

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
LODWAR

ELC APPEAL NO. E001 OF 2025

PAUL **EKIRU**
NARIAMAO-----
APPELLANT
(Registered Trustee of Legio Maria of African Church Mission)

VERSUS

EITON
EWOI-----
RESPONDENT

[Being an Appeal from the Ruling and the Hon. Evanson Ngigi (SPM) delivered on 30/07/2025 in Lodwar MCELC No. E006 OF 2023]

JUDGMENT

1. The appellant, in his capacity as a trustee of Legio Maria of African Church Mission, who was the plaintiff at the lower court, sued the respondent through a plaint dated **29/6/2023**, seeking:
 - (a) **Declaration that the respondent was a trespasser on land known as LDW/Kanamkemer Block 3/037 (Mt. Kenya), hereinafter the suit property.**
 - (b) **Permanent injunction restraining the respondent, her agents, servants, or**

assigns from interfering with the suit property.

2. The appellant contended that the church was the legal owner of the suit property measuring **2.383 Ha**, in which the respondent had, without justifiable cause, encroached on and put up a temporary structure.
3. The respondent filed a preliminary objection dated **13/7/2023** that the suit was *res judicata* in view of **Lodwar SPMC No. 01 of 2020**, whose final determination was made on **30/5/2023**, hence the suit is an abuse of the court process. By a ruling dated **3/7/2025**, the trial court upheld the preliminary objection leading to the appeal herein.
4. The appellant, by a memorandum of appeal dated **13/8/2025**, faults the trial for upholding the preliminary objection, misapplying or ignoring the legal threshold of what a preliminary objection ought to be, determining the matter of fact without evidence, hence arriving at an unjust and unfair ruling; failing to appreciate that the matter in issue in the two suits were different and for not appreciating the rival submissions and the authorities.
5. The appellant relied on written submissions dated **30/10/2025**. It is submitted that the only way the trial court could have considered the issue of *res*

judicata was by availing the pleadings and judgment in the previous suit.

6. It is submitted that the said pleadings and judgment could only be availed by way of affidavit as held in **George Kamau Kimani & Others -vs- County Government of Trans Nzoia & Another [2014] eKLR.**
7. The appellant submitted that raising a preliminary objection through a notice of motion would have allowed him to respond to the application; otherwise, it was not possible to do so in the instant suit, hence he was prejudiced by the trial court hearing the preliminary objection without allowing him to not only see the pleadings, but also leave to comment on them.
8. The appellant submitted that courts in many cases have refused to peruse documents attached to a preliminary objection; by doing so, it would amount to probing evidence, as held in **Margaret Njeri Gitau - vs- John Mburu Gitau [2022] eKLR.**
9. The role of an appellate court of the first instance is to review the record of the court below and come up with independent findings on both fact and law. See **Peters -vs- Sunday Post Ltd [1958] EA 424.** The

court has carefully perused the record of the lower court. The appellant had filed a plaint dated **29/6/2023**. At paragraph **8**, it was averred that there is no pending case and that there have never been any previous proceedings between the parties over the subject matter.

- 10.** A cause of action is defined as acts on the part of the defendant which give a cause of complaint on the part of the plaintiff. See **D.T. Dobie & Company (Kenya) Limited -vs- Joseph Mbaria Muchina & another [1980] KECA 3 (KLR).**
- 11.** The cause of action by the appellant, as disclosed in the plaint dated **29/6/2023**, was on an alleged encroachment or trespass to land known as **LDW/Kanamkemer Block 3/037 (Mt. Kenya).**
- 12.** The reliefs sought included a declaration that the land belongs to the appellant, an eviction order, and a permanent injunction. Paul Ekiru, as the trustee of the appellant, verified the truthfulness of the plaint by an affidavit sworn on **29/6/2023**. In the witness statement dated **29/6/2023**, the encroachment date is not indicated. The appellant relied on a list of documents dated **29/6/2023**, among them a certificate of registration of the church, allotment

letter, bundle of correspondence from the Ministry of Lands, Turkana County, and a demand letter. On the other hand, the respondent relied on a notice of preliminary objection dated **13/7/2023**.

13. The single issue for my determination is whether the trial court rightfully found the suit *res judicata* in view of the previous suit between the parties, namely **Lodwar SPMC Land Case No. 01 of 2020. Section 7** of the Civil Procedure Act bars a court from trying any suit or issue on 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.

14. The ingredients to establish *res judicata* were discussed in **John Florence Maritime Services Ltd & Another -vs- Cabinet Secretary for Transport & Infrastructure & Others [2021] eKLR**. They include:

- (a) *There is a former judgment or order which was final.*
- (b) *Judgment or order was on merit.*
- (c) *Judgment or order was rendered by a court having jurisdiction over the subsequent matter and the parties.*
- (d) *There must be between the first and the second action identical parties, subject matter, and a cause of action.*

15. The concept of *res judicata* aims to prevent causes of action or issues from being relitigated once they have been determined on merit and prevents a party who has lost in a previous claim from taking a second bite at the cherry. The doctrine ensures that there is an end to litigation. Courts, as held in **Independent Electoral and Boundaries Commission -vs- Maina Kiai & Others [2017] eKLR** and **E.T. -vs- Attorney General & Another [2012] eKLR**, must be vigilant to guard against parties evading *res judicata* by introducing new causes of action to seek the same remedy before the court.

16. Addition of new parties or causes of action, as held in **Omondi -vs- National Bank of Kenya & Others [2001] EA 177**, may not be tolerated; otherwise, there would be no end to litigation. The doctrine of *res judicata* as held in **John Florence Maritime (supra)**, is to protect a party from facing repetitive litigation

over the same matter, and to ensure economic use of court's limited resources and for timely termination of cases, where there is stability of judgment, avoidance of conflicting judgments, the promotion of confidence in the courts and the concept of maintaining respect for justice and the rule of law predictably.

