

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC APPEAL NO E063 OF 2024

BETH WANGARI NJOROGE.....
.....APPELLANT

VERSUS

MUSA KIMENGICH KIMUGE..... RESPONDENT

(Being an appeal arising from the Ruling of Hon. Lina Akoth (SRM) delivered on 31st October, 2024 in NAKURUCM ELC NO E578 OF 2023)

BETH WANGARI NJOROGE.....PLAINTIFF

VERSUS

MUSA KIMENGICH KIMUGE.....DEFENDANT

JUDGMENT

1. This appeal arises from the Ruling of Hon. Lina Akoth, (SRM) delivered on 31st October, 2024, in **NAKURU CM ELC NO E578 OF 2023**. The Appellant filed a Memorandum of Appeal dated 20th November, 2024 and listed the following nine grounds:

- 1. THAT the Learned Trial Magistrate erred in law and fact by failing to appreciate the overwhelming evidence adduced by the Appellant.***
- 2. THAT the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant’s submissions and legal authorities relied upon in support thereof.***
- 3. THAT the Learned Trial Magistrate erred in law and fact in entering a finding in the Respondent’s favour and thus***

giving weight to the entire evidence of the Respondent while wholly disregarding the Appellants' rebuttal evidence.

- 4. THAT the Learned Trial Magistrate erred in law and in fact in finding that the Appellant's suit was res judicata and thus entering a finding that the court was functus officio.*
- 5. THAT the Learned Trial Magistrate erred in law and in fact in declaring the suit as res judicata when in fact she failed to consider that the previous suit in NAKURU CMCC NO 230 OF 2012, did not touch on the issue of the Respondent's eviction but was rather anchored on the issue of the tenancy between the Appellant and the Respondent.*
- 6. THAT the Learned Trial Magistrate erred in law and in fact in failing to find that the suit was not res judicata based on the fact that the Appellant/Applicant's application dated 4th September, 2022 filed in NAKURU CMCC NO 230 OF 2012 seeking eviction orders was dismissed on the grounds that it was not anchored on an existing suit and as such, it was not heard on its merits and instead, the court directed the Appellant herein to file a fresh suit seeking eviction orders.*
- 7. THAT the Learned Trial Magistrate erred in law and in fact in failing to enter a finding that the previous suits before the magistrate's court and the appellate court found that the dispute had been overtaken by events on the basis that the tenancy had been terminated by effluxion of time*

but had never entered a finding on the question of eviction and thus the Trial Magistrate was clothed with the requisite jurisdiction to determine the suit.

8. THAT the Learned Trial Magistrate erred in law and in fact in failing to find that the above mentioned application seeking the eviction of the Respondent from the Appellant's land was never heard on its merits and as such, the same cannot be declared to be res judicata.

9. THAT the Learned Trial Magistrate erred in law and in fact in upholding the preliminary objection when the issues that the Respondent raised were not pure points of law but needed the ascertainment of facts and as such the preliminary objection before her was not proper.

2. The Appellant prayed for the following orders:

a) THAT the Appeal herein be allowed.

b) THAT ruling and order of the Honorable Magistrate delivered on 31st October, 2024, be set aside.

c) THAT the Preliminary Objection dated 15th July, 2024, be dismissed.

d) THAT the costs of this appeal be borne by the Respondent.

3. A brief background of the Appeal is that the Appellant vide Plaint dated 3rd October, 2023, sought the following orders against the Respondent:

a) THAT this honourable court be hereby pleased to issue an order that the Landlord-Tenant agreement dated 1st

January, 2011 between the plaintiff and the defendant with regards to the property known as NAKURU MUNICIPALITY BLOCK/28 was terminated by effluxion of time on 30th December, 2018.

b) THAT this honourable court be hereby pleased to issue an order that since the landlord-tenant was terminated on 30th December, 2018, the defendant herein is a trespasser on the property known as NAKURU MUNICIPALITY BLOCK/28.

c) THAT an eviction order directed to the Defendant ordering him to forthwith vacate the Plaintiff's parcel of land namely NAKURU MUNICIPALITY BLOCK/28.

d) General damages.

e) Mesne profit for the use of the suit property.

f) Interests of mesne profits.

g) Costs of this suit.

h) Any other reliefs that this honourable court deems fit.

