and not as a Notice of Motion Application, did not err. The said Preliminary Objection was a pure point of law.

II. Whether ELC Judicial Review App. No. E004 OF 2021 proceedings constituted a final determination on the merits of ownership and fraud.

37. It is evident from the Ruling of the trial court, the court did uphold the Preliminary Objection as raised by the 1st and 3rd Defendants thereon (Respondents herein) and stated that the issues raised by the Appellant had been determined by the Minister and later by the ELC in its Judgement in the ELC Judicial Review No. E004 OF 2021. The trial court held that it cannot purport to handle the issues that had been raised by the Appellant in the Judicial review.

38. The trial court quoted para 22 and 23 of the Judgement in ELC JR E004 OF 2021 as follows; -

Paragraph 22

“Based on the summary of the applicant’s claim, the court is of the view that the issues raised involved mainly contested issues of fact. In hindsight, the applicant is inviting this court to determine whether there was a written sale agreement in existence. In my view, these are contested facts that are apparent from the dispute resolution proceedings during adjudication. It is basic law that judicial review is ill equipped to deal with dispute matters of fact where it would involve fact finding on an issue which requires proof. For the facts presented by the applicant to be proved, there is need for direct evidence to be adduced and tested through cross-examination of witnesses before the court can make conclusions.”

Paragraph 23

“It is trite law that a court hearing a judicial review case is concerned only with the lawfulness of the process by which the decision was arrived at. Judicial review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory and not appellate. This court cannot sit on appeal on the decision of the 2nd Respondent and review the merits of the same as one would be dealing with an appeal...” (Emphasis mine)

39. It is clear that the ELC in the above paragraphs held and found that the issues raised by the Appellant in the said ELC JR were contested facts, and Judicial Review is ill equipped to deal with disputed matters. Further the Court held that its role was supervisory and not an appellate court. In the said Judicial Review, the court dealt with the issue of whether the said Judicial Review met the criteria for issuance of prerogative orders of certiorari or mandamus, but did not deal with the contested issue of ownership of the suit land.

40. Therefore, it is this court considered view that ELC JR E004 OF 2021, did not constitute a final determination on merit of ownership of the suit land and the issue of fraud.

III. Whether the Appellant’s allegations of fraud and illegal tampering with adjudication records warranted a substantive hearing.

41. In his Complaint dated 8th August 2022, the Appellant raised the allegations of illegality and fraud on the part of the Defendants in acquiring the suit property. The Judgement in ELC JR E004 OF 2021 was clear that it did not go into the merit of the claims raised by the Appellant on fraud or illegal tampering with the adjudication record.



42. This court has considered the Plaintiff, the annexures attached to it, being several letters of complaints to different government agencies, wherein the Appellant has always complained about being cheated out of his land by the Respondents. Land is an emotive issue and a litigant should be given his day in court.
43. Judicial Review typically examines the legality of process, not substantive rights of ownership. If prior proceedings were limited to procedure, *res judicata* may not apply. Further, Fraud is a serious claim requiring strict proof through oral evidence and cross-examination; striking out may have been premature. judicial review did not conclusively determine ownership, fraud, and title, then the appeal has merit, and the suit should be reinstated.
44. Since the Appellant's claim hinges on claims of fraud, illegality and irregular allocation of his parcels of land to the Respondents and he had sought for declaration that he is the rightful owner of land parcels no 118 and 119, and that proper procedure was not followed in allocating the said land to 1st and 2nd Defendants(Respondents), this court finds that the ELCJR NO E004 OF 2021, did not address those allegations and the Appellant should be allowed to ventilate his case through substantive hearing.
45. Courts have always held that striking out suits should be considered as a last resort as a litigant should not be removed from the seat of justice. See the case of *D.T. Dobie & Company Kenya Limited versus Joseph Mbaria Muchina & Another* [1980] eKLR, court held that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

IV) Whether the Appellant's suit before the trial court should be reinstated and the said suit be set down for a full hearing.

46. Having found that the issues raised and determined in the ELCJR E004 OF 2021, were not substantive issues of land ownership and fraud as raised by the Appellant in his Plaintiff dated 8th August 2022, this court finds that the logical conclusion herein is to allow the reinstatement of the Appellant's suit, and having it set down for full hearing and be decided on merit. Of course the Appellant will have the onerous task of calling sufficient evidence to prove his case on the required standard of balance of probabilities.
47. For the above reasons, this court in its appellate jurisdiction finds merit in the instant Appeal, and proceeds to set aside the Ruling of the trial court dated 27th July 2023, and directs the Narok MELC NO. E063 OF 2021, be reinstated and set down for full hearing and be determined on merit.

IV. Who should bear costs of this Appeal and the PO before the trial court.

48. Section 27 of the *Civil Procedure Act* provides that costs are awarded at the discretion of the court. However, ordinarily costs follow the event, and are awarded to the successful litigant.
49. The Appellant herein is the successful litigant and is awarded costs of this Appeal and costs at the lower court.
50. Ultimately, this court allows the Appellant Appeal dated 16th August 2023, by setting Aside the Ruling dated 27th July 2023, and directing that the said suit be set down for hearing and be determined on merit.



51. The suit will be remitted back to the Chief Magistrates Court for full hearing by calling of evidence. The said suit to be heard by any other magistrate other than Hon. P.L Shinyanda who delivered the impugned ruling.
52. Further, the Appellant is awarded costs of this Appeal, and costs at the lower court. However, the court has noted that this is an old matter, which is now a backlog. The Appellant, or Plaintiff at the said reinstated suit to prepare the suit for hearing and ensure that the same is heard and determined within the next 180 days from the date hereof.

Appeal allowed Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 16TH DAY OF OCTOBER 2025

L. GACHERU

JUDGE

Delivered online in the presence of

Elijah Meyoki - Court Assistant.

Ms. Chepkemoi for the Appellant

N/A for the Respondent

