



**Kang'ethe v Nkirote & another (Environment & Land Case  
E004 of 2024) [2024] KEMC 121 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEMC 121 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
ENVIRONMENT & LAND CASE E004 OF 2024  
AT SITATI, SPM  
JUNE 28, 2024**

**BETWEEN**

**DANPHONE KAMUNA KANG'ETHE ..... PLAINTIFF**

**AND**

**JENNIFER NKIROTE ..... 1<sup>ST</sup> DEFENDANT**

**CHARITY KATHURE NKANATA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Preliminary Objection dated 7<sup>th</sup> May, 2024 the defendants/objectors challenged this suit on the following points of law:
  1. That the suit is res judicata Githongo Elc Case No. E005 Of 2022 And Meru Elc Case No.E012 OF 2022(O.S.).
  2. That the suit is filed contrary to section 7 of the *Civil Procedure Act*, 2010 and therefore the Honourable Court lacks jurisdiction since the subject matter which is the 1981 Agreement in respect of LR NO. Abothuguchi/Makandune/786 has been dealt with in the above-mentioned matters.
  3. That the suit is time-barred under section 4 and 7 of the *Limitation of Actions Act* cap 22.
  4. That the suit is an abuse of the process of court and should be dismissed under section 3A of the Civil Procedure Rules.
2. The preliminary objection is directed the whole suit which was instituted on 12<sup>th</sup> April, 2024 by way of plaint seeking the following reliefs:



- a. An order of cancellation of the registration of LR. No. Abothuguchi/Makandune/3420 which is registered in the name of the 2<sup>nd</sup> defendant and the same to be registered in the name of the Plaintiff.
  - b. An order of permanent injunction barring the Defendants, their agents, servants, assigns or successors in title from interfering or in any way dealing with the plaintiff quiet user and occupation of and utilization of LR. Abothuguchi/Makandune/3420.
  - c. An order directed to the Lands Registrar to ensure implementation of the prayer No. A above.
  - d. An order directed to the Land Registrar to dispense with the production of the original title deed during the registration process.
  - e. Costs of the suit plus interest thereon.
3. Concurrent with the objection was a replying affidavit by the defendants dated 7<sup>th</sup> May, 2024 in which the defendants/objectors deposed that the suit was indeed res judicata, time-barred and an abuse of court process and produced the following annexures in support of their contentions: Official search to prove that the land belonged to one Mbiriti Ruthiri (deceased) even before his demise in 1984. Githongo Citation Cause No. 5 of 2019 in which the plaintiff had cited the defendants to take out letters of administration for the estate of Mbiriti Ruthiri (deceased) and this was duly done by the defendants leading to a closure of the Citation Cause. The rectified grant showing that the resultant Githongo Succession Cause No. 33 of 2019 was finalized with all the beneficiaries getting their shares. That as a result of the subdivision of the estate, one of the beneficiaries sold parcel Abothuguchi/Makandune/3420 to the 2<sup>nd</sup> defendant herein. Green card to prove sharing out of the shares of the beneficiaries. Ruling dated 1<sup>st</sup> July, 2022 in Githongo SPM ELC Case E005 of 2022 in which the court dismissed a similar claim of ownership of the very same subject parcel of land by the very same plaintiff and the dismissal was made on the ground of limitation of actions since the time to file the suit lapsed in 1993 being 12 years from the date the cause of action arose. Decree dated 26<sup>th</sup> September, 2023 in Meru ELC CASE E012 of 2022 (O.S.) dismissing the plaintiff's claim for declaration of being an owner from the deceased.

### **Objector's Written Submissions**

4. In furtherance of the preliminary objection, the defendants lodged written submissions placing reliance on the following authorities:
- a. Salim Mohamed Salim Tweshe v Khalid Salim Naaman & 5 others (2020) e KLR where C.K Yano J. stated:

The cause of action in this case is indicated to have arisen on 14<sup>th</sup> May, 1983. The suit was filed on 2<sup>nd</sup> October, 2018 which was far beyond the six years period within which an action founded on contract may be brought and also beyond the twelve years within which an action may be brought for the recovery of land. From the above provisions of the law, it is evident that the plaintiff's suit herein is statute barred. In this case, the plaintiff argues that the time the cause of action accrued is contested and therefore the objection before court is not on a pure point of law. However, in my view the matters raised are purely on points of law and in particular the issue that the suit is caught by limitation of time.

