

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELCLC NO. E047 OF 2024

EMMANUEL KEMEI
PLAINTIFF

VERSUS

PAULINE JEPKEMBOI KIBET1ST
DEFENDANT
ELIZABETH JEPCHIRCHIR SANG 2ND
DEFENDANT
JULIUS KIPKEMBOI KIBET..... 3RD
DEFENDANT
SYLVESTER KIPLAGAT KIBET 4TH
DEFENDANT

RULING:

1. This Ruling is in respect to the Notice of Preliminary Objection dated 2nd April, 2025 and the Notice of Motion Application dated 11th November, 2024.
2. The 4th Defendant filed a Notice of Preliminary Objection dated 02.04.2025 in response to the entire suit and the Application dated 23.07.2024. The Notice of Preliminary Objection was raised on the following grounds: -
 - a. That the ruling scheduled for 9th October, 2024 be deferred to allow parties to file their responses and submissions.
 - b. That this instant suit and the application dated 23.07.2024 is res judicata vide the Judgment dated 11.12.2023 in Succession Cause No. 105 of 2010.

- c. That this instant suit and the application dated 23.07.2024 is an afterthought, abuse of the court process and barred by the Limitation of Actions Cap 22 since the applicant actively participated in the Succession Cause No. 105 of 2010 and testified and produced evidence in relation to parcel No. L.R. No. KAPTAGAT/ LOTONYOK BLOCK 3 (NGELEL - TARIT)/ 33.
- d. That the applicant has never filed any appeal nor application for review in succession No. 105 of 2010 and this suit and the application dated 23.07.2024 is disguised as an appeal.
- e. That this Honourable Court is functus officio and the application dated 23.07.2024 should be dismissed with costs.
3. In the Notice of Motion Application dated 11.11. 2024, the Defendants sought the following orders THAT: -
- i. That the Plaintiff's suit be struck out with costs for being Res Judicata.
 - ii. The costs of this Application be borne by the Plaintiff.
4. The application was premised on the 10 grounds on the face thereof and supported by the Affidavit of the 2nd defendant/applicant, Elizabeth Jepchirchir Sang sworn on even date, on her own behalf and on behalf of the other applicants.

5. She averred that vide a Plaint dated 25.06.2024, the plaintiff instituted the present suit and outlined the orders sought against them therein. It is her claim that the issues raised in the present suit had already been heard and determined through Eldoret High Court Succession Cause No. 105 of 2010(hereinafter referred to as the former suit).
6. It is further her contention that the subject matter in the present suit is the same as the subject matter in the former suit being land parcel known as L.R. No. KAPTAGAT/ LOTONYOK BLOCK 3 (NGELEL-TARIT)/33. That the parties in both suits are equally similar.
7. She further deponed that the former suit was determined vide the judgment issued by Hon. Justice R. Nyakundi on 28.07.2022, which decision has never been appealed against.
8. She explained that the effect of the said judgment was to find that the land parcel known as L.R. No. KAPTAGAT/ LOTONYOK BLOCK 3 (NGELE TARIT)/33 was being held by Emmanuel Kemei, the plaintiff herein, in trust and that the said parcel of land formed part of the Estate of the late Kibet Sang and should be distributed to the beneficiaries of the said estate.
9. Subsequently, the honourable court in the former suit went ahead and distributed the Estate of the late Kibet Sang including the subject land pursuant to the provisions of section 40 of the Law of Succession Act, Cap 60.

10. She maintained that no appeal has ever been preferred against the decisions of the succession court in Eldoret High Court Succession Cause No. 105 of 2010.
11. She thus averred that the present suit has been rendered Res Judicata on account of the issues raised having been conclusively determined on merit vide the judgment in Succession No. 105 of 2010.
12. In conclusion, she dismissed the suit as being an abuse of the court process and urged the court to dismiss the same with costs in the interest of justice.
13. The application was opposed. The Plaintiff/respondent filed a Replying Affidavit dated 09.11.2024 wherein he dismissed the application as being unprocedural, unfair, tainted with malice and brought in bad faith.
14. He deponed that he is the registered owner of the suit property known as Kaptagat/Lotonyok Block 3 (Ngelel Tarit)/33. That being aggrieved by the mode of distribution approved by the succession court which included his private land, he instituted the instant suit.
15. It was his contention that the orders sought should not be granted since his claim raises substantive issues and he should therefore be allowed to ventilate and enforce his constitutional and lawful rights.
16. It was further his assertion that the succession court was misinformed as to the status of the assets and failed to consider that the deceased had sold to him the entire suit land and that the same was legally transferred to him before

he died. In conclusion, he urged the court to dismiss the application with costs.

17. Both the Preliminary Objection and the Notice of Motion application were canvassed by way of written submissions. The 4th defendant filed his submissions dated 07.10.2025, the 2nd defendant filed her submissions dated 26.09.2025 while the plaintiff filed his submissions dated 13.10.2025 which I have read and considered.

