



REPUBLIC OF KENYA



**Cherogony v Chiri (Environment and Land Case E082 of 2025)
[2025] KEELC 7772 (KLR) (11 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE E082 OF 2025
MAO ODENY, J
NOVEMBER 11, 2025**

BETWEEN

MATHEW CHEBON CHEROGONY PLAINTIFF

AND

JOHN WACIRA CHIRI DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff Applicant’s Notice of Motion application dated 18th August, 2025, and the Defendant Respondent’s Notice of Preliminary Objection dated 17th September, 2025. The Plaintiff Applicant’s Notice of Motion application seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit the court be pleased to restrain the Defendant from implementing the notice dated 23rd April, 2025 by evicting the Applicant from title Nos. Nakuru Municipality Block 29 1445 and 1087.
 - d. That the costs of this application be provided for.
2. The application is supported by the annexed affidavit of Mathew Chebon Cherogony sworn on 18th August, 2025, where he deponed that he has been in possession and occupation of Nakuru Municipality Block 29 1445 and 1087 since 1980. He further deponed that the Defendant caused the two parcels of land to be registered in his name more than twelve years after obtaining registration of the said parcels of land.
3. The Plaintiff Applicant deponed that on or about 16th July, 2025, the Defendant issued him with a notice dated 23rd April, 2025 to vacate the land within ninety days. In his deposition he stated that he



replied to the said notice and he believes the Respondent wants to use unlawful means to recover the suit land from him. The Plaintiff Applicant urged the court to grant the orders sought.

4. John Wacira Chiri, the Defendant Respondent filed a Replying Affidavit sworn on 17th September, 2025, and deponed that the application is an abuse of court process as the suit is Res-judicata. He deponed that the notice to vacate the suit land was issued after the delivery of the judgment in Nakuru ELC No 212 of 2013 (O.S) where the applicant had sued him together with others over the same issues. The Defendant Respondent deponed that the applicant has not paid him costs of the previous suit and he prayed that the applicant be ordered to deposit security for the costs of Ksh.600,000 = before he is allowed to ventilate its case.
5. The Defendant Respondent also raised a Notice of Preliminary Objection dated 17th September, 2025 on the following grounds:
 - a. That this matter is Res-Judicata because the same issue has been decided in Nakuru Elc No 212 of 2013 (O.S) between the same parties.
 - b. That the claim of adverse possession is bad in law and premature as all the statutory requirements for a claim of adverse possession as provided under the *akn ke act 1968 21 limitation of actions act* cap 22 of laws of Kenya have not been met.
 - c. That time stops to run when there is a pending proceedings between the same parties over the same subject matter and the same issues.
 - d. That we pray that the suit be struck out with punitive costs to the applicant.

Applicant's Submissions

6. Counsel for the Applicant filed submissions dated 30th September, 2025, and submitted that the court has to examine the statutory notice in light of the provisions of Sections 7 and 17 of the *akn ke act 1968 21 Limitation of Actions Act*, and relied on the cases of Lilian Njeri Muranja & John Muranja Mahinda vs Virginia Nyambura Ndiba & Kajiado County Government [2014] eKLR and Donald Osewe Oluoch vs Kenya Airways Limited [2017] eKLR.
7. Counsel submitted that the Applicant seeks a declaration that the statutory notice lacks legal foundation as it is founded on a title that has been extinguished in law. Counsel further relied on the case of Giella vs Cassman Brown & Co Ltd, 1973 EA 358 and submitted that if the applicant is removed from the suit land, he will suffer irreparable damage as he is in occupation and control of the parcels of land in dispute since the 1980s. Counsel submitted that the Applicant is in possession of the disputed parcels of land and urged the court to dismiss the preliminary objection and to allow the application.

Respondent's Submissions

8. Counsel for the Respondent filed submissions dated 1st October, 2025, and identified the following issues for determination:
 - a. Whether this suit is res judicata?
 - b. Whether the prayers sought in the interim have merit as founded on the Limitation of Actions?
9. On the first issue, counsel submitted that the parties were the same in Nakuru ELC 212 OF 2013 (O.S) where the Respondent was the 8th Defendant and the matter was heard and determined on 28th March, 2025, and the Plaintiff's case was dismissed. Counsel relied on Section 7 of the *akn ke act 1924 3 Civil*



Procedure Act and Section 107 of the *akn ke act 1963 46 Evidence Act* and submitted that the matter is res judicata.

10. On the second issue, counsel submitted that if the court finds that the preliminary objection has merit, the court should proceed to strike out the entire suit with costs.

Analysis And Determination

11. The issues for determination are: whether the Defendant Respondent's Notice of Preliminary Objection dated 17th September, 2025, has merit and whether the court should restrain the Defendant from implementing the notice dated 23rd April, 2025.
12. The Defendant's Notice of preliminary objection is premised on the matter being res judicata and the claim of adverse possession being premature under the *akn ke act 1968 21 Limitation of Actions Act* Cap 22 of the Laws of Kenya.
13. The court in the case of *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another* [2014] eKLR held as follows:

“I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection.”

14. On whether an issue of limitation of time can be raised through a preliminary objection, the court in the case of *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi* [2019] eKLR held as follows:

“ 13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial.

On this see the case of *Oruta & Another vs. Nyamato* [1998] KLR 590, where the court held that limitation of action:-

“...could only be queried at the trial but not by...a preliminary objection...The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”



14. See also the case of Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *akn ke act 1968 21 Limitation of Actions Act...*”

15. The claims of the matter being Res-judicata and the defense under limitation of actions cannot be raised by way of a Preliminary objection. The Respondent has however, filed a Replying affidavit to the applicant’s Notice of Motion application dated 18th August, 2025, where he avers that the parties were the same in Nakuru ELC 212 OF 2013 (O.S) where the Respondent was the 8th Defendant and the matter was heard and determined on 28th March, 2025, whereby the Plaintiff’s case was dismissed.
16. In the case of Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR, the court stated as follows in respect of what constitutes the elements of res judicata:
- a. The former judgment or order must be final;
 - b. The judgment or order must be on merits;
 - c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identity of parties, of subject matter and cause of action.
17. In cases where the issue of res judicata is glaring and a replying affidavit has been filed with the supporting documentation, including a judgment or decree that shows that the parties were similar and litigating over the same subject matter, where a competent court has rendered a decision, it would be remiss of the court to turn a blind eye to such.
18. In the case of KCB Limited -vs- Benjoh Amalgamated Limited [2017]eKLR where the Court while addressing the issue of res judicata stated thus :

“The doctrine is provided for in our jurisprudence by dint of Section 7 of the *akn ke act 1924 3 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.”

19. The Respondent attached a decree in respect of ELC No 212 of 2013 in his Replying affidavit sworn on 17th September, 2025, a Plaint filed by the Applicant dated 18th August, 2025 and noted that the subject matter in both cases was on adverse possession and the matter has been heard and determined between the parties herein.



20. This is a classic example of a litigant who wants to circumvent the doctrine of res judicata by re-litigating afresh a matter that has been heard and determined by a competent court.
21. Further, in the case of Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR, the court in addressing what amounts to res judicata held as follows:

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
22. I therefore find that the Plaintiff Applicant’s Notice of Motion application dated 18th August, 2025, lacks merit and the Applicant’s suit dated 18th August 2025, is res judicata and is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF NOVEMBER 2025.

M. A. ODENY

JUDGE

