

matter between the parties herein has already been ventilated in Machakos ELC 220 of 2015.

b. THAT the plaintiff bears the costs of this motion and the suit.

2. The motion is supported by the grounds outlined in the body thereof and Syombua Sammy's affidavit, sworn on the date in question. A summary of the grounds in support of the motion are that: a) the matter constitutes an abuse of the court's processes as it breaches the principles of *res judicata*; b) the cause of action herein has already been litigated in **Machakos ELC 220 of 2015 ("former suit")**, where the plaintiff who was a defendant therein-by a finding of this court, raised a counterclaim on the same issue, claiming adverse possession over the suit property, that is **Land Parcel No. NDALANI/MAVOLONI/BLOCK 1/357 ("suit property")**; c) the plaintiff's counterclaim was later dismissed by this court on 14/02/2022 in the former suit; d) judgment has since been delivered in the former suit, where the prayers sought by the 1st defendant were granted over the same suit property, which was the subject matter, and the plaintiff was declared a trespasser on the suit property.
3. The motion is vigorously opposed through a lengthy affidavit deposed by the plaintiff on 2/05/2025. In this affidavit, the plaintiff has invited the court to consider matters that are not

the subject matter of the motion, such as consolidation, an appeal pending before the Court of Appeal, and directives issued by this court in the former suit, among others, which this court respectfully declines to entertain as this is beyond the purview of deciding if the suit is *res judicata* or not.

4. Regarding the pertinent averments contained in the replying affidavit, the plaintiff asserts that: a) the motion is frivolous, vexatious, an abuse of the court process, unmerited in all circumstances and not *res judicata* and, b) both suits involved the same parties, save for the 2nd defendant herein, the same subject matter and the same cause of action, which was her claim to the suit property, having continuously occupied, openly used and exclusively possessed the same since sometime in 1988.
5. In a prompt response and following the lead of the plaintiff, the 1st defendant swore a supplementary affidavit on 30/05/2025. Similarly, as with the replying affidavit, this court declines to entertain irrelevant issues as both documents deviated from the substantive matter before this court.
6. Accordingly, and in accordance with the court's directions, the law firms of **Ms. Nzei & Co. Advocates** and **Kipkenda & Co. Advocates**, representing the 1st defendant and the plaintiff, respectively, filed their submissions dated 30/05/2025 and 16/01/2025. This court is indebted to them on these

illuminating submissions. Accordingly, having given careful thought to the motion, its grounds, affidavits, submissions and legal framework and prevailing jurisprudence, the singular issue that arises for determination is **whether the suit is *res judicata***.

7. Regarding the legal framework of this doctrine, it is found in our **Section 7** of the **Civil Procedure Act**, in the following terms: -

“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.”

8. In illuminating this doctrine, the learned authors of **Mulla, Code of Civil Procedure, 18th Ed. 2012, page 293**, explained the purpose of the doctrine and its exceptions in the following words:

“The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

9. In discussing this principle in the decision **Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others [2016] KESC 6 (KLR)**, the Supreme Court of Kenya clarified as follows:

“52. Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights.”

This decision extends further in **paragraph 54** by stating: -

“54.The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

10. As held in the decision of [Makau & 2 others & 2 others \(Suing as the Administrators of the Estate of the Late Thomas Makau Musyoki - Deceased\) v Syokimau Farm Limited & 2 others \[2024\] KEELC 3981 \(KLR\)](#), when the doctrine of *res judicata* arises in a suit, the court is called to scrutinize the decision and pleadings and record of the former case that is claimed to have settled the issues in question, ascertain the issues determined in the former case, and whether these are the same in the subsequent case, establish if the parties are the same, or are litigating under the same title, and whether the former case was determined by a court of competent jurisdiction.

11. Thus, having considered this former decision vis-à-vis this decision, the competence of the court in the former suit, which determined the case with finality on merits, is undoubted. Thus, the court must now evaluate other criteria, including: (a) if the parties involved in both suits are the same, (b) the issues in dispute are identical in both cases, and (c) the parties are litigating under the same title or claim.

12. As regards test (a), this court has had an opportunity to scrutinise the former case against the current suit and concludes that some parties in the former case are the same as in this one. In the former case, the 1st defendant here was the plaintiff, and the plaintiff here was the defendant. The party not involved in the former suit is the 2nd defendant here. *Paragraphs 13 and 14* of the plaintiff's affidavit, sworn on 1/03/2022, show she only sued the 2nd defendant because he transferred the suit property to the deceased 1st defendant, indicating the claim in the former suit was common to both, as they both had an interest in the suit property at some point. ***See also Explanation (6) in Section 7 of the Civil Procedure Act.***

13. As concerns test (b), this court has no difficulty in finding that the issue in the former suit was the suit property, which is the same property in the instant suit. Thus, this court finds the subject matter in dispute is the same.

14. Turning to test (c), in the instant suit, the plaintiff has pleaded adverse possession. Similarly, in the former case, the plaintiff herein, in her defence dated 12/11/2015, raised a counterclaim in *paragraph 20* of her defence stating, "*That without prejudice the defendant counterclaims the subject land under adverse possession.*" In the former suit, she also sought to be declared an adverse possessor.
15. This defence and counterclaim in the previous suit were appropriate, as they adhered to the provisions outlined in **Explanation (4) of Section 7 of the Civil Procedure Act**, which stipulates that any matter that could and should have been included as a ground of defence or attack in such litigation shall be regarded as directly and substantially in issue in that litigation. Consequently, it was not permissible for her to initiate the current litigation, as her entire defence and counterclaim ought to have been presented within the previous litigation. Her act of filing this suit while the former suit was subsisting was an abuse of the court process and amounted to *sub judice*. Moreover, should her defence and counterclaim contain any deficiencies, she bears sole responsibility for such shortcomings.
16. As this court concludes, it is pertinent to note that the plaintiff has expended considerable effort on **Machakos ELC No. 193 of 2015 (OS)**, a matter from which she subsequently withdrew. Nevertheless, this case, which seemed to be

incompetent as it had sued a deceased person, is non-existent as it was terminated upon withdrawal.

17. In the end, this court finds the instant suit is *res judicata*. The notice of motion dated 10/03/2025 is allowed. It therefore strikes out the suit with costs to the 1st defendant. This file is hereby effectively marked as closed.

It is so ordered.

Delivered and Dated at Machakos this 11th day of November, 2025.

**HON. A. Y. KOROSS
JUDGE
11.11.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Mr. Nzei for applicant.

Mr. Wachira for the respondent/plaintiff.

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