

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERUGOYA**  
**ELCA NO. E071 OF 2024**

**SAIDA WANJIKU KANGANGI ..... APPELLANT**

**VERSUS**

**PATRICKNJUGUNA            RICHU            .....**  
**RESPONDENT**

*[Being an appeal from the ruling and orders of Hon. Martha Mutuku, CM,  
delivered on 26<sup>th</sup> November 2024 in Kerugoya CMCC NO. 87 of 2015]*

**JUDGEMENT**

1. The appellant commenced this appeal through the memorandum of appeal dated 4<sup>th</sup> December 2024 raising three (3) grounds summarized as follows: -
  - a. *That the honourable learned magistrate erred in law and fact by finding that the respondent's preliminary objection dated 30<sup>th</sup> September 2024 raised a pure point of law.*
  - b. *That the honourable learned magistrate erred in law and fact by finding that the said preliminary objection met the threshold in the case of **Mukisa Biscuits versus Westend Distributors Limited (1969) EA 696.***
  - c. *That the honourable learned magistrate erred in law and fact by finding that the appellant's suit is res judicata and striking it out.*

The appellant prays for orders/ruling of 26<sup>th</sup> November 2024 to be set aside and the suit be heard to its logical conclusions.

2. The appellant filed their record of appeal dated the 19<sup>th</sup> March 2025 and served. The court on 18<sup>th</sup> September 2025 directed that the appeal be canvassed through written submissions. The learned counsel for the respondent and appellant subsequently filed their submissions dated 10<sup>th</sup> November 2025 and 13<sup>th</sup> January 2026 respectively, which the court has considered.

3. The issues for determinations by the court in this appeal are as follows:
  - a. *Whether the preliminary objection dated the 30<sup>th</sup> September 2024 by the respondent before the trial court raised a pure point of law in compliance with **Mukisa Biscuits versus Westend Distributors Limited [supra]**.*
  - b. *Whether the learned trial magistrate erred in law and in fact by upholding the preliminary objection and striking the suit for being res judicata vide the ruling delivered on 26<sup>th</sup> November 2024.*
  - c. *Who meets the costs?*
  
4. The court has carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior court decisions cited thereon and come to the following determinations:
  - a. That from the plaint dated 24<sup>th</sup> March 2015, it is apparent the appellant's claim was that she has been the registered proprietor of **land parcel Inoi/Kimandi/436**, the suit property and in 2009 her house got burnt. That when she later did a search at the lands office, she discovered the suit property had been irregularly, illegally and fraudulently transferred to the defendant. She therefore filed this suit seeking for declaration that she is the proprietor of the said land and for rectification of its register to cancel the defendant's name and replace it with her name. The defendant opposed the claim through his statement of defence disputed the plaintiff's assertion averring that the plaintiff on 14<sup>th</sup> August 2002, he entered into an agreement with the plaintiff whereby he gave her **motor vehicle KYX 140** in exchange for the suit property. That the plaintiff signed all the necessary documents and transferred the suit property to him on or about 7<sup>th</sup> February 2005. That the plaintiff latter lost the vehicle to some conmen and filed a claim over the suit property before the **Kirinyaga Central Land Disputes Tribunal in 2009**. That the tribunal's award was adopted as judgement of the court in **Kerugoya PM LDT No. 58 of 2009** on 7<sup>th</sup> January 2010, and a decree issued on 12<sup>th</sup> January 2010, and there has been no appeal.

- b. The respondent filed notice of preliminary objection and notice of motion both dated 30<sup>th</sup> September 2024 seeking to have the appellant's suit struck out/dismissed with costs for inter alia, being res judicata the previous case and contravening **Section 7 of the Civil Procedure Act chapter 21 of Laws of Kenya**. The appellant responded to the preliminary objection and application through the replying affidavit sworn by Saida Wanjiku Kangangi on the 28<sup>th</sup> October 2024, and the respondent filed a further affidavit sworn by Peninah Wanjiku Njuguna on 29<sup>th</sup> October 2024. The record confirms that during the proceeding of 29<sup>th</sup> October 2024 and 7<sup>th</sup> November 2024, the trial court issued directions that the preliminary objection be canvassed through written submissions. Subsequently, the learned counsel for the respondent and appellant filed their submissions dated 29<sup>th</sup> October 2024 and 14<sup>th</sup> November 2024 respectively. In the ruling delivered on 26<sup>th</sup> November 2024, the learned trial magistrate considered the grounds on the notice of preliminary objection, depositions by the parties and after an elaborate analyses of various superior court decisions came of the finding that the preliminary objection had merit and struck out the suit with costs.
- c. This being a first appeal, the court's mandate is as guided by the holding in several superior courts including the case of **Neepu Auto Limited versus Narendra Chananlal Solanki & 3 Others [2014] KECA 383 (KLR)**, where the Court of Appeal held that:

