

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ELCL OS NO. E018 OF 2024**

**ALEX WATTY MALAYI .....**  
**PLAINTIFF/RESPONDENT**

**-VERSUS-**

**THE CHURCH**  
**COMMISSIONERS OF KENYA**  
**.....DEFENDANT/APPLICANT**

**RULING:**

1. The Defendant/Applicant filed a Notice of Motion Application dated 30<sup>th</sup> October, 2025, against the Plaintiff/ Respondent seeking the following orders: -
  - i. Spent.
  - ii. Spent.
  - iii. THAT the prayers contained in the Plaintiff's Originating Summons dated 20<sup>th</sup> December 2024 and filed herein be struck out in limine and/or dismissed with costs, on grounds that the same discloses no reasonable cause of action in law, it is scandalous, frivolous, vexatious, res judicata, it may prejudice, embarrass or delay the fair trial of the action and it is otherwise an abuse of the due process of this Honourable Court.
  - iv. THAT this Honourable court be pleased to set aside or vacate the interim injunction issued on 29.01.2025 forthwith.

- v. THAT the plaintiff's claim for adverse possession over Eldoret Municipality Block 15/206 measuring 5.440 Ha, being a leasehold interest derived from the National Government, be dismissed with costs, on grounds that the same offends Rule 41 of the Limitation of Actions Act and is therefore misconceived, incompetent and untenable in law.
  - vi. THAT the costs of this application and the entire suit is awarded to the defendant/applicant.
  - vii. Such further or other orders as this Honourable court may deem just and expedient in the circumstances.
2. The application is premised on the 13 grounds on the face thereof and on the Supporting Affidavit sworn by one Arch-Deacon Ben Birech, the Administrative Secretary of the defendant/applicant within Archdiocese of Eldoret, on even date.
  3. He gave a history and factual explanations on the acquisition of the suit property herein, from the application for allotment, the issuance of the Allotment letter and PDP, the various requisite payments, amendment of the RIM and the subsequent execution and processing of the Certificate of Lease registered on 30.01.2002.
  4. It is his claim that the plaintiff has instituted and is actively prosecuting a claim for adverse possession over the suit land notwithstanding the existence of a judgment delivered on 15.10.2024 in ELDORET ELC NO. 209 OF 2014 between

Church Commissioners of Kenya vs Pamela Jeto Lumurian & 28 Others (hereinafter referred to as the 'previous suit); which conclusively determined the issue of ownership and issued orders of eviction of all unlawful occupants including the plaintiff herein.

5. It is his contention that the previous suit was heard and determined on merit by Hon. E. Obaga J. vide a judgment issued on 15.10.2024 and whose effect was to allow the Church Commissioner's claim and uphold its title.
6. He thus avers that the present suit is barred by the doctrine of res judicata. That the question of who is entitled to the suit property and whether the persons occupying it have any legal rights was the direct issue and subject in the previous suit, the same having been conclusively determined by a competent court and a final judgment issued thereto.
7. Further, that the defendant and plaintiff herein are effectively litigating under the same title or interests as in the previous suit. That the plaintiff cannot therefore re-introduce the same issues via a fresh OS contrary to the provisions of section 7 of the Civil Procedure Act.
8. That the plaintiff herein was fully aware of the previous suit and even sought to be enjoined in that suit. However, he voluntarily withdrew his application for joinder before the final determination of the case.
9. Consequently, it is his claim that the plaintiff having sought and withdrawn his application for joinder in the previous suit is barred from relitigating the same issues. He annexed

copies of the said Application for Joinder and a Notice of Withdrawal by the plaintiff in the previous suit.

10. He further averred that the plaintiff's claim under the doctrine of adverse possession over the suit property is untenable since section 41 of the Limitation of Actions Act bars such claims over public or government land. That time for purposes of adverse possession could not run against the state prior to the land being leased to the defendant on 30.01.2002 for a term of 99 years from 01.09.1990 and having in mind the proceedings instituted in the previous suit in the year 2014.
11. On the interim injunction issued on the 29.01.2025, it was his contention that the same cannot override the prior final judgment and decree issued in the previous suit and the continued litigation thus amounts to an abuse of the court process.
12. He further avers that the judgment and decree in the previous suit has neither been stayed, set aside and/or varied. That the plaintiff has acknowledged the existence and knowledge of the judgment and decree in the previous suit.
13. In conclusion, he urged the court to allow the application and grant the orders sought therein.
14. The application was opposed. The plaintiff/respondent filed a Replying Affidavit dated and sworn on 07.11.2025. He dismissed the averments raised by the applicant in their application and supporting affidavit.