From the pleadings and especially the plaint, it is clear that the plaintiff's claim is grounded on a contract which arose in the year 1983. The court does not require any evidence to arrive at a finding that the suit is caught by limitation of time. Am alive to the fact that at this stage,



the court cannot investigate on some facts as to when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. I am only beholden to look at the pleadings as I have done in the instant case.”

On the basis of this authority it was contended that the alleged sale agreement between the plaintiff and the now deceased Mbiriti Ruthiri was recorded in 1984 which was more than 40 years ago without any transfer being done and actually lapsed in 1993 as was already decided in Githongo ELC E005 of 2022.

b. Oraro...Vs...Mbaja (2005) 1KLR 141, where the Court held that:-

Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

c. E.T vs Attorney General & Another (2012) eKLR where it was held that:

The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, „parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.# In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, „If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

5. On the strength of the foregoing authorities, the objectors submitted that this suit is res judicata Githongo Elc Case NO. E005 OF 2022 and Meru Elc Case No. E012 OF 2022 (OS) even if the plaintiff applicant herein has added another party for purposes of evading the doctrine of res judicata.

### **The Plaintiff’s/respondent’s Submissions**

6. In their written submissions dated 22<sup>nd</sup> JUNE, 2024 the plaintiff did not address the preliminary objection. Instead, the submissions canvassed the interlocutory application for injunction. Notwithstanding this, the court studied the said submissions and noticed that the plaintiff/respondent did not contest the fact that the alleged sale agreement between the now deceased Mbiriti Ruthiri and the plaintiff was recorded in 1981 over the subject land. This was an important submission because it settled the factual basis for the purposes of analysing the preliminary points of law raised by the objectors.

7. The firm of Otieno A. & Co. Advocates represented the defendants/objectors while the firm of Munene Kirimi & Co. Advocates represented the plaintiff/respondent.

### **Issue For Determination: Res Judicata**

8. Res judicata is regulated by Section 7 of the [Civil Procedure Act](#) which provides:

“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.”

9. Apart from the objector’s own cited authorities which the court has considered, the court had occasion to consider the authority of *Diocese Of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR (M.A. Odeny J.) held as follows

“From the proceedings and the decree it is clear that this is a case that falls on all fours within the doctrine of res judicata. What more would a party require to prove that a case is res judicata. In the case of *Henderson vs Henderson* (1843) 67 ER 313 res-judicata was described as follows;

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case.

The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.

10. Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.
12. I find that this suit is res judicata and an abuse of the court process. The preliminary objection has merit and hence upheld. Plaintiff’s case is dismissed with costs.”
13. From the material placed before this Honourable Court, it is the finding of this court that the present suit is indeed res judicata. The issues of ownership and limitation of actions were finally dealt with in 2 different courts:Githongo ELC E005 of 2022 wherein the court found that the plaintiff’s claim therein for the same subject land now Abothuguchi/Makandune/3420 was time barred by the *Limitation of Actions Act* since the alleged sale agreement lapsed way back in 1993. No appeal was filed.In Meru ELC E012 of 2019 (O.S.) the same plaintiff had sued to be declared an owner but the same was dismissed with costs. No appeal overturning that order has been allowed.The substance of the present suit still revolves around the ownership of the subject parcel of land which 2 courts have already looked into with the participation of the plaintiff herein.
14. That being so, the court finds that the plaintiff is abusing the court process and must be stopped by a dismissal with costs of the entire suit for being res judicata. It is so ordered. Right of appeal is 30 days.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 28<sup>TH</sup> DAY OF JUNE, 2024.**

**HON.T.A. SITATI SPM**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**



Munene Kiriimi Advocate For The Applicant/respondent

Miss Otieno C Advocate For The Defendant/objector