Analysis and Determination:

18. I have carefully considered the grounds in the preliminary objection, the Notice of Motion Application, the Supporting Affidavit and the Affidavit in response as well as the rival submissions thereto and the various authorities cited. Consequently, it is this court's considered opinion that the following issues arise for determination: -

- i. Whether the notice of preliminary objection dated 2nd April, 2025 meets the threshold of what amounts to a proper preliminary objection.*
- ii. Whether the instant suit and the Application dated 23.07.2024 is res judicata.*
- iii. Who should bear the costs of the preliminary objection and the Application.*

Whether the Notice of Preliminary Objection dated 2nd April, 2025 meets the threshold of what amounts to a Preliminary Objection;

19. The law on what constitutes a preliminary objection was outlined in the leading case of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; where the Court defined Preliminary Objection as follows;

“...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.”

20. This position has been reiterated by the Supreme Court in the case of **Aviation & Allied Workers Union Vs Kenya Airways Ltd & 3 Others, Application No. 50 of 2014 [2015] eKLR** where it was held as follows;

“Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

21. It is well settled that a Preliminary Objection can only be raised on a pure point of law, which is argued on the

- assumption that there is no contest as to the facts as pleaded in the plaintiff's suit and Application.
22. The 4th defendant herein has maintained that the preliminary objection is merited and is premised on pure points of law as provided in Section 7 of the Civil Procedure Act. He maintained that the plaintiff's suit and application offend the doctrine of res judicata.
 23. The plaintiff on the other hand averred that the notice of preliminary objection did not meet the threshold of what amounts to a proper preliminary objection as discussed in the Mukhisa Biscuit case and reiterated in the Supreme Court decision in the case of **Independent Electoral & Boundaries Commission vs Jane Chepengerer & 2 Others [2015] eKLR.**
 24. The question that therefore follows is whether the preliminary objection as filed meets the threshold set out in the Mukhisa Biscuit case (supra) and the facts as pleaded can be said to be uncontested. The preliminary objection is majorly premised on the doctrine of res judicata and that the court is functus officio as well as the fact that no appeal has ever been preferred against the decision of the succession court in Succession Cause No. 105 of 2010. It is their claim that the ownership of the suit land was duly determined vide the judgment in Succession Cause No. 105 of 2010 delivered on 28.07.2022.
 25. The plaintiff's suit and application on the other hand are founded on the ownership of the suit parcel known as L.R.

No. Kaptagat/Lotonyok Block 3 (Ngelel - Tarit)/33. It is his claim that the said suit land is his private land, duly registered in his name and should not therefore form part of the estate of the late Kibet Sang.

26. It is common ground that a proper preliminary objection must not be blurred with factual details liable to be contested or proved by the process of evidence. In the case of **Oraro -vs- Mbaja (2005) 1KLR 141** the court held as follows: -

“Where a Court needs to investigate facts, a matter cannot be raised as Preliminary Objection. Anything that purports to be a Preliminary Objection must not deal with dispute facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

27. From a cursory look at grounds outlined in the preliminary objection, it is clear that the same are marred with factual issues, which may need to be ascertained and may require the exercise of judicial discretion by the honourable court in determining the same. As held in the Oraro vs Mbaja case above (supra) a preliminary objection should not derive its foundation from factual information which stand to be supported by evidence.
28. As earlier stated, the preliminary objection herein is majorly premised on the doctrine of res judicata. In the case of **George Kamau Kimani & 4 Others vs County**

Government of Trans Nzoia & Another (2014) eKLR,
the Court while dealing with the issue of res judicata raised in a preliminary objection held as follows held that: -

“I have considered the points raised by the 1st 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 issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

29. In view of the foregoing, it is the finding of this court that the grounds raised in the notice of preliminary objection are not pure points of law. In essence therefore, the preliminary objection as filed does not meet the threshold/criteria of what amounts to a proper preliminary objection.

Whether the instant suit and the Application dated 23.07.2024 is res judicata;

30. The second issue for determination is whether the plaintiff's suit and application dated 23.07.2024 offends the doctrine of res judicata on account of the judgment delivered by Hon. Justice R. Nyakundi on 28.07.2022 in Eldoret High Court Succession Cause No. 105 of 2010.

31. Section 7 of the Civil Procedure Act provides 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.”

32. This position was restated by the Supreme Court while discussing the elements to be satisfied in a claim of res judicata in the case of ***John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)*** where the court held as follows:

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be

invoked in a civil matter the following elements must be demonstrated:-

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was 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 identical parties, subject matter and cause of action.”

