

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC LC NO. E081 OF 2025

JOEL KIPCHOGE KITUR PLAINTIFF

VERSUS

DORCAS MISOI 1ST

DEFENDANT

LANDS REGISTRAR NANDI COUNTY 2ND

DEFENDANT

THE KAPSABET LANDS

DISPUTE TRIBUNAL 3RD

DEFENDANT

THE HON. ATTORNEY GENERAL 4TH

DEFENDANT

RULING:

1. When the matter came up in court on 03.03.2025, the 1st Defendant, through her counsel, raised a Preliminary Objection on the issue of *res judicata* on the basis that the court had rendered itself on the issue in Kapsabet ELC Appeal No. 1 of 2022.
2. The 2nd, 3rd and 4th Defendants on the other hand also raised a Preliminary Objection at paragraph 6 of their Statement of Defence dated 20th February, 2024, on the ground that the suit was filed offends the Government Proceedings Act, Cap, 40.
3. The Preliminary Objections were canvassed by way of written submissions; the Plaintiff filed her submissions dated 27th March, 2025, which I have read and considered.

However, from a perusal of the court record, I have not seen any submissions filed on behalf of either the 1st defendant or the 2nd, 3rd and 4th defendants. Be that as it may, I will proceed to render my decision as hereunder.

Analysis and Determination:

4. Having duly considered the grounds of preliminary objection raised by the defendants as well as the submissions filed by the plaintiff, it is my considered opinion that the following issues arise for determination;

- i. Whether the Notice of Preliminary Objection raised by the 1st defendant on res judicata and the 2nd, 3rd and 4th defendants at paragraph 6 of their statement of defence meets the threshold of what amounts to a Preliminary Objection.*
- ii. Whether the Preliminary Objection raised on the ground of res judicata and Government Proceedings Act is merited.*
- iii. Who shall bear the costs of the preliminary objection.*

Whether the Notice of Preliminary Objection raised by the 1st defendant on res judicata and the 2nd, 3rd and 4th defendants at paragraph 6 of their statement of defence meets the threshold of what amounts to a Preliminary Objection;

5. The preliminary objection has been raised on account of the doctrine of res judicata and Government Proceedings Act. It is the 1st defendant's claim that the suit herein offends the

doctrine of res judicata for the reason that the court had already rendered itself on the issues directly and substantially in issue in the present suit in Kapsabet ELC Appeal No. 1 of 2022.

6. The 2nd, 3rd and 4th defendants' claim on the other hand is that the present suit offends the Government Proceedings Act, Cap 40.
7. The law on what constitutes a preliminary objection is now well settled. In **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; the Court defined Preliminary Objection as follows;

"...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

8. The Supreme Court in the case of **Aviation & Allied Workers Union -vs- Kenya Airways Ltd & 3 Others, Application No. 50 of 2014 [2015] eKLR** restated the position in Mukhisa case and held as follows:-

"Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest to the facts. The facts are

deemed agreed, as they are prima facie presented in the pleadings on record.”

9. The plaintiff in his submission disputed the averments made by the 1st defendant that the present suit offends the doctrine of res judicata and stated that the Kapsabet Land Dispute Tribunal was not vested with the requisite jurisdiction to hear and determine the matter and that the subsequent award issued thereto is null and void.

10. He thus maintained that the Kapsabet Tribunal having acted without jurisdiction, the award issued by the Tribunal and subsequently adopted by the Magistrates' Court is a nullity and unenforceable. Consequently, he asserted that the present suit cannot be said to offend the doctrine of res judicata for the reason that the previous decision was arrived at without the requisite jurisdiction or based on the outcome of the said ELC Appeal No. 1 of 2022, which sought to direct the parties to file fresh proceedings in the proper court.

11. On the issue of the suit offending the Government Proceedings Act, it was the plaintiff's submission that the 2nd - 4th defendants did not specify the exact section of the Government Proceedings Act which was offended. Be that as it may, counsel for the plaintiff relied on the provision of section 13A of the said Act, which requires the issuance of

Notice of Intention to institute proceedings against the government.

