



Orianga (Suing on his own behalf and as the Legal Representative Estate of Loyce Oduka Oriango, now Deceased) v County Government of Nyamira & 2 others (Environment and Land Case E017 of 2024) [2025] KEELC 5608 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE E017 OF 2024**

**DO OHUNGO, J
JULY 29, 2025**

BETWEEN

SAMWEL OWINO ORIANGA (SUING ON HIS OWN BEHALF AND AS THE LEGAL REPRESENTATIVE ESTATE OF LOYCE ODUKA ORIANGO, NOW DECEASED) PLAINTIFF

AND

COUNTY GOVERNMENT OF NYAMIRA 1ST DEFENDANT

THE KENYA PRISONS SERVICE 2ND DEFENDANT

HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The Plaintiff commenced proceedings in this matter through Plaintiff dated 6th August 2024 which was later replaced by Amended Plaintiff amended on 26th September 2024. He brought the suit on his own behalf and as legal representative of the estate of Loyce Oduka Oriango (deceased). He averred in the Amended Plaintiff that a 1.7 hectares portion of the parcel of land known as LR No. North Mugirango/Magwagwa II/403 (the suit property) was hived off from the deceased’s ancestral land and that registration of the suit property in the name of the First Defendant was unlawful, illegal and void. The plaintiff therefore sought judgment against the Defendants jointly and severally for:
 - i. Declaration that the Plaintiff is the owner and/or is entitled to 1.7 Ha out of LR No. North Mugirango/Magwagwa II/403 which portion forms part of the suit Property.
 - ii. Declaration that the 1st Defendant hold a portion measuring 1.7 Ha out of LR No. North Mugirango/Magwagwa II/403, respectively, on Trust for the Plaintiff.



- iii. An Order directing the 1st Defendant to sub-divide and transfer a portion measuring 1.7 Ha out of LR No. North Mugirango/Magwagwa II/403 in favor of the Plaintiff.
 - iv. In default, the Deputy Registrar of this Honorable Court be ordered and/or liberty to sign the relevant Mutation, Consents and Transfers Documents to facilitate compliance with Orders in (iii) above.
 - v. Order of Eviction against the 1st and 2nd Defendants, their Agents and/or Servants from a portion measuring 1.7 Ha out of LR No. North Mugirango/Magwagwa II/403.
 - vi. Permanent Injunction, restraining the 1st and 2nd Defendants either by themselves, agents, servants and/or anyone claiming under the said Defendants from harassing, threatening, entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, fencing, Interfering with and/or in any other manner dealing with a portion measuring 1.7 Ha out of LR No. North Mugirango/Magwagwa II/403.
 - vii. General Damages, exemplary damages and/or aggravated damages for unlawful interference, denial of a constitutional right to property, Trespass as against the 1st and 2nd Defendants.
 - viii. Costs of this suit be borne by the Defendants.
 - ix. Such further and/or other relief as the Honorable Court may deem fit and expedient so to grant.
2. The First Defendant reacted to the suit by filing Memorandum of Appearance dated 21st August 2024 and thereafter Notice of Preliminary Objection dated 20th March 2025. This ruling is in respect of the Preliminary Objection.
 3. The Preliminary Objection was pleaded as follows:

Take Notice that the 1st Defendant shall, in limine, raise a preliminary objection against the instant application dated 6th August, 2024 on grounds that: -

The application offends the mandatory provisions of Order 51 Rule 14 (1), of the Civil Procedure Rules, 2010 for reasons that:

 1. The issues raised are res judicata having been a subject in The Environment and Land Court at Nyamira Nyamira Elc Case No. 95 OF 2021, James Onyango Oriango -vs- The County Government of Nyamira and 4 others;

Reasons Wherefore it shall be submitted that the instant application is defective ab initio in law and principle and tantamount to abuse of judicial function the 1st Defendant on the foregoing grounds apply that this suit be struck out with costs.
 4. The Preliminary Objection was canvassed through written submissions. The First Defendant filed submissions dated 21st May 2025 through which it argued that a decision of the court must be respected and that judicial determinations must be final, binding and conclusive. It added that there would be injustice if a party is required to litigate afresh matters which had been determined by the Court. That unless set aside or quashed in a manner provided for by the law, a decision of the court must be accepted as incontrovertibly correct. It further contended that these principles would be undermined if the Court were to revisit them every time a party is dissatisfied with an order and goes back to the same Court particularly when there is a change of Judicial Officers in the Court station.



5. The First Defendant went on to submit that judgment was delivered in Nyamira ELC No. 95 of 2021 on 22nd March 2023 concerning a claim that 9 hectares of the suit property was ancestral land. It further argued that in those circumstances, the present suit should be dismissed with costs.
6. The First Defendant relied inter alia on the cases of *Siri Ram Kaura v Morgan* [1961] EA 462 and *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR in support of its submissions. For good measure, it attached to the submissions a copy of judgment delivered in Nyamira ELC No. 95 of 2021 on 22nd March 2023.
7. On his part, the Plaintiff filed submissions dated 23rd May 2015 through which he contended that the issues raised in the objection are factual in nature and call for evidence to be received. That res judicata could only be validly raised through an application supported by an affidavit and that in the circumstances the objection had been improperly raised. Relying inter alia on the cases of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, *J E N v D O K* [2018] eKLR and *Lucy Kurgat v Franline Yaola Manyonge* [2020] eKLR, he urged the Court to dismiss the Preliminary Objection with costs, for want of merit.
8. The Second and Third Defendants opted not to participate in the hearing of the Preliminary Objection and did not therefore file any submissions.
9. I have carefully considered the Preliminary Objection and the submissions. The issues that arise for determination are whether the Preliminary Objection is a valid preliminary objection and whether the suit is res judicata.
10. The law relating to preliminary objections was succinctly summed up in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 by Law JA as follows:

So far as I'm 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.

11. Thus, for a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. If it is upheld, a valid preliminary objection should result in summarily terminating the suit or application against which it is raised.
12. The caution given by Sir Charles Newbold (P) in *Mukisa Biscuit Manufacturing Co. Ltd* (supra) is a good enough reminder that not every objection amounts to a valid preliminary objection. If what is raised does not amount to a pure point of law, the issue is better addressed through a substantive application or in the ordinary course of defending a given matter. Sir Charles Newbold (P) held:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.



13. The Court of Appeal recently revisited the issue of what constitutes a valid preliminary objection in *Ndumba v Returning Officer Kimilili Constituency & another* [2025] KECA 636 (KLR) where it held:
 26. A P.O serves to challenge the legal sufficiency of a case, proceeding on the assumption that all factual claims presented are accurate. It is reserved solely for addressing legal points, strictly avoiding engagement with any disputed factual matters. The court's assessment hinges on whether the objection originates exclusively from the pleadings and is rooted firmly in established legal principles.
 