33. Taking into account the provisions of section 7 of the Civil Procedure Act on the doctrine of res judicata and guided by the supreme court decision above on the elements to be established and proved for a claim on res judicata to succeed, I now seek to address each of the following elements.
34. The defendants' claim on res judicata is founded on the decision of Hon. Justice R. Nyakundi in Eldoret High Court Succession Cause No. 105 of 2010 delivered on 28.07.2022 (hereinafter referred to as the former suit). This court has carefully and critically looked at the said decision vis-a - vis the claims and the issues raised herein.
35. On whether the parties in the present suit are similar as the parties in the former suit, from a reading of the decision in the succession cause, it is evident that all the parties in the present suit are the beneficiaries of the estate of Kibet Sang.

The present suit has been instituted against the administrators of the estate of Kibet Sang. The plaintiff herein is also a beneficiary of the estate of Kibet Sang and in particular, a member of House B.

36. The second element is on the subject matter. For res judicata to succeed, the subject matter and the cause of action in dispute must be similar in both suits. It is not in dispute that the suit land herein L.R. No. Kaptagat/Lotonyok Block 3 (Ngelel- Tarik)/33 was also the subject matter in dispute in the former suit.
37. The next element and which is at the center of the claim herein is on the issues directly and substantially in issue and whether the same are similar in both suits. Among the issues in dispute in the former suit was the suit parcel herein. An objection was raised regarding its ownership and whether the same even though registered in the name of the plaintiff, was held in trust and thus formed part of the estate of Kibet Sang.
38. The plaintiff herein among other orders is seeking declaratory orders on ownership and further an order that the suit parcel does not form part of the assets of Kibet Sang and should therefore not be distributed as part of his estate. In the application dated 23.07.2024, the plaintiff is also seeking temporary orders of injunction stopping the survey and the distribution of the suit parcel as part of the estate of Kibet Sang.

39. In considering the rival issues at the center of each claim in the former and present suit, both issues despite the former suit being in a succession court while the present suit is civil in nature and in the Environment and Land Court, the issues directly and substantially in question are similar in both suits. They both derive their foundation from a similar transaction.
40. The final element is whether there is a former judgment or order on merit and whether the same was issued by a court with competent jurisdiction.
41. I have carefully looked at the decision by my brother Nyakundi J. in Succession Cause No. 105 of 2010. As held hereinabove, all the parties herein are the beneficiaries of the estate of the late Kibet Sang. The 1st defendant is the mother of the plaintiff while the other defendants, who were the objectors in the succession cause are the sisters of the plaintiff.
42. The said judgment analyzed in details the positions by all the parties, from the negotiations, family meetings as well as the mediation process. The testimonies of all the parties and evidence was taken into consideration.
43. At pages 12 and 13 of the judgment in the former suit delivered on 28.07.2022, the honourable judge while discussing the issue on what properties form part of the estate of the deceased stated as follows: -

“I also find that Emmanuel Kemei was holding KAPTAGAT/ LOTONYOK BLOCK 3 (NGELEL- TARIT)/33 in

trust and this shall be part of the estate distributed to the objectors....”

44. In addition, at paragraph 5 and 8 of the Replying affidavit, the plaintiff in his own admission has stated that aggrieved by the mode of distribution approved by the Succession court instituted the present suit. The plaintiff ought to have lodged an appeal against the said decision instead of filing the instant suit. The High Court and the Environment and Land Court are courts of equal status and therefore, this court cannot sit on an appeal of a court of equal status. If aggrieved by the decision of the succession court, the plaintiff was at liberty to challenge the said decision on appeal at the Court of Appeal and not file the present suit in this court.
45. In the premises therefore, it is clear that the instant suit and application dated 23.07.2024 offends the doctrine of res judicata. The defendants have proved all the elements of res judicata to the satisfaction of this court.

Who shall bear the Costs of the Preliminary Objection;

46. The general rule is that costs follow the event unless the court directs otherwise.
47. In this case, having held that the Notice of Motion Application is merited, I find that the defendants are entitled to the costs.

Conclusion:

48. In conclusion, it is the finding of this court that the Notice of Motion Application dated 11th November, 2024 is **merited** and is hereby **allowed** on the following terms: -

- i. The Application dated 11th November, 2024 is allowed.
- ii. The Plaint dated 25.06.2024 and the Application dated 23.07.2024 are hereby struck out for being res judicata.
- iii. The Notice of Preliminary Objection dated 02.04.2025 is dismissed.
- iv. The costs of application and suit to be borne by the Plaintiff.

49. It is so ordered.

DATED, SIGNED and DELIVERED virtually at **ELDORET** this **13th** day of **NOVEMBER, 2025.**

HON. C. K. YANO
ELC, JUDGE

Ruling delivered in the virtual presence of: -

Mr. Gichohi holding brief for Mr. Omusundi for the Plaintiff

Mr. Mathai for 2nd Defendant and holding brief for Mr. Songok for 1st Defendant.

Court Assistant - Laban