***“Being a first appeal we must re-evaluate the evidence and come to our own conclusions, but always bearing in mind we did not hear the witnesses nor observe their demeanour. We may only interfere with the findings of the trial judge if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence - see the judgement of this court in Maimuna s/o Patrick Mutoo versus Wilson Njau Nyaki Civil Appeal No.***

131 of 1994. In Peters versus Sunday Post Limited, [1958] EA 424 it was held that:

*“while an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of the circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to so decide.”*

- d. In the ruling of 26<sup>th</sup> November 2024, the learned trial magistrate considered the classicus case of *Mukisa Biscuits versus Westend Distributors Limited [supra]*, and summed up that a preliminary objection raises pure point of law and is argued on the assumption that the facts arising from the pleadings are undisputed. It is trite that in dealing with the grounds on such preliminary objections, no evidence required or considered. However, the respondent had not only filed a notice of preliminary objection but also a notice of motion both dated 30<sup>th</sup> September 2024 raising similar ground that the suit was res judicata and seeking for the same order that the suit be struck out/dismissed. The notice of motion was supported by an affidavit by the respondent and the appellant filed a replying affidavit that was followed by a further affidavit by the respondent. The affidavits provided the evidence that the parties relied on and it is evident from the ruling that the trial court considered it.
- e. The learned trial magistrate summed up the issues for consideration to be whether the suit was res judicata and which party bears the costs. The trial court then referred to section 7 of the Civil Procedure Act that codifies the doctrine of res judicata and several superior court decisions that have considered the application of the said doctrine, including the cases of *Abok James Odera versus John Patrick Machira Civil Application No. Nai. 49 of 2001, Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others (2017) eKLR, Lotta versus Tanaki [2003]*

2EA 556, Gurbachan Singh Kalsi versus Yowani Ekori Civil Appeal No. 62 of 1958, Mburu Kinyua versus Gachini Tuti [1978] KLR 69; [1976-80] 1KLR 790, Churanji Lal & Co. versus Bhaijee (1932) 14 KLR 28, Alfred Sagero Omweri versus Kennedy Omweri Civil Appeal No. 4 of 2016, Eric V. J. Makokha & 4 Others versus Lawrence Sagini & 2 Others [1994] eKLR, Nancy Mwangi t/a Worthlin Marketers versus Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR, and E.T versus Attorney General & Another (2012) eKLR, whose holding is spot on.

After completing the analysing and considering the findings in the foregoing superior court decisions, the learned trial magistrate pronounced herself as follows:

*“It is therefore clear that parties are not to evade the application of res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit. Litigation must come to an end. The plaintiff’s having failed to appeal the decision of the Land Dispute Tribunal, this court finds and holds that there exists a decree of the court, and that the same cannot be disturbed by the court at this stage.*

*I find merit in the preliminary objection raised but [sic] the defendant, [sic] accordingly, the plea of res judicata succeeds and is allowed and the suit is struck out with costs to the defendant.”*

- f. The parties are in agreement that the appellant had filed a dispute over the suit property against the respondent being **Kirinyaga Central Land Disputes Tribunal Case No. TC 18 of 2009**, and its award was adopted in **Kerugoya PM Land Dispute Tribunal Case No. 58 of 2009**. The law that guided the land disputes tribunals was the **Land Disputes Tribunals Act No. 18 of 1990 (chapter 303A) of Laws of Kenya** that commenced operation on 1<sup>st</sup> July 1993. The said Act has since been repealed by **Section 31 of the Environment and Land Court Act No. 19 of 2011** that commenced on 30<sup>th</sup> August 2011. As can be discerned on the heading of the **Land Disputes Tribunal Act**, it was “**An Act of Parliament to limit**

*the jurisdiction of magistrate's courts in certain cases relating to land; to establish Land Disputes Tribunals and define their jurisdiction and powers and for connected purposes."*

**Section 3(1) of the said Act** limited the jurisdiction of the tribunals the division of, or the determination of boundaries to land, including land held in common; a claim to occupy or work land; or trespass to land. Under **Section 8 of the Act**, a party not satisfied with the tribunal's award had a right to file an appeal before the **Provincial Appeals Committee** on both matters of facts and law and thereafter the High Court on questions of law alone. Needless to mention, a party to a dispute before the tribunal could also approach the superior court for a judicial review remedy in appropriate cases.

It is apparent none of the parties in ***Kirinyaga Central Land Disputes Tribunal Case No. TC 18 of 2009***, whose award was adopted in ***Kerugoya PM Land Dispute Tribunal Case No. 58 of 2009***, filed any appeal, or judicial review application over the award.

