



Maina (Suing as a Trustee and on behalf of Zablun Kamaika, Emmanuel Santai Maina, Noah Sipoi Maina, Alex Simintei Maina, Tom Rampei Maina, David Saitoti Maina, Paul Paita Maina and Solomon Sane Maina) v Mushake & another (Land Case E144 of 2024) [2025] KEELC 8566 (KLR) (3 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8566 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
LAND CASE E144 OF 2024
LC KOMINGOI, J
DECEMBER 3, 2025

BETWEEN

SIMON KAPAITO MAINA (SUING AS A TRUSTEE AND ON BEHALF OF ZABLON KAMAIIKA, EMMANUEL SANTAI MAINA, NOAH SIPOI MAINA, ALEX SIMINTEI MAINA, TOM RAMPEI MAINA, DAVID SAITOTI MAINA, PAUL PAITA MAINA AND SOLOMON SANE MAINA) PLAINTIFF

AND

TEMUKA OLE MUSHAKE 1ST DEFENDANT

JACKSON SIRINKET LEMUSHAKE 2ND DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion dated 25th February 2025 and the Preliminary objection dated 12th June 2025.
2. The Notice of Motion dated 25th February 2025 is brought pursuant to Order 51 Rules 1 & 4 of the Civil Procedure Rules; Section 3A and 6 of the [Civil Procedure Act](#); and all other enabling provisions of the law. It seeks for orders that:
 - i. This Hon. Court be Pleased to strike out the Plaintiff herein.
 - ii. This Hon. Court does grant any other Order it deems fit in the circumstance..
 - iii. Costs of this application and suit be provided for.
3. The grounds are on the face of the application as set out in paragraphs 1 to 7. It is supported by the sworn Affidavit of Temuka Ole Mushake, the 1st Defendant/Applicant herein.



4. It is his case that the ownership of parcel: Loitokitok/Olkaria/100 was settled by the High Court in Nairobi in High Court Civil Case Number 2155 of 1987 by the Judgment of 21st July 1992 which has never been appealed against or set aside. That, this suit is res judicata and the suit property was not available for distribution to the Estate of the late Maina Nkoirishishe Kamaika. It is his contention that, the title issued to the Plaintiffs ought to be cancelled and the suit dismissed with costs.
5. The Plaintiff then filed a Preliminary objection dated 12th June 2025, contesting the defendants' counterclaim on grounds that:
 - i. The cause of action raised in the Counter Claim dated 25th February 2025 is Statute Barred pursuant to the provisions of Section 4 (4) of the *Limitation of Actions Act* and shall seek to have the Counter Claim dismissed with costs to the 1st Defendant in Counterclaim.
6. The Plaintiff also filed a Replying Affidavit where he averred that the late Maina Nkoirishishe was his father and was the registered owner of the suit property on 6th August 1969. That upon his demise intestate, they initiated succession proceedings and the Plaintiff was appointed as the Administrator as per the Rectified Certificate of Confirmation of Grant. He claimed that he and his father were not aware of the suit Nairobi High Court Civil Case No. 2155 of 1987 and that it was on record that service was through substituted service. He also contested that a Decree should have been taken out and rectification of entries done by the Land Registrar. It is his case that the defendants cannot seek enforcement of a judgement which was delivered in 1992 because it was time barred by Section 4(4) of the *Limitation of Actions Act*. He urged that the Notice of Motion and counterclaim be dismissed.
7. The Notice of Motion and the Preliminary Objection were canvassed by way of written submissions.

Submissions of the 1st and 2nd Defendants

8. On whether the Plaintiff's suit was res judicata it was submitted that the judgement in HCCC No. 2155 of 1987 settled the matter in question which was between the defendants herein and the Plaintiff's father and the same was still valid having never been appealed against or set aside. Reference was made to Uhuru Highways Development Limited Vs. Central Bank and 2 Others and Satya Bhama Gandhi Vs. The Director of Public Prosecutions & 2 Others among others on the issue of res judicata.
9. On whether the Defendant's Counterclaim was Statutory time barred, it was submitted that the Defendants had not sought to enforce the Judgment of the High Court in Nairobi HCCC No.2155 of 1987 but to have this Court recognize it as a valid judgement and the title issued to the Plaintiff be cancelled. As such, the preliminary objection should be dismissed together with costs.

Submissions of the Plaintiff

10. On whether the suit should be struck out, it was submitted that the defendants were seeking to enforce a judgement that was delivered in 1992 contrary to Section 4(4) of the *Limitation of Actions Act* citing Taib v Said [2022] KEHC 12598 (KLR) and that the Defendants did not make a move in correcting the Green Card records to reflect what was in the judgement. Therefore, records show that the suit property belonged to the Plaintiff's father and it was available for distribution. It was also submitted that the Defendants encroached on the suit property sometime in the year 2020 which was almost 30 years since the alleged judgement was delivered. The judgement was therefore moot, unenforceable and the defendant's application should be dismissed with costs. Reference was made to Natural World Mombasa Safaris Ltd v Karuri [2022] KEC 9979 (KLR) on the issue of mootness.
11. On whether the preliminary objection was merited, it was submitted that the issue of statute limitation raised by the Plaintiffs was a question of facts pleaded by the Defendants that a judgement was passed in



1992. Therefore, determination of whether it was statute barred under Section 4(4) of the *Limitation of Actions Act* was a question of law which was within the precincts of a preliminary objection as held in *Mukisa Biscuits Manufacturing Co. Ltd v. West Distributors Ltd* [1969] E.A. 696.

12. The preliminary objection was therefore merited and the counterclaim should be dismissed with costs.

Analysis and Determination

13. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions and authorities cited.

14. Section 7 of the *Civil Procedure Act* provides that;

“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”.

15. The Supreme Court of Kenya in *John Maritime Florence Services Limited & Another Vs. C.S for Transport and infrastructure* (2021) KESC 39 held;

“59 for Res judicata to be invoked in a civil matter the following elements must be demonstrated;

- a. There is a former judgement or order which is final;
- b. The judgement was on merit;
- c. The judgement or order was rendered a by a court having jurisdiction over the subject matter and the parties and
- d. There must be between the first and second action identical parties, subject matter and cause of action.....”



16. I also rely on the case of Kenya Commercial Bank Limited Vs. Mueri Coffee Estate Limited & Another (2016) eKLR; IEBC Vs. Maina Kiai & 5 Others KECA 477 KLR.
17. I have gone through the Plain herein. It is not in dispute that the question of ownership of Loitoktok/Olkara/100 was settled by the High Court sitting in Nairobi HCCC NO.2155 of 1987 and the judgement delivered on 21st July 1992. There was no appeal against this said judgement hence it is res judicata. The same cannot stand. It is struck out with costs to the defendants.
18. On the issue that the defendants counter claim is statute barred, my view is that it is not. The counter claim brushes out of the actions that occurred on the 24th October 2024. Where the Plaintiff illegally obtained title to the suit property. The defendant seek a cancellation of the said title. The act complained of is not time barred. The counter claim therefore remains to be prosecuted.
19. In conclusion, the plaint herein is struck out for being res judicata with costs to the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 3RD DAY OF DECEMBER 2025.

L.KOMINGOI

JUDGE.

In The Presence Of:

Mr.Kibet Korir for the Plaintiff.

Mr. Webale for the Defendant.

Court Assistant – Peter.