15. It was his claim that no basis had been laid for the application, he denied that his suit is neither res judicata nor vexatious, frivolous or scandalous as alleged. He maintained that the OS is grounded on solid ground and further that there has never been any previous suit between himself and the respondent.
16. He further averred his claim under the doctrine of adverse possession can be maintained on a leasehold interest land. That pursuant to the provisions of Articles 61(2), 62 and 64 which classifies the different types of land tenures in Kenya and defines what constitutes a public and private land respectively. He thus maintained that in light of Article 64(b), the suit property is private land.
17. Further, that sections 24 (a) and (b) of the Land Registration Act defines registered land as both freehold and leasehold. He also relied on the provisions of section 37 and 38 of the Limitation of Actions Act.
18. He reiterated that he was not a party in Eldoret ELC No. 209 of 2014 and that the proceedings therein do not concern him and thus the provisions of section 7 of the Civil Procedure Act on res judicata do not apply in the instant suit.
19. He also deponed that the judgment in Eldoret ELC No. 209 of 2014 does not have a bearing on the dispute in the instant case. He however admitted to have applied to be enjoined as an interested party in ELC No. 209 of 2014 but later withdrew the application and filed the instant suit instead.

20. It was his contention that the fact that he withdrew his application to be enjoined as an interested party does not defeat his claim.
21. In conclusion, he dismissed the application as being misconceived and thus not merited in the circumstances and amounts to a blatant abuse of the court process. He thus urged the court to dismiss the same with costs.
22. The replying affidavit was served upon the applicant, who filed a Further Affidavit dated 04.12.2025 in response thereto. He deponed that the nature, origin and legal character of the suit property lie at the heart of the present dispute.
23. In response to paragraph 29 of the replying affidavit, he reiterated that the suit property is a leasehold land granted by the Government of Kenya as the head lessor and is therefore government land which bars its acquisition by way of adverse possession.
24. He also reiterated that the court in the previous suit, conclusively determined issues of ownership and occupation on the suit property. That although the plaintiff was not named as a defendant in the said suit, he was among the unlawful occupiers targeted by the decree and was at all material times aware of the said proceedings as demonstrated in his Application for Joinder and the subsequent Notice of Withdrawal.
25. He further deponed that the doctrine of res judicata, binds not only the parties formally named in the previous

proceedings but also those who claim under them or litigate under the same title and extends to issues which either were or ought to have been raised in the earlier suit.

26. It is his contention that the effect of the present suit is to invite this court to sit in substantive review of another court of concurrent jurisdiction under the guise of an adverse possession claim.
27. In conclusion, he urged the court to allow the defendant's application and grant the orders sought therein.
28. The Application was canvassed by way of written submissions. The Applicant filed their submissions dated 08.12.2025 while the plaintiff/respondent filed his submissions dated 04.12.2025 together with authorities which I have read and considered.

**Analysis and Determination:**

29. I have carefully considered the application, the supporting and further affidavit and the annexures therein, the replying affidavit in response thereto as well as the rival submissions in totality. Consequently, it is my considered view that the following issues arise for determination: -
  - i. Whether the plaintiff's suit offends the doctrine of res judicata.*
  - ii. Whether the plaintiff's suit offends the provisions of section 41 of the Limitation of Actions Act*
  - iii. Who shall bear the costs of the application.*

**Whether the plaintiff's suit offends the doctrine of res judicata;**

30. The Defendant/Applicant herein seeks to have the plaintiff's suit struck out on account of the doctrine of res judicata.
31. It is the defendant's claim that the issues directly and substantially in issue in the present suit were similar to the issues that were directly and substantially in issue in the previous suit; ELDORET ELC NO. 209 OF 2014, which was heard and determined by a Justice E. Obaga vide the judgment entered on 15.10.2024.
32. The plaintiff/respondent on the other hand avers that his suit does not offend the doctrine of res judicata for the main reason that he was not a party in the said previous suit. Further, it is his contention that the Application for Joinder and which was subsequently withdrawn, was filed post judgment in the matter and the same could not therefore have any legal effect but was merely an exercise in futility. He thus maintains that he was not a party in the previous suit and the doctrine is therefore not applicable in the instant suit and cited several cases to this effect.
33. The question that therefore follows is whether the present suit offends the doctrine of res judicata. It has been held that to constitute res judicata, there must be an adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.

