

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELC (O.S) NO. E008 OF 2023

ELIUD MICHAEL
SICHEI.....APPLICANT/RESPONDENT

VERSUS

TUTI HOLDINGS LIMITED.....1ST
RESPONDENT/APPLICANT

SWALEH AHMED MOHAMED.....2ND
RESPONDENT

RULING

1. For my determination is the Notice of Motion by the 1st Respondent/Applicant dated 20/06/2025 seeking *inter alia* to strike out the suit herein for being res judicata and statute barred. The application is premised on grounds on the face thereof supported by the affidavit of Dr. Vincent Wekesa sworn on 20/06/2025.

2. It is the 1st Respondent/Applicant case that he entered into a land sale agreement with the 2nd Respondent herein wherein he bought 20 acres from land parcel no. E.Bukusu/S.Nalondo/370(hereinafter referred to as “the suit land”) and paid the entire consideration. That thereafter, the land was transferred into their names. That 7acres of the suit land was to revert to the Applicant/Respondent. That he further purchased 2 acres from the Applicant/ Respondent and paid a consideration of Kshs.1,500,000/= only to discover that there was a dispute involving the land and he sought for a refund of

the consideration which was ordered by the court in Sirisia Civil Case No.1 of 2018, a decision upheld in Bungoma ELCA No.9 of 2019. That he is willing to excise the 7 acres from the suit land once the decree aforementioned is settled. He argued that the issue was res judicata and sub judice.

3. The Applicant/Respondent filed a replying affidavit in opposition thereto sworn on 26/09/2025 and averred that the suit land measures 10.8ha which is approximately 27 acres all initially registered in his name. That on 10/05/1992, he sold 20 acres to Daniel Shikuku Ehitemi who was to give out the 20 acres and return 7 acres to him. That through an error by the Land Control Board, the entire 27 acres was transferred to the purchaser. That the said Daniel Shikuku Ehitemi sold the land to the 2nd Respondent who later sold to the 1st Respondent/Applicant.

4. That the extra 7 acres were acknowledged to be held for the Applicant/Respondent in a further agreement for the sale of 2 acres out of the said 7 acres which the 1st Respondent/Applicant later rescinded and a judgment issued in his favour wherein the court further noted the said trust. He argued that the court in Sirisia did not issue a rider for the said 7 acres to be held in lieu of refund of the claimed consideration/decretal sum and that the Originating summons are not in relation to the contract for sale and that the limitation period for recovery of land is 12 years.

5. The application was agreed to be canvassed by way of written submissions.

6. The 1st Respondent/Applicant filed submissions dated 04/08/2025 wherein it was submitted that all elements for a res judicata suit described under Section 7 of the Civil Procedure Act are satisfied in the present matter in that the subject matter involves the same parcel of land being 2 acres from L.R E. BUKUSU/S. NALONDO/370, the refund of the purchase price, the same parties as in Sirisia Civil Case No. 1 of 2018 and Bungoma ELC Appeal No. 9 of 2019, the parties litigated under the same titles as vendor/purchaser, the matter was fully heard and determined in both the trial and appellate courts and the courts were competent to adjudicate on the dispute. It was further submitted that the cause of action forming the basis of this suit arose more than ten years ago and accordingly, any rights the Applicant/Respondent may have had are extinguished by operation of the law. It was argued that the current suit is an abuse of the court process. He cited inter alia the following cases **Pius Kimalyo Langat v Co-operative Bank of Kenya Ltd (Civil Appeal No. 48 of 2015) [2017] KECA 152 (KLR), Edward Moonge Lenguuranga v James Lanaiyara & Another (2019) eKLR and Bosire Ongero v Royal Media Services [2015],**

Analysis and determination.

7. 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. 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. The test for whether a matter is res judicata is summarized in **Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others, (2010) eKLR**, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

8. The doctrine of sub judice prohibits courts from proceeding with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in

Kenya to grant the relief claimed. See the case of **Bundotich v. Managing Director Kenya Airways Authority and Another (2007)2 E.A 90.**

9. Having considered the pleadings and the record of Sirisia PMCC No. 1 of 2018, this court is not persuaded that the present suit meets the threshold of res judicata under Section 7 of the Civil Procedure Act. While it is undisputed that the Applicant and the 1st Respondent were parties in the earlier suit and that the subject property i.e. L.R EAST BUKUSU/SOUTH NALONDO/370 is common to both matters, the substantive issues for determination are fundamentally distinct. The previous proceedings were anchored on a claim for refund of Kshs. 1,500,000/= allegedly paid pursuant to a breached sale agreement. In contrast, the instant suit seeks the transfer of seven (7) acres of the same land allegedly retained by the Applicant. The question as to whether the Applicant is entitled to a portion of the land was neither framed nor adjudicated upon in the former suit. Consequently, the issues presently before the court cannot be said to have been directly and substantially in issue, nor conclusively determined, in Sirisia PMCC No. 1 of 2018. I therefore find that the plea of res judicata is therefore without merit.

10. Similarly, the doctrine of sub judice as encapsulated in Section 6 of the Civil Procedure Act does not arise in the circumstances of this case. For the bar of sub judice to apply,

there must be an ongoing suit between the same parties before a court of competent jurisdiction in which the matter in issue is directly and substantially the same as that in the subsequent suit. The Applicant has not demonstrated the existence of any pending proceedings in Sirisia PMCC No. 1 of 2018 or any other forum touching on the transfer of the seven acres now claimed. The previous case appears to have been fully heard and determined, and no evidence has been tendered to suggest that any aspect of that litigation remains active or unresolved. In the absence of a pending parallel proceeding involving the same issues, the present claim cannot be rendered sub judice.

11. The Notice of Motion application 20/06/2025 is therefore devoid of merit and the same is hereby dismissed with Costs to be in the cause.

DATED, SIGNED and DELIVERED at **BUNGOMA** this 27th day of November, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Wepoh for the Respondent.
2. Applicant/Advocate-absent.
3. Bett C/A.