

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCLC NO. E012 OF 2024

AMINA EMMY IMINZA JUMA NDEMBI.....PLAINTIFF/APPLICANT

VERSUS

FLORENCE NDEMBI.....1ST DEFENDANT/RESPONDENT

JORAM NDEMBI.....2ND DEFENDANT/RESPONDENT

RULING

This ruling is in respect of a Preliminary Objection raised by the Defendants herein vide the Notice of Preliminary Objection dated 2nd May 2025. The background of the matter is that the Plaintiff instituted the suit herein against the Defendant vide the plaint dated 12th July 2024. The Plaintiff claims to be the rightful and proprietary owner of land parcel known as E/BUNYORE EBUCHITWA/2491 (the suit land). Her complaint is that the Defendants who are her in laws had encroached onto the said parcel of land. She therefore sought for orders of mandatory injunction, a declaration that the suit land belongs to her, an order of eviction and costs of the suit.

Although the dispute was referred to Alternative Disputes System (AJS) for resolution, the parties were not able to agree and vide the report dated 4th June, 2025 the matter was returned to Court for determination.

The grounds of the Preliminary Objection are that;

- a) the court lacks jurisdiction to entertain the suit as the issues raised were conclusively determined by a court of competent jurisdiction in VIHIGA SPM CIVIL suit NO. 18 of 2015 where the matter was dismissed and no appeal or review has been preferred against the judgment.

- b) The matter offends the doctrine of res-judicata set out in section 7 of the Civil Procedure Act.
- c) The filing of the current matter constitutes an abuse of the Court process and is in direct violation of the legal doctrine of finality in litigation which demands that litigation must come to an end.
- d) The court is *functus officio*.
- e) That the Plaintiff's recourse, if any, lies in an appeal or review under the applicable procedural laws and not by way of fresh pleadings or disguised re-litigation of the same issue.
- f) The jurisdiction of the court under Article 162 (2), (b) of the Constitution of Kenya 2010 and section 13 of the Environment and Land Court Act does not include and /or extend to probate and family matters.
- g) By entertaining this suit, the court is arrogating itself jurisdiction thus offending section 13 of the Environment and Land Court Act as held in the case of Samuel Kamau Macharia vs Kenya Commercial Bank Ltd & 2 others Civil Application No. 2 of 2022 where it was held that a court's jurisdiction flows from either the Constitution or legislation or both.
- h) The Plaintiffs application and suit are therefore frivolous, vexatious, incompetent, fatally defective, bad in law, incurable by amendment and ought to be struck out in toto with costs and all orders issued be set aside.

Vide directions given on 9/7/2025, the Preliminary Objection was heard by way of written submissions. On behalf of the Defendant, it was submitted that there was a former suit vide which the Plaintiff brought a claim involving land parcel No. EAST BUNYORE/EBUCHITWA/2491 which claim was dismissed on merit. That the Defendants are successors to the original party in the suit land and that as such they are litigating under the same title. That the issues raised now are identical to those previously raised and adjudicated namely; competing

claims to ownership, allegations of unlawful occupation and attempts to evict the Defendants. That the current suit is an attempt to relitigate matters that were conclusively determined and to re-open a cause that has already run its full judicial course. That the court lacks jurisdiction by reason of res-judicata.

Counsel submitted further that the court lacks jurisdiction to entertain the present suit in light of its clear overlap with matters that properly fall within the domain of succession and probate law. That the suit concerns not merely land rights but rights claimed through instances arising out of the death of the registered owner and involving disputes over who may legally succeed the estate. That the suit by its nature brings into question the validity of succession, the lawfulness of transmission and the status of the Plaintiff's alleged beneficial interest.

That the Plaintiff's entire claim arises from an alleged interest in land whose ownership is linked to a deceased person, that the Defendants are named in their capacities as administrators or successors of the estate. That this places the matter outside the jurisdictional competence of the Environment and Land Court. That if the Plaintiff genuinely believes that she has a beneficial interest in the land as a result of familiar ties or inheritance, her proper recourse lies in initiating proceedings in the Family Division under the Law of Succession Act.

Counsel prayed that the Preliminary Objection be upheld, the suit and the application be struck out for want of jurisdiction and costs be awarded to the Defendants.

On behalf of the Plaintiff written submissions dated 11th August 2025 were filed by the firm of Atemo & Associates Advocates, Counsel submitted that the Preliminary Objection raised by the Defendants did not meet the test of what amounts to a Preliminary as it does not raise pure points of law and the

objection of res-judicata cannot be determined without accessing the facts from elsewhere. Counsel relied *inter alia* on the case of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors (1969) E.A 696* where it was held that a Preliminary Objection taken by the Defendant was not a true Preliminary Objection as evidence is required to prove the issues raised therein. That the issues in the Preliminary Objection in this case do not arise from the pleadings or by a clear implication of the pleadings.

Counsel submitted further that the instant issue does not fall within the four pillars of res-judicata as the parties herein are not the same as the one in Vihiga SPMC Civil Suit No. 18 of 2015, and that the prayers sought in the instant suit are not the same for which the Defendants claim to have canvassed in the previous suit.

That the Plaintiff has moved the court against the Defendants who have arbitrarily encroached her rightful, legal and beneficial piece of land.

That the Preliminary Objection has been premised on an unknown case to wit Vihiga SPMC Civil Suit No. 18 of 2015 which does not form part of the parties' pleadings. That being the case evidence is required to prove that the issues raised in the instant suit and the former suit are the same. That the Preliminary Objection is therefore not proper, is bad in law, untenable and ought to be dismissed with costs. Counsel submitted that submissions do not amount to evidence unless expressly adopted as such and that the Preliminary Objection was unmerited and should be dismissed.

Determination

The point of objection on which the Preliminary Objection is based is that the court lacks jurisdiction for the reason that the suit before it is res-judicata and

that the claim placed before court falls within the jurisdiction of the succession court and not this court.

The threshold for Preliminary Objection was set in the case of Mukisa Biscuit Manufacturing Co. Ltd – vs- West End Distributors Ltd [1969] E.A 696 that a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion. _

Although the issue of jurisdiction of a court and res-judicata are issues of law, there is no pleadings in the plaint relating to the former suit.

In order for the court to determine whether the present suit is res-judicata the Defendants needed to exhibit to the court the pleadings, proceedings and decision in the former suit. This has not been done. As matters are, the court is being invited to go beyond the pleadings so far filed and resort to examining evidence to decide the Preliminary Objection.

I find that the grounds of the Preliminary Objection have not been proved. The Preliminary Objection is hereby dismissed. Each party to bear own costs.

Orders accordingly.

**RULING DATED AND SIGNED AT VIHIGA AND DELIVERED
VIRTUALLY THIS 11TH DAY OF DECEMBER, 2025.**

E. ASATI,
JUDGE

In the Presence of; -

Patricia- Court Assistant

Atemo for the applicant

Wanda for the respondents.