- g. It is apparent from (a) above that the appellant's suit before the trial court seeks for declaration that she is the proprietor of the suit proprietor and for rectification of its register to cancel the defendant's name and replace it with her name. This being a claim to title of a registered land was an issue outside the mandate or jurisdiction of land disputes tribunal in view of the express jurisdictional limitations under **Section 3(1) of the repealed Land Disputes Tribunal Act**, and if such a decision was made in ***Kirinyaga Central Land Disputes Tribunal Case No. TC 18 of 2009***, then it was obviously ultra vires, and a nullity ab initio, and the subsequent adoption of its award in ***Kerugoya PM Land Dispute Tribunal Case No. 58 of 2009***, and the ensuring decree thereof amounted to nothing but nullities.
- h. A nullity refers to a legal act, proceeding, or judgement that is incurably invalid from its inception and possesses no legal force, as it arises primarily from a total lack of jurisdiction or gross

violations of legal procedure. It is not merely irregular or illegal, but it is in law a nullity and automatically null and void without more ado, which means it cannot be cured by later actions.

In the case of **Macfoy versus United Africa Co. Ltd, (1961) 3 ALL ER 1169** the court held that “***you cannot put something on nothing***”, and therefore any subsequent proceedings based on a nullity are also null and void. From the pleadings filed before the trial court, the appellant treated the award of the tribunal in ***Kirinyaga Central Land Disputes Tribunal Case No. TC 18 of 2009***, its adoption in ***Kerugoya PM Land Dispute Tribunal Case No. 58 of 2009***, and the decree thereof as non-existent, when commencing the suit, and in view of the foregoing findings, it was indeed a nullity, and *void ab initio*. Though a party may move the court to declare such an order or decision a nullity, it does not mean the failure to move the court make it valid unlike a voidable order or decision, which may be validated through subsequent proceedings and court’s exercise of discretion.

- i. The award in **Kirinyaga Central Land Disputes Tribunal Case No. TC 18 of 2009**, as adopted in **Kerugoya PM Land Dispute Tribunal Case No. 58 of 2009**, which is a nullity, should be contrasted to a tribunal award made with jurisdiction that ceases to exist after the process of adopting it before the magistrate’s court is completed and a decree thereof issued. I understand the finding in the case of **Alfred Sagero Omweri versus Kennedy Omweri Ondieki Civil Appeal No. 4 of 2016** that evidently, the learned trial magistrate herein relied heavily on in her decision, to be that the tribunal decision/award ceased to exist upon adoption of the same by the court, and issuance of a decree thereof.

It follows therefore that the learned trial magistrate erred in facts and in law in holding the award affecting the title of a registered land in ***Kirinyaga Central Land Disputes Tribunal Case No. TC 18 of 2009***, and adopted in ***Kerugoya PM Land Dispute Tribunal Case No. 58 of 2009***, which was evidently a nullity, to have been made the appellant’s suit *res judicata*, which was not the case. Had the

learned trial magistrate not have made the wrong finding on the status of the tribunal dispute's award, she would not have upheld the respondent's preliminary objection, but would have rejected it.

- j. In view of the finding in (h) & (i) above, the learned trial magistrate's conclusion that the decree issued after the adoption of the tribunal's award in ***Kerugoya PM Land Dispute Tribunal Case No. 58 of 2009***, made this suit res judicata was erroneous. The tribunal's award and decree issued after its adoption remained to the extent that it sought to determine title to the suit property that was registered land, a nullity and incapable of qualifying to make this suit res judicata. I therefore find merit in the appeal.
  - k. Under ***Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya***, costs follow the event unless where otherwise directed by the court on good reasons being presented. The appellant having succeeded in this appeal is granted the costs on appeal and in the preliminary objection before the trial court.
5. Having come to the foregoing determinations in this appeal, the court finds and orders as follows:
- a. ***The appeal has merit and is allowed.***
  - b. ***The orders/ruling of 26<sup>th</sup> November 2024 upholding the preliminary objection dated 30<sup>th</sup> September 2024, and striking out the appellant's suit is hereby set aside in its entirety with costs.***
  - c. ***That it follows that the respondent's notice of preliminary objection and notice of motion, both dated 30<sup>th</sup> September 2024, are without merit and stands dismissed with costs.***

***d. That the appellant's suit before the trial court is to be heard to conclusion.***

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4<sup>TH</sup> DAY OF FEBRUARY 2026.**

**S. M. Kibunja  
ELC JUDGE**

**In the presence of:**

Appellant - No appearance

Respondent - Mr. Mwaura

Kinyua-Court Assistant

**S. M. Kibunja  
ELC JUDGE**