4. The trial court in its ruling dated 31st October, 2024, found that the Preliminary Objection dated 15th July, 2024 to be merited and allowed the same with costs. The trial court struck out the suit on the grounds that it was *res-judicata*.

APPELLANT'S SUBMISSIONS

5. Counsel for the Appellant filed submissions dated 30th July, 2025 and 14th November, 2025, and submitted that the trial Magistrate failed to

appreciate that there was a clear distinction between the former tenancy-related suit and the fresh cause of action grounded on trespass.

6. Counsel submitted that the Appellant provided uncontroverted evidence demonstrating that the lease had expired in 2018 and that the Respondent has continued occupation beyond that point was unlawful, still the court struck out the suit without engaging with the Appellant's rebuttals and supporting documents.
7. Mr. Karanja, further submitted that the Learned Magistrate's reliance on the doctrines of *res judicata* and *functus officio* was both erroneous and unsustainable, as the Appellant's suit raised a legitimate, triable issue that warranted full adjudication. He further stated that the previous suit NAKURU CMCC NO. 230 OF 2012 neither raised nor determined the question of the Respondent's eviction, that the only application touching on eviction filed on 4th September 2022 was dismissed on a procedural basis (i.e., not anchored on an existing suit) and not heard on merits, that the Appellant was explicitly directed to file a fresh suit for eviction, meaning the issue remained un-adjudicated and open for determination
8. Counsel submitted that by dismissing the suit summarily, the court foreclosed the Appellant's right to be heard and allowed procedural technicalities to override the dictates of substantive justice, and relied on Section 7 of the Civil Procedure Act and the following cases: **Qayrat Foods Limited vs Safiya Ahmed Mohamed & 6 others [2020] eKLR, Independent Electoral and Boundaries Commission vs Maina Kiai**

and 5 others [2017] eKLR and Zurich Insurance Company plc vs Colin Richard [2011] EWCA civ 641.

9. According to Mr. Karanja the Respondent's objection was improperly entertained as a preliminary objection, as a preliminary objection must be based on pure points of law, not requiring factual ascertainment. It was counsel's submission that in the present case, the determination of whether the suit was *res judicata* required a review of pleadings, applications and rulings from previous pleadings, a task that could only be undertaken through evidence and not summarily, and cited the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696.**
10. On the issue as to whether the proceedings in CMCC No E578 of 2023 are *res judicata*, counsel submitted that the cause of action for trespass and the right to *mesne* profits simply did not exist during the currency of the former suit and they materialized only upon the expiry of the lease on 30th December, 2018.
11. Counsel submitted that a matter that was not in existence and could not have been pleaded, hence was not directly and substantially in issue in the previous proceedings and relied on the case of on the case of **Maithene Malindi Enterprises Ltd vs Kaniki Karisa Kaniki & 2 others 2018 eKLR.** Counsel urged the court to allow the Appeal with costs.

RESPONDENT'S SUBMISSIONS

12. Counsel for the Respondent filed submissions dated 3rd November, 2025, and submitted that the trial Court rightfully found that the Preliminary Objection had merit and struck out the suit **NAKURU CM ELC E578 of 2023** on the ground that it was *res judicata*, and relied on the case of **William Koross (Legal personal Representative of Elijah C.A Koross) vs Hezekiah Kiptoo Komen & 4 others [2015] eKLR**.
13. It was counsel's further submission that any matter which the Appellant could have raised in the former suit is barred by the doctrine of *res judicata*, and relied on Section 7 of the Civil Procedure Act and the cases of **Clement Kung'u Waibara vs Anne Wanjiku Kibeh & Another [2020] eKLR** and **Mohamed Dado Hatu vs Dhadho Gaddae Godhana & 2 others [2017] eKLR**.
14. Mr. Waiganjo stated that the Appellant's application dated 4th September, 2022, in Nakuru CMCC No 230 of 2012, having been fully canvassed and dismissed, the matter cannot be brought up again as a fresh suit, as it is *res judicata* and the court is *functus officio*. It was counsel's further submission that the Respondent's preliminary objection dated 15th July, 2024, before the trial court was based on pure points of law and relied on the cases of **John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**, **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR** and **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors**

[1969] E.A 696, and urged the court to dismiss the appeal with costs to the Respondent.