17. A preliminary objection is a pure point of law argued on the basis, or which arises by clear implication out of the pleadings, that all the facts pleaded by the opposite side are correct. See **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd [1965] EA 696**. To discern a pure point of law, courts have to be satisfied that there is no proper contest as to the facts. See **Aviation & Allied Workers Union (K) -vs- Kenya Airways Ltd & Others [2015] eKLR**.

18. In **Henderson -vs- Henderson [1843] 67 ER 313**, *res judicata* was described as where a given matter becomes the subject of litigation and adjudication by a court of competent jurisdiction, parties are expected to bring forward their whole case and will not be permitted to open the same subject matter later unless on account of negligence, inadvertence, or accident. The court's jurisdiction or scope in handling

preliminary objection was discussed in **Henry Wanyama Khaemba -vs- Standard Chartered Bank Ltd & Another [2014] eKLR.**

- 19.** In this appeal, the trial court was asked to determine whether or not there was a former suit between the same parties, over the same subject matter, which was heard on the merits and finality by a court of competent jurisdiction. It is trite law that parties must make full disclosure in courts on material facts.
- 20. Order 4 Rule 1 (1)** of the Civil Procedure Rules requires that there be an averment that there is no other suit pending or there have been no previous suits over the same parties or subject matter. A court may strike out a suit for being an abuse of the court process under **Orders 2 Rule 15** and **13, Rule 2** of the Civil Procedure Rules. See **Blue Shield Insurance Co. Ltd -vs- Joseph Mboya Oguttu [2009] eKLR.** Swearing a false affidavit under **Order 7 Rule 1(1)** of the Civil Procedure Rules is to be abhorred. The appellant failed to disclose that there was a previous suit over the suit property between the

same parties, which was heard on the merits and to finality.

- 21.** Abuse of court process includes instituting multiplicity of cases, forum shopping, filing a suit which has already been subject to an earlier suit, over the same relief, improper use of court processes, attempting to vex, irritate, or annoy an adversary. See **Shivji Jadva Parbat & 2 others -vs- Attorney General & 2 others [2017] KEHC 4565 (KLR)**, and **Kensalt Limited -vs- Water Resources Management Authority (Petition 8 of 2016) [2020] KESC 67 (KLR) (10 January 2020) (Ruling)**.
- 22.** In **William Odhiambo Ramogi & Others -vs- Attorney General, Constitutional Petition No. 201 of 2019**, the court cited **Satya Bhama Gandhi -vs- Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)**, that abuse of court process is where a court has not been or is not resorted to fairly, properly or honestly to the detriment of the other party and that *res judicata* limits the court's jurisdiction so that one suit decision is enough and there should not be many decisions in regard of the same suit. The court cited **Satya**

Bhama Gandhi (*supra*), that *res judicata* can apply to both as a question of fact and a question of law.

- 23.** In this appeal, the appellant is not disputing that there was a previous suit over the same subject matter, which was between the same parties and was heard and determined on the merits to finality. All I hear the appellant saying is that the trial court had no benefit of seeing the pleadings and the judgment in the previous suit.
- 24.** The preliminary objection was two-pronged, based on *res judicata* and an abuse of the court process. The judgment in the previous suit had been rendered on **30/5/2023**. A month later, the current suit was filed. Other than the preliminary objection and a memorandum of appearance, there was no statement of defence by the respondent alluding to the issues that fell for determination in the former suit; the pleadings, such as the defence in the former suit, the manner of evidence tendered, and the judgment therein, were not attached to the preliminary objection.
- 25.** Similarity of the parties is not enough for a party to invoke *res judicata*. A preliminary objection should be on points of law and not on contested facts. A

preliminary objection should not be obscured by contested facts requiring evidence to ascertain, or where, what is in place is the exercise of judicial discretion. In **Independent Electoral & Boundaries Commission -vs- Cheperenger & 2 others [2015] KESC 2 (KLR)**, the court held that preliminary objections should not be used as a sword for winning a suit, otherwise destined to be resolved judiciously and on the merits.

- 26.** The appellant in this appeal had raised the issue of proceedings and pleadings in the former suit, which the trial court dismissed as a non-issue. How the former suit court file came into the instant suit and appeal for consideration by the trial court without the proceedings, and the pleadings thereto, being formally introduced as part of the court record by way of a list of documents attached to the statement of defence by the respondent to be relied upon by the proponent of the preliminary objection, remains unclear.
- 27.** The trial court, in the last six paragraphs of the ruling, descended into the arena of litigation and determined the preliminary objection based on extraneous

documents or evidence that was not properly before the trial court.

28. Parties are bound by their pleadings, and issues for the court's determination flow from the pleadings. Without pleadings by the respondent introducing the previous pleadings and their decision, there was no basis for the trial court to call for the previous file *suo moto* and to find the suit *res judicata*, without allowing the appellant an opportunity to respond to the new evidence contained in that former file.

29. The appeal is allowed, and the parties are directed to file and exchange pleadings for the suit to be heard on the merits by another magistrate, other than Hon. Evanson Ngigi (SPM). Costs of appeal to the appellant.

30. Orders accordingly.

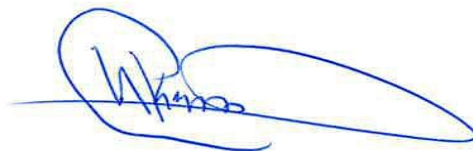
Judgment dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 26th day of November 2025.

In the presence of:

Court Assistant - Dennis

Serebe for Appellant present

Menjo for Respondent present



HON. C.K. NZILI

JUDGE, ELC KITALE.

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