

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELC JUDICIAL REVIEW NO. E004 OF 2024**

**JOSPINE KAVELE NDUVU**  
**MAXWELL MULWA NDUVU**  
**PETER MUSEMBI NDUVU**  
**(Suing as the legal representative of the estate of**  
**PHILIP NDUVU KIVELANGE – Deceased .....EX-PARTE**  
**APPLICANTS**

**-VERSUS-**

**THE DEPUTY COUNTY COMMISSIONER KILUNGU**  
**SUB-COUNTY (AS DELEGATE OF THE CABINET SECRETARY,**  
**LANDS AND PHYSICAL PLANNING .....1<sup>ST</sup>**  
**RESPONDENT**  
**THE DIRECTOR OF LANDS ADJUDICATION AND**  
**SETTLEMENT OFFICE .....2<sup>ND</sup> RESPONDENT**  
**THE HON. ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT**

**-AND-**

**JOSIAH MUKELI KIMUYA .....1<sup>ST</sup> INTERESTED**  
**PARTY**  
**JOHN MUTAKI MUSYIMI .....2<sup>ND</sup> INTERESTED**  
**PARTY**  
**HENRY MUANGE NGUI .....3<sup>RD</sup> INTERESTED**  
**PARTY**  
**DAVID KIMUYA JOSIAH .....4<sup>TH</sup> INTERESTED**  
**PARTY**  
**SAMSON KELI JOSIAH .....5<sup>TH</sup> INTERESTED**  
**PARTY**

**RULING**

1. The Ex-parte Applicants filed a substantive Notice of Motion dated 24<sup>th</sup> February, 2025 seeking judicial review orders of certiorari, mandamus and prohibition against the Respondents.

2. Subsequent to the filing of the application, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties filed a preliminary objection dated 12<sup>th</sup> May, 2025 on the basis of the following grounds: -

**1) THAT the filing of this application is a complete contravention of Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya.**

**2) THAT a similar matter concerning the same subject matter between the same parties was heard and determined by the same court in JR E007 of 2022 and this court is *functus officio*.**

3. Directions were issued on 27<sup>th</sup> May, 2025 for disposal of the preliminary objection by way of written submissions.

4. At the time of writing this ruling only the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties had filed their submissions dated 29<sup>th</sup> May, 2025.

5. Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties argued that the dispute herein regards land Parcel No. 3075 located in Kilungu Sub-County which was the subject of an appeal to the Minister Case No. 341 of 2019 that was filed by the Ex-parte Applicants. The following issues for determination were identified: -

*a) Whether the suit is res judicata and therefore whether the court lacks jurisdiction;*

*b) Whether this court is functus officio in this matter.*

6. Submitting on the first issue, Counsel contended that the Ex-parte Applicants are seeking to relitigate issues that were directly and substantially is issue in previous proceedings (Makueni ELC JR No. E007 of 2022) between the same parties. Counsel asserted that the said proceedings culminated in a binding decision in favour of the Interested Parties. Counsel submitted that this court is debarred from entertaining the present suit by virtue of the doctrine of res judicata under Section 7 of the Civil Procedure Act.

7. Counsel argued that the present suit and the former suit relate to ownership, occupation and subdivision of the same parcel of land Parcel No. 3075. Counsel urged the court to find that the present suit amounts to an abuse of court process and that the matter should be dismissed forthwith.
8. Neither the Ex-parte Applicants nor the Respondents filed submissions in respect to the preliminary objection as at the time of writing this ruling.
9. The sole issue for determination is whether the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties have demonstrated whether this court's jurisdiction to entertain the present suit is barred by virtue of the doctrine of res judicata.
10. *Res judicata*, is embodied in Section 7 of the Civil Procedure Act which outlines 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.**

**Explanation — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

Explanation — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation — (6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

11. In the **Black’s Law Dictionary, 9<sup>th</sup> Edition** at page 1425, the doctrine of *res judicata* has been defined as follows:

*“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”*

12. In the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR**, the Court of Appeal aptly held as follows: -

*“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the Civil Procedure Act, 2010;*

*“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 the 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.”*

*Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms.”*

13. Similarly, the Court of Appeal expressed the elements which must be demonstrated when the doctrine of *res judicata* has been invoked in **Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR** as follows: -

- “(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 identical parties, subject matter and cause of action.”*

14. Again, in the case of **Henderson v Henderson (1843) 67 ER 313**, Wigram, V-C expounded on the doctrine of *res judicata* 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 litigation in respect of 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 plea 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.”*

15. With those principles in mind, the subject matter of the judicial review proceedings herein as already noted in the prayers within the substantive Notice of Motion are in respect of land Parcel No. 3075. The suit property was the subject of proceedings before the Minister in Appeal Case No. 341 of 2019 and a decision thereof was delivered on 6<sup>th</sup> April, 2022.
16. The Minister’s decision was the subject of judicial review proceedings filed in this court on 18<sup>th</sup> July, 2022 under case No. ELCJR E007 of 2022. The Ex-parte Applicant in the suit was Josiah Mukeli Kimuya whereas the Interested Parties were John Mutaki Musyimi and Henry Muange Ngui. The Respondents who had been impleaded were the Deputy County Commissioner – Kilungu, the Director of Land Adjudication and Settlement and the Attorney General.
17. Makueni ELCJR No. E007/2022 culminated in the judgment delivered on 8<sup>th</sup> November, 2023 dismissing the judicial review proceedings.
18. Of foremost importance to the present suit is that the Ex-parte Applicants herein were not parties or witnesses in the Appeal Case before the Minister Case No. 341 of 2019 and neither were they parties in Makueni ELCJR No. E007/2022.
19. Instead, after an avid perusal of the pleadings in this case and in particular the Chamber summons dated 22<sup>nd</sup> August, 2024, it is evident that the Ex-parte Applicants were the Respondents in the Appeal Case before the Minister Case No. 348 of 2019 whereas the Appellant was Josiah Mukeli Kimuya. That Minister’s Appeal concerned Parcel No. 3074 which is distinct land from Parcel No. 3075.

20. It is unclear whether the Ex-parte Applicants intended to file judicial review proceedings in respect of either land Parcel No. 3074 or Parcel No. 3075. Nonetheless, the present suit is caught by the doctrine of *res judicata* in view of Explanation No. 6 of Section 7 of the Civil Procedure Act.
21. The substantive questions in dispute in respect of the private rights of the disputants in Makueni ELCJR No. E007/2022 were fully and finally determined vide the judgment delivered on 8<sup>th</sup> November, 2023 by Lady Justice T. Murigi. Therefore, it is the finding of this court that the Ex-parte Applicants herein are deemed as persons who were litigating under the same title and in respect of similar interests and reliefs over the suit property Parcel No. 3075.
22. In the end, the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties' preliminary objection is merited. The suit herein is hereby dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties on account of the doctrine of *res judicata*.

It is so ordered.

.....  
**HON. E. O. OBAGA**

**JUDGE**

**RULING DATED SIGNED AND DELIVERED VIA MICROSOFT TEAMS  
THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**IN THE PRESENCE OF:**

Mr. Apollo for 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties.

Court assistant – Steve Musyoki

ORIGINAL