



**Kamotho v Kamotho (Environment and Land Case E484 of 2025)  
[2026] KEELC 535 (KLR) (3 February 2026) (Ruling)**

Neutral citation: [2026] KEELC 535 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E484 OF 2025  
MN KULLOW, J  
FEBRUARY 3, 2026**

**BETWEEN**

**EUNICE WAMBUI KAMOTHO ..... PLAINTIFF**

**AND**

**MARIANNE NYOKABI KAMOTHO ..... DEFENDANT**

**RULING**

1. The matter for determination is the Notice of Preliminary Objection dated 28<sup>th</sup> October 2025 filed by the Defendant/Respondent on the grounds that the Plaintiff's application dated 16<sup>th</sup> September 2025 and the entire suit are fatally defective, misconceived and an abuse of the court process.
2. The Defendant contends that the present application is barred by the doctrine of res judicata under Section 7 of the *Civil Procedure Act*, having been directly and substantially determined by courts of competent jurisdiction in Milimani ELC Case No. E300 of 2024 and Milimani CMCC No. E6834 of 2020 between the same parties.
3. It is further contended that all the elements of res judicata have been satisfied in that the subject matter in issue, being eviction and restraining orders over the suit property, is identical to that in the previous suits, the parties are the same, the courts were competent and the earlier determinations were final and conclusive.
4. The Defendant also avers that the present proceedings constitute an abuse of the court process as they amount to a calculated attempt to re-litigate matters already determined and that the repeated filing of similar applications without appealing or seeking review of the prior rulings amounts to a collateral attack on judicial decisions and undermines the principle of finality of litigation.
5. It is further contended that the application is frivolous, vexatious, intended to waste judicial time and meant to harass the Defendant by re-opening issues already rejected by the court.



6. The Plaintiff was duly served and filed written submissions in opposition to the Preliminary Objection. The Court directed the parties to canvass the objection by way of written submissions and in compliance with the said directions, both parties filed submissions relying on various judicial authorities and provisions of the law, which the Court has carefully read and considered.
7. The Court has also carefully considered the pleadings of the parties together with the submissions on record and now renders itself as follows:-
8. The guiding law on the issue of res judicata is 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”.
9. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd. –Vs- West End Distributors Ltd (1969) EA 696* to mean:-“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 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”.
10. Further Sir Charles Nebbold, JA stated that: -“A Preliminary Objection 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.
11. This Court having made a finding on the description of a Preliminary Objection, it is not in doubt that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.
12. Further, in the case of *Quick Enterprises Ltd. -Vs- Kenya Railways Corporation, Kisumu HCCC No.22 of 1999*, the Court held that:-“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
13. It is this Court’s opinion that in determining a Preliminary Objection, the Court will also take into account that the Preliminary Objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another -Vs- Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the court held that:-“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
14. Before the Court embarks on determining the merit of the Notice of Preliminary Objection, it has to first determine whether what has been raised herein satisfy the ingredients of a Preliminary Objection. As the Court determines whether what the 1<sup>st</sup> Respondent has filed amounts to a Preliminary Objection or not, the Court will also be persuaded by the findings in the case of *Oraro -Vs- Mbaja (2005) 1KLR 141*, where the Court held that:-“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”.



15. In the instant Preliminary Objection, the Defendant/Respondent has averred that the Plaintiff's application and the entire suit are barred by the doctrine of res judicata on the basis that similar issues relating to eviction and restraining orders were raised and determined in Milimani ELC Case No. E300 of 2024 and Milimani CMCC No. E6834 of 2020 between the same parties. The Defendant has further contended that following the dismissal of the earlier application, this Court is functus officio and that the present proceedings amount to an abuse of the court process.
16. The Plaintiff opposed the Preliminary Objection and contended that the previous matters were not determined on merits and that the present suit is founded on a fresh eviction notice issued in April 2025 which gave rise to a new cause of action.
17. For this Court to determine whether the issues herein were directly and substantially in issue in the said previous suits and whether the earlier determinations were final on merits, the Court would be required to ascertain facts by calling for and scrutinising the pleadings, applications and rulings in Milimani ELC Case No. E300 of 2024 and Milimani CMCC No. E6834 of 2020.
18. The Court would further be required to examine whether the present cause of action is founded on new operative facts arising from a fresh eviction notice or whether it is identical to that litigated previously.
19. Further, this Preliminary Objection as raised does not stem purely from the pleadings before this Court but requires ascertainment of facts through examination of evidence from prior proceedings.
20. Though Section 7 of the *Civil Procedure Act* provides for the doctrine of res judicata, it is evident that the issue of res judicata in the circumstances of this case cannot properly be raised by way of a Preliminary Objection. As was held in *George Kama Kimani & 4 Others -Vs- County Government of Trans-Nzoia* (supra), the proper manner of raising the plea of res judicata is through a substantive application where pleadings and decisions from the previous suits are annexed to enable the Court to compare the issues.
21. Similarly, the Defendant's contention that the Court is functus officio requires this Court to interrogate the substance and scope of the earlier rulings to determine whether the rights of the parties were conclusively determined, which again calls for evidentiary inquiry.
22. Given the limited scope of the jurisdiction on a Preliminary Objection and the test laid down in *Mukisa Biscuits Manufacturing Co. Ltd -Vs- West End Distributors Ltd* (supra), this Court finds that the issue of res judicata as raised herein involves probing of evidence and factual ascertainment and therefore cannot be determined through a Preliminary Objection.
23. This Court further finds that the issues raised in the objection do not constitute pure points of law capable of disposing of the suit without recourse to evidence.
24. Accordingly, this Court finds and holds that the Notice of Preliminary Objection dated 28<sup>th</sup> October 2025 does not meet the threshold of a proper Preliminary Objection.
25. For the foregoing reasons, the said Notice of Preliminary Objection is hereby dismissed in its entirety with costs being in the cause.
26. The matter shall be set down for hearing and determination on merits.

It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 3RD DAY OF FEBRUARY, 2026.**



**MOHAMMED N. KULLOW**

**JUDGE**

Ruling delivered virtually in the presence of:

Ms. Amondi holding brief for Ms. Wanyonyi for the Plaintiff/Applicant

Ms. Makori holding brief for Kimatta for the Defendant/Respondents

Ms. Philomena W. Court Assistant

