



REPUBLIC OF KENYA



KENYA LAW
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Asanga v Oyale & 3 others (Environmental and Land Originating Summons E005 of 2024) [2025] KEELC 8286 (KLR) (26 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8286 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2024
A NYUKURI, J
NOVEMBER 26, 2025

BETWEEN

JANE M.ASANGA PLAINTIFF

AND

BEATRICE AWINJA OYALE 1ST DEFENDANT

JOACKIM ENOCK SABANA 2ND DEFENDANT

LAND REGISTRAR KAKAMEGA 3RD DEFENDANT

HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Before court is a Notice of preliminary objection dated 29th January 2025 filed by the 1st and 2nd defendants seeking the striking out of the plaintiff's suit on the ground that the suit is an abuse of the court process, that it offends provisions of section 7 of the *Civil Procedure Act* and that the plaintiff's suit is res judicata because parties in this suit have litigated the same matter in Kakamega CMC ELC Case No. 180 of 2021.
2. Both parties have filed submissions which this court has duly considered.
3. Having considered the Preliminary objection and submissions, the only issue that arises for the court's determination is whether the preliminary objection is a proper preliminary objection and whether the same is merited.



4. A preliminary objection is a pure point of law raised where facts are not disputed. A preliminary objection was described in the case of *Mukisa Biscuits Limited vs West End Distributors* [1969] E.A 696 as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

5. Similarly, in the case of *Oraro vs Mbaja* [2005] KLR 141, the court held as follows;

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

6. Essentially therefore, for a preliminary objection to be deemed to be valid, it must raise pure points of law and be anchored on facts that are not in dispute.
7. In the instant matter, the respondent argued that this suit is *res judicata* as the matters herein were litigated between the parties in *Kakamega CM ELC NO. 180 of 2021* which was heard and determined.
8. The doctrine of *res judicata* is anchored in section 7 of the *Civil Procedure Act* which provides 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.”



9. Therefore, the doctrine of res judicata bars a court from trying a suit or an issue which was directly and substantially in issue between the same parties or their privies in a former suit, where a competent court has already determined such suit or issue on merit and with finality.
10. For a defendant to prove res judicata, they must provide evidence that demonstrates that;
 - a. The issues, the parties, the subject matter and cause of action in the former suit are identical to those in the current suit.
 - b. There is a judgment or order in a former suit which is final.
 - c. The judgment or order in the former suit was on merit.
 - d. The judgment or order was rendered by a competent court with jurisdiction.
11. That being the case, the issue of res judicata rests on evidence of a merit determination of a former suit or issue between the same parties by a competent court. That question cannot therefore be determined through a preliminary objection as the same is not a pure point of law. In the premises, I find and hold that the preliminary objection herein dated 29th January 2025 is not a proper preliminary objection and the same is hereby struck out with costs.
12. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 26TH DAY OF NOVEMBER, 2025.

A. NYUKURI

JUDGE.

In the presence of;

No appearance for the plaintiff

No appearance for the defendants

Court Assistant: Delphine