12. It was therefore his submission that the plaintiff had already instituted proceedings herein and the present suit was mainly a direction of the court, which he contends is simply a continuation of what had already been instituted in a proper court. That the present suit is a product of the court's decision in Appeal No. 1 of 2022 where the court held that the plaintiff was at liberty to file a fresh suit before the proper court.

13. In **Oraro -vs- Mbaja (2005) 1KLR 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”.

14. The question that therefore follows is whether the grounds in the preliminary objections are pure points of law and whether there is no contest as to the facts.

15. I have carefully considered the grounds in the preliminary objections and the rival position taken by the plaintiff in the matter being res judicata as well as the serving the 2nd, 3rd and 4th defendants with the Notice of Intention to institute proceedings against the government and my answer to the above is in the negative.

16. The preliminary objections have not only raised grounds which are not pure points of law but are also marred with contested factual issues. In determining the veracity of the said averments, this court will be required to interrogate the evidence adduced by the parties in the previous suit, call for the Kapsabet ELC Appeal No. 1 of 2022 file; look at the pleadings therein, examine the issues raised therein and whether the same are directly and substantially in issue in the present suit and ascertain the essential elements in a claim of res judicata. The court will also have to consider and ascertain whether the Notice of Intention to institute proceedings was indeed issued to the 2nd, 3rd and 4th defendants as required in law or whether they were parties in the said proceedings. It is only then that this court will be able to ascertain the issue of res judicata as raised and whether the suit offends the Government Proceedings Act. This may also lead to the exercise of judicial discretion.

17. Further, the court in dealing with the issue of whether the doctrine of res judicata may be raised as a ground of preliminary objection in the case of **George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR** held as follows: -

***“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection.*”**

The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

18. Thus, guided by the above decision, it is the finding of this court that an issue of res judicata cannot be determined by way of the Preliminary Objection for the reasons outlined hereinabove.
19. On the second ground of the present suit offending the Government Proceedings Act, it is important to note that the 2nd, 3rd and 4th defendants did not outline the exact section of the Government Proceedings Act which the present suit offends.
20. Be that as it may, from the arguments presented by the plaintiff, it is evident that there are contested factual information and which may require to be tested by rules of evidence. The plaintiff avers that he had already taken out and served the 2nd - 4th defendants with the requisite notice of intention to institute the proceedings against them in the proceedings known as Kapsabet ELC Appeal No. 1 of 2022.

This can only be proved and ascertained upon the plaintiff adducing the relevant evidence of such service.

21.To this end therefore, it is the finding of this court that the grounds of preliminary objections raised herein, on the issue of res judicata and Government Proceedings Act, do not meet the threshold of what amounts to a preliminary objection in the sense of the law.

Whether the Preliminary Objections raised on the ground of res judicata and Government Proceedings Act is merited;

22.Having held that the grounds of preliminary objections raised herein do not meet the threshold of what amount to a preliminary objections in the sense of the law, I find that discussing the merits thereto of the said grounds would amount to an academic exercise.

Who shall bear the costs of the preliminary objections;

23.It is a well settled principle that costs follow the event unless the court deems otherwise. In this case, having held that the notice of Preliminary Objections is not merited, I find that the plaintiff is entitled to the costs.

24.In the premises, I accordingly find that the Preliminary Objections raised by the 1st defendant on 03.03.2025 and by the 2nd, 3rd and 4th defendants in paragraph 6 of the Statement of Defence dated 20.02.2024 are not merited and are hereby struck out with costs to the Plaintiff.

25.It is so ordered.

DATED, SIGNED and DELIVERED virtually at **ELDORET** this
5th day of FEBRUARY, 2026.

**HON. C. K. YANO
JUDGE**

Ruling delivered in the presence of: -

Mr. Tallam for the Plaintiff.

No appearance for Defendants.

Court Assistant - Laban

ORIGINAL