



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

ELCOS NO. E004 OF 2025

MARY ROTICH.....APPLICANT

VERSUS

ALEXANDER ONON (*Sued as the Legal Representative and*

Administrator of the Estate of Kiptugen Chelagat alias

Kiptugen Chelagat Mwaititu).....
RESPONDENT

RULING

1. The applicant herein instituted the instant suit claiming that she has acquired a portion of Parcel NO. Cherangany/ Chebororwa/75 measuring 1.4 acres by virtue of having been in adverse possession thereof.
2. Claiming that the instant suit is *res sub judice* Iten CMELC E009 of 2025-Alexander Onon & Another vs.

Mary Rotich & Others and *res judicata* Iten CM
Succession Cause No.E117 of 2013-Re-estate of
Kiptugen Chelagat alias Kiptugen Mwaititu, the
respondent contends that the suit is incompetent, bad
in law and an abuse of the process of the court.
Through the notice of preliminary dated 4th July, 2025
which he filed seeking to strike out the instant suit in
limine, he contends that this court lacks jurisdiction to
entertain, hear and determine the suit as the same is
res sub judice and/or *res judicata* the former suits.

3. Although the preliminary objection taken up by the respondent raises issues that would require evidence to prove hence not a notice of preliminary objection properly so called, the applicant filed a replying affidavit sworn on 13th August, 2025 in which she attached the pleadings filed in the suits mentioned in the preliminary objection thereby curing the defect in the respondent's preliminary objection as filed.
4. Pursuant to directions given by this court on 9th July, 2025 that the preliminary objection be disposed of by way of written submissions, parties filed submissions

which I have read and considered.

SUBMISSIONS

Respondent's Submissions

5. Regarding the contention that the suit is *res judicata*, the respondent avers that the succession cause made determinations relating to ownership and administration of the suit property.
6. Terming the instant suit *res judicata* the succession cause, the respondent submits that by filing the instant suit, the applicant is attempting to re-litigate the issue of ownership or entitlement to the suit property which was determined by the succession court by repackaging his claim as a claim for adverse possession and/or a claim by an innocent purchaser for value of a portion of the suit property.
7. The respondent further submits that parties cannot evade *res judicata* by merely altering the form of the proceedings or introducing new causes of action as *res judicata* applies to both substantive issues and

incidental matters determined in the former suit.

8. Claiming that the applicant has filed multiple suits over the same property namely the succession cause where she was an objector; Iten E009 of 2025, which is pending before the lower court and the instant suit, the respondent submits that the current suit constitutes abuse of the court process and amounts to forum shopping. In that regard, the respondent places reliance on the case of **Muchanga Investment Ltd vs. Safaris Unlimited (Africa) Ltd & 2 Others (2009) e KLR**, where the court held that abuse of the court process includes using the court process in a manner that is vexatious, oppressive or to achieve an improper purpose. The respondent also relied on the case of **Agnes Muthoni Nyanjui & 2 Others vs. Annah Nyambura Kioi & 3 Others**, where it was held that multiplicity of suits over the same subject matter constitutes an abuse of the court process.
9. On jurisdiction of this court to entertain, hear and determine the instant suit, the respondent submits that this court's jurisdiction to entertain, hear and

determine the instant suit is ousted once it is established that the suit is *res sub judice* and/or *res judicata*.

10. On costs, the respondent makes reference to **Section 27** of the Civil Procedure Act and submits that the ordinary principle is that a successful party is entitled to costs.
11. Maintaining that the application dated 9th June, 2025 is fatally defective, frivolous and amounts to abuse of the court process, the respondent urges the court to uphold the preliminary objection, strike out the application dated 9th June, 2025 and award costs of the application to him.

Applicant's submissions

12. In her submissions dated 18th September 2025, the applicant acknowledges that there are pending proceedings in the lower court between the parties to this suit but contends that the instant suit is neither *res sub judice* the suit pending in the lower court nor *res judicata* the succession cause. In that regard, the

applicant points out the current suit is a claim for adverse possession which claim the lower court lacks jurisdiction to entertain, hear and determine. In support of her claim that the lower court lacks jurisdiction to hear and determine a claim for adverse possession, the applicant relies on the case of **Sugawara v Kiruti & 3 Others (CA E141 of 2022) (2024) KECA 1417 (KLR)**.

Analysis and determination

13. I have carefully read and considered the case urged by the respondent in support of the preliminary objection. As pointed out herein above, the preliminary objection does not raise pure points of law as evidence is required to prove the allegation that the instant suit is *res sub judice* or *res judicata*. In that regard, see the case of **Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & another (2014) e KLR** where it was held that one cannot raise a ground of *res judicata* by way of preliminary objection; that 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 determine whether the current suit is *res*

judicata.

14. Ordinarily, the respondent's preliminary objection would have failed for failure to meet the threshold of a preliminary objection set out in the **Mukisa Biscuits case**. However, as pointed out herein above, the applicant filed a replying affidavit introducing the pleadings on which the respondent's preliminary objection is premised, thereby curing the defect in the preliminary objection.
15. In their submissions, both parties have acknowledged existence of former suits. In the circumstances, the sole issue that arises from the preliminary objection, the response filed in respect thereof and the submissions by the parties in respect thereof, is whether the respondent has made up a case for being granted the orders sought.
16. Although there is a suit pending in the lower court between the parties to the instant suit, where the respondent inter alia seeks to evict the applicant from the suit property, the applicant has ably demonstrated

that the lower court does not have jurisdiction to entertain, hear and determine her claim for adverse possession of the suit property.

17. On whether the suit property is *res judicata* the Succession Cause filed in the lower court, which cause has since been heard and determined, no evidence has been tendered by the respondent capable of proving that the lower court determined the applicant's claim for adverse possession of the suit property. In any event, the Succession Court lacked jurisdiction to hear and determine the applicant's claim for adverse possession. In the circumstances, the applicant cannot reasonably be said to have repackaged her case in order to evade the doctrine of *res judicata*. Her claim for adverse possession was never heard and determined by a court with competent jurisdiction to hear and determine it and that being the case, the claim that the instant suit is *res judicata* the Succession Cause is not maintainable.

18. The upshot of the foregoing is that the respondent has not made up a case for being granted the reliefs/orders

sought in the preliminary objection. Consequently, I
dismiss the preliminary objection with costs to the
plaintiff/applicant.

19. Orders accordingly.

**Dated, signed and delivered at Iten this 18th day of
November, 2025.**

**L. N. WAITHAKA
JUDGE**

Ruling delivered virtually in the presence of:-

Mr. Cheruiyot holding brief for Mr. Bett for the Applicants

N/A for the Respondents

Court Asst: Christine