ANALYSIS AND DETERMINATION

15. The Appellant listed many grounds of appeal which can be summarized into two grounds as follows: whether the Trial Magistrate erred in fact and law in allowing the Respondent's preliminary objection that the Plaintiff's suit in the lower court was *res judicata*, and whether the trial Magistrate erred in striking out the suit on that ground.
16. The background of the case is that the Respondent filed a suit against the Respondent vide a Plaint in NAKURU CMCC NO. 230 OF 2012, and that the Appellant being dissatisfied with the outcome, filed an Appeal vide **ELC Appeal No 16 of 2019**. It was the Appellant's case that the previous suit **NAKURU CMCC NO. 230 OF 2012** neither raised nor determined the question of the Respondent's eviction that the only application touching on eviction filed on 4th September 2022 was dismissed on a procedural technicality as it was not anchored on any existing suit. The Appellant stated that she was directed to file a fresh suit for eviction, to be heard on merit, as the same was not determined.
17. This matter has been protracted before the court with suits, appeals and counter appeals. It is not disputed that the parties had a tenancy/lease relationship on the suit land. The lease was for a period of 8 years which terminated by effluxion of time in 2018. It is on record that the

Respondent is still in occupation of the suit premises, which is the core of the suit that the Appellant had filed in the lower court for the eviction of the Respondent. This is an issue which was not determined by the lower court.

18. Courts have determined in various cases that, courts should be slow in terminating cases vide preliminary objections, especially where the objection is not purely on a point of law. Where the court has to ascertain facts or a history of the suit and the status of the litigation away from the documents presented, then the court should allow evidence to be tendered instead of prematurely terminating a case.
19. The court is also cognizant of cases where litigants file multiple cases involving the same subject matter, same parties and where the suits have been determined conclusively by a competent court. In such instances, the court cannot shy away from upholding the preliminary objections which are filed vide applications where affidavits and evidence are attached for determination of the court.
20. Preliminary objections should not be used as a sword for winning a case, as was held in the Supreme Court Case of **Independent Electoral & Boundaries Commission v Cheperenger & 2 others (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015)**, as follows:

“[21] The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true

preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

21. The above holding applies to this case, where the Respondent has used the preliminary objection as a sword, why would a party want a case to be terminated prematurely without being heard on merit and there are outstanding issues? The back and forth of this case which started in 2012 is a classical case where litigants do not want to embrace the expeditious settlement of disputes. If the parties had tried alternative dispute resolution maybe they would have come up with a win-win which would not have taken more than 20 years in court. Counsel should also advise their clients accordingly, on the amicable and expeditious settlement of disputes.

22. Similarly, in the case of **George Kamau Kimani & 4 others Vs County Government of Trans Nzoia & Another (2014), ECLR** the Court held as follows:

“I have considered the points raised by the first 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 raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence.”

23. In the case of **Josephat Njuguna Karugu Vs Margaret Nduta Ngugi & 2 others [2021] eKLR**, the court held:

“It is not in doubt that for the Court to ascertain whether the instant suit is Res Judicata, unprocedural or bad in law and an abuse of the Court process, the Court will have to ascertain and probe evidence more so as the parties are disputing various issues. Therefore, the Court finds and holds that grounds No.1,3,4 and 5 are not pure points of law as they are not capable of disposing off the matter preliminarily without calling for evidence, probing it and the Court ascertaining facts from elsewhere and therefore the same are not properly raised Preliminary Objection.”

24. I have considered the Record and Supplementary Record of Appeal, the submissions by counsel, and find that the Appeal has merit and therefore issue the following specific orders:

- a) The Appeal is hereby allowed.*
- b) The ruling and order of the Honorable Magistrate delivered on 31st October, 2024, is hereby set aside.*
- c) The Preliminary Objection dated 15th July, 2024, is hereby dismissed.*
- d) The NAKURU CM ELC NO. E 578 OF 2023, to be heard on merit by a Magistrate other than Hon. Lina Akoth (SRM.)*
- e) Costs of the Appeal are awarded to the Appellant.*

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH
DAY OF FEBRUARY 2026.**

**M. A. ODENY
JUDGE**