

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC NO. E036 OF 2022

MARGARET KAVINI MWANGU..... 1ST
PLAINTIFF
JOHN KAVINYA YATTA..... 2ND
PLAINTIFF

-VERSUS-

RAPHAEL MUTINDA MUUMBI.....
DEFENDANT

RULING

1. The Plaintiffs filed this suit against the Defendant in which they sought the following reliefs:
 1. **A declaration that the Plaintiffs herein have acquired the fifteen and half (15½) acres to be excised from land parcel No. Makueni/Kalii/739 by way of adverse possession against the Defendant.**
 2. **A declaration that the Defendant holds the fifteen and half (15½) acres to be excised from Land Parcel No. Makueni/Kalii/739 in trust for the Plaintiffs.**
 3. **An order directing the Defendant to transfer the aforesaid fifteen and half (15½) acres of land Makueni/Kalii/739 to the Plaintiffs and in default the Deputy Registrar of this court to sign and/or execute the relevant transfer documents in favour of the Plaintiffs in respect of 15½ acres to be excised from land parcel No. Makueni/Kalii/739.**
 4. **An order of permanent injunction restraining the Defendant by himself, his agents, servants or someone acting under his authority from trespassing, cultivating and in any other manner from interfering with the said fifteen and half (15½) acres of land parcel Makueni/Kalii/739 occupied by the Plaintiffs.**

- 5. Costs and interests of this suit.**
 - 6. Any other relief that this honourable court deems fit and just to grant.**
2. The Defendant filed a defence and raised a counterclaim in which he sought the following reliefs:
- 1. An order declaring that the Defendant is sole and exclusive owner of land parcel No. Makueni/Kalii/739.**
 - 2. An order of permanent injunction restraining the Plaintiffs whether by themselves their agents, servants and/or any other person claiming under them from in any way from trespassing, or otherwise interfering with the Defendant's occupation/possession and/or use of land parcel Mukueni/Kalii/739.**
 - 3. General damages for trespass and loss of user.**
 - 4. An order of eviction against the Plaintiffs to be implemented by the OCS Makueni Police station.**
 - 5. Costs of this suit.**
 - 6. Any other relief that this honourable court may deem fit and just to grant.**
3. The Defendant filed a notice of motion dated 6th August, 2025 in which he sought to have the Plaintiffs' suit struck out with costs on the ground that it offends Section 7 of the Civil Procedure Act Cap 21 laws of Kenya.
4. The Defendant contends that LR No. Makueni/Kalii/739 (suit property) has been a subject of litigation before and the issue of ownership was determined and therefore the filing of the present suit cannot be sustained.
5. The Defendant states that his parent and the parent of the Plaintiffs were engaged in litigation over plot 739 both in court and adjudication process under the Land Adjudication Act and process under the Land Adjudication Act and both fora ruled that the suit property belonged to his late father Muumbi Mbuvi.

6. The Defendant stated that in 1973 his father filed an appeal to the Resident Magistrate court in civil Appeal No. L62 of 1973 against the Plaintiffs' father. The parties to the appeal agreed that the appeal was to be determined by conducting a "Kithitu oath" under customary law. On the day when the Kithitu oath was to be taken, the Plaintiffs' parent did not show up. The trial magistrate ruled that the appeal had been determined and declared the Appellant that is Muumbi Mbuvi as the owner of the suit property.
7. There was also Kalii Adjudication case No. KA/30/86 and Appeal No. LA/81/2000 to the Minister under Land Adjudication Act. The Appeal to the Minister was determined in favour of Muumbi Mbuvi. There has been no appeal against the Minister's decision or any appeal against the magistrates in Appeal No. L 62 of 1973.
8. The Respondents opposed the Applicants application based on a replying affidavit sworn on 16th October, 2025. The Respondents contend that they are claiming 15½ acres out of the suit property by virtue of adverse possession and that what their parents were previously litigating on is not the suit property. The Respondents in the alternative state that whereas their parents may have litigated over the suit property, theirs is a claim for adverse possession which is a different cause of action altogether which has never been litigated before.
9. The Respondents state that the decision of the Minister was never implemented and that they have continuously lived on the land for over 12 years and they are therefore protected by the doctrine of adverse possession.
10. The parties were directed to file written submissions. The Applicant filed his submissions dated 16th October, 2025. The Respondents filed their submissions dated 10th November, 2025.
11. I have considered the Applicant's application as well as the opposition to the same by the Respondents. I have also considered the submissions by the

parties. The only issue for determination is whether the Respondents' suit is res judicata.

12. The doctrine of res judicata is predicated on Section 7 of the Civil Procedure Act which 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.

Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

***Explanation.* — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating”.**

13. There is no contention that the suit property was the subject of Appeal No. L62 of 1973 where the parents of Applicant and the Respondents were parties. This appeal must have arisen from decision of a lay magistrate who were commonly referred to as District Magistrate 1 (DM 1). The parties to the appeal agreed by consent that the appeal was going to be determined by way of “Kithitu oath”. On the day when “Kithitu oath” was to be taken, the Respondents’ father who was one of the Respondents never appeared for the “Kithitu oath”. The appeal was therefore decided in favour of Muumbi Mbuvi.

14. Later, the suit property was again the subject of litigation under the Land Adjudication Act. The Minister’s decision was that the suit property belonged to the late Muumbi Mbuvi. There was no judicial review filed from the Minister’s decision. There was also no appeal from the Resident Magistrate’s decision on the appeal. Both the Resident Magistrate and the Minister were competent to determine the dispute between the parents of the parties before this application.

15. In the case of **E.T –vs- Attorney General & Another (2012) eKLR** it was stated as follows:

“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 a form of a new cause of action which has been

resolved by a court of competent jurisdiction. In the case of Omondi –vs- National Bank of Kenya Limited and 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., in the case of Njangu –vs- Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata”.

16. In the case of C. K. Bett Traders Ltd & 2 Others –vs- Kennedy Mwangi & Another (2021) eKLR Justice Mwita stated as follows:

“The provision is on the fundamental doctrine that there should be an end to litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estopped. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and

they were conclusively determined by a court of competent jurisdiction”.

17. In the case of **Charity Njanja Mwaniki (Suing on her behalf and 8 others siblings –vs- James Mwaniki Gaturu & Another (2017) eKLR** the court held as follows:

“I also find that parties in the present case, the Plaintiffs herein, are children of the 1st Defendant hence are estopped from litigating under the provisions on Section 7 of the Civil Procedure Act”.

18. The ownership of the suit property was finally determined in Appeal No. L62 of 1973 as well as the Minister’s decision rendered on 23rd November, 2001. The Respondents cannot again bring a new cause of action over the same property. As was stated in the case of ET –vs- Attorney General (Supra), the Respondents are trying to evade the doctrine of res judicata by bringing a fresh cause of action. I therefore find that the Respondents’ suit is res judicata. I proceed to strike it out with costs to the Applicant.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF FEBRUARY, 2026.

IN THE PRESENCE OF:

Mr. Muendo for Mr. Muthiani for Plaintiff/Respondent.

Ms. Kyalo for Applicant.

Court assistant - Steve Musyoki