34. Section 7 of the Civil Procedure Act on res judicata states 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.*”**

35. The Supreme Court in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)** while dealing with the issue of res judicata held as follows:

***“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final; b) The Judgment or order was on merit; c) The Judgment or order was rendered by a court having*”**

***jurisdiction over the subject matter and the parties; and d) There must be between the first and the second action identical parties, subject matter and cause of action.”***

36. The Supreme Court in expounding the doctrine of res judicata at paragraph 69 further stated that: -

***“The elements set out above are to be conjunctive rather than disjunctive before a suit or an issue is to be deemed res judicata on account of a former suit. It must be demonstrated that there was a former judgment which was final, it was on merit and by a court having jurisdiction and have identical parties, subject and cause of action.”***

37. It is common ground that 3 of the necessary elements in a claim of res judicata have been satisfactorily established. The subject matter in the previous suit is similar to the subject matter in the present suit, that is, Eldoret Municipality Block 15/206 measuring approx. 5.440Ha. This fact has not been disputed.

38. It is also not in dispute that the issues directly and substantially in issue in the present suit, being issues on ownership and occupation of the suit property, are also the same issues which were directly and substantially in issue in the previous suit.

39. Lastly, it is common ground that there is previous suit was heard and determined. There is a former judgment by Justice E. Obaga entered on 15.10.2024 and which conclusively determined the issue of ownership and occupation on merit and the court was vested with the requisite jurisdiction to hear and determine the claim in the previous suit.
40. What appears to be in dispute in the present application is the issue of parties; that is, whether the plaintiff herein was also a party in the previous suit No. 209 of 2014.
41. From a cursory look at the pleadings, on the face of the same, the plaintiff herein was not a party in the previous suit. However, this court has carefully looked at the annexures in the Supporting Affidavit, particularly the Application for Joinder and the grounds therein as well as the subsequent Notice of Withdrawal of the said Application for Joinder. Further, in paragraph 38 of his Affidavit in response to the application herein, the plaintiff admits that he did apply to be joined in Eldoret ELC No. 209 of 2014 as an interested party, but withdrew his application and filed this suit instead.
42. It is evident that the plaintiff herein was fully aware of the existence of the previous/former suit but failed to take the necessary steps in ventilating his claim. His actions in filing the instant suit, fully aware of the existence of the former suit and judgment and decree therein amounts to circumventing the doctrine of res judicata.

43. In the case of **Attorney General & Another vs ET [2012] eKLR** it was held that: -

***“the courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs NBK & Others (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J. (as he then was) in the case of Njanju vs Wambugu and Another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issues with the same opponent before the courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of the doctrine of res judicata”***

44. Consequently, it is the finding of this court that the instant suit offends the doctrine of res judicata and is therefore ripe for striking out.

45. It is trite law that a claim on res judicata touches on the jurisdiction of a court to entertain this claim. Having held that the plaintiff's suit herein is res judicata, this court finds that it is not vested with the requisite jurisdiction to canvass the remaining issues.
46. Consequently, issue no. (ii) fails for want of jurisdiction.

**Who shall bear the costs of the application;**

47. It is well settled that costs follow the event unless the court directs otherwise as provided under section 27 of the Civil Procedure Act.
48. In the present case, having held that the plaintiff's suit is res judicata, it is the finding of this court that the defendant/applicant should be awarded the costs of the application as well as the suit.

**CONCLUSION:**

49. In view of the foregoing, it is the finding of this court that the Notice of Motion Application dated 30<sup>th</sup> October, 2025 is merited and is hereby allowed as prayed.
50. Consequently, the plaintiff's suit be and is hereby struck out with costs.
51. It is so ordered.

**DATED, SIGNED and DELIVERED in ELDORET this 19<sup>th</sup> day of FEBRUARY, 2026.**

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

Ruling delivered in the presence of: -

Mr. Momanyi for Applicant.

Mr. Chirchir & Ms. Chesoo for Respondent.

Court Assistant - Laban

ORIGINAL