



**Ongoto v Machuka & 2 others (Environment and Land Case
68 of 2019) [2025] KEELC 6945 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 68 OF 2019
MD MWANGI, J
OCTOBER 9, 2025**

BETWEEN

CHARLES ONGOTO PLAINTIFF

AND

JOSEPHAT MAKWORO MACHUKA 1ST DEFENDANT

LAND REGISTRAR, NGONG 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

(In respect of the Preliminary Objection dated 19th March 2025 contesting the court's jurisdiction to hear and determine the suit pursuant to Section 7 of the *Civil Procedure Act*)

Introduction

1. By way of a Notice of Preliminary Objection dated 19th March 2025, the 1st Defendant challenged the court's jurisdiction to hear and determine the plaintiff's suit filed vide the plaint dated 22nd July 2019 and thus prays for its striking out on the following grounds:
 - a. That the suit is res judicata.
 - b. That the Court lacks jurisdiction to entertain the matter.
 - c. That the suit is bad in law, vexatious.
 - d. That the suit is misconceived and an abuse of the court process.
 - e. That the issues raised by the Plaintiff herein were directly and substantially in issue in Milimani Children Cause No. 187 of 2013 which was heard and determined.



- f. That Milimani Children Cause No. 187 of 2013 was dismissed for want of prosecution through a decree issued at Nairobi on 19th June 2019.
 - g. That if the Plaintiff was aggrieved by the said determination, the proper course of action was to prefer an appeal before the appropriate appellate forum and not to institute fresh proceedings, which amounts to forum shopping.
2. The preliminary objection is primarily founded on the doctrine of res judicata and the jurisdictional competence of the Court to entertain the suit as framed. It is further supported by the decree issued in Milimani Children Cause No. 187 of 2013, annexed to the Preliminary Objection.

Directions

3. The court directed that the preliminary objection be canvassed by way of written submissions. I have had the opportunity to read the parties' submissions and the same have been considered in the writing of this ruling.

Analysis and Determination

4. Having carefully considered the Preliminary Objection, this court finds that the central issue raised in the objection is that the present suit is res judicata, allegedly the question in issue herein having already been determined in Milimani Children Cause No. 187 of 2013.
5. It is not lost upon this Court that this is not the first time the 1st Defendant has raised the issue of res judicata. The record is clear that by way of a Preliminary Objection dated 30th September 2020, filed by the same law firm of Mwenda Njagi & Co. Advocates, the 1st Defendant advanced a similar objection. That objection was heard and determined by my predecessor, Justice Maxwell Gicheru in his ruling delivered on 28th June 2022. In that ruling, the Court pronounced itself on the issue, and to that extent, the matter stands settled.
6. For the 1st Defendant to again raise the same issue through a fresh Preliminary Objection amounts to nothing more than an abuse of the court process. It is trite law that parties ought not to vex the Court and their opponents with repetitive objections already determined. As the Court of Appeal stated in *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR:
- “The concept of abuse of court process is not limited to instances of frivolous or vexatious proceedings. It encompasses situations where the process of court is misused or employed in bad faith to achieve ends that are improper. Courts of law must, at all times, guard against such abuse and invoke their inherent jurisdiction to ensure that the process of court is not abused.”
7. Additionally, it is important to observe that an advocate, as an officer of the Court, owes a duty to the Court. Re-litigating an issue previously determined by the Court, while fully aware of the subsisting ruling of 28th June 2022, is a dereliction of that duty and amounts to forum shopping, which this Court cannot countenance.
8. Even if I were to entertain the objection on its merits, the form in which it has been raised is legally untenable. The starting point is the decision in *Mukhisa Biscuit Manufacturing Co. Ltd v West End*



Distributors Ltd [1969] EA 696, where the Court set out the parameters of a proper preliminary objection in the following terms:

“A preliminary objection consists of a point of law which has 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

9. The court, in the same case emphasized the nature of a true preliminary objection, stating:

“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 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.”

10. The principle was later reinforced by the Court of Appeal in *Oraro v Mbaja* [2005] eKLR, where Ojwang J. (as he then was) reiterated as follows:

“A preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit... Anything that requires the ascertainment of facts, or the exercise of judicial discretion, cannot be raised as a preliminary objection.”

11. Section 7 of the *Civil Procedure Act* provides in mandatory terms that:

“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.”

12. The plea of *res judicata* does not fall within the category of pure points of law that can be disposed of at a preliminary stage without reference to evidence. By its very nature, *res judicata* demands a factual inquiry into the pleadings, proceedings, judgment, or ruling in the earlier suit, and a comparison with the issues in the current suit to determine whether the matter directly and substantially in issue is the same, whether the parties are the same, and whether the former court was competent and made a final determination.

13. This position has been made clear by the superior courts. In *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another* [2014] eKLR, the Court stated:

“The plea of *res judicata* cannot be raised by way of a preliminary objection. This is because it requires the Court to look at the pleadings and the judgment in the former suit, and to satisfy itself that the elements set out in section 7 of the *Civil Procedure Act* have been established. That exercise goes beyond a pure point of law and therefore takes the issue outside the realm of a preliminary objection.”

14. It follows that the invocation of *res judicata* must be by way of a substantive application supported by evidence demonstrating that the statutory ingredients have been met.



15. In light of the foregoing, I find that the Preliminary Objection herein is an abuse of the process of court but further that it lacks merit. The same is hereby dismissed with costs to the Plaintiff assessed at Kshs.30,000/- to be paid in the next 30 days from the date of this ruling failing which the 1st Defendant shall be denied right of audience before this court.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 9TH DAY OF OCTOBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

N/A by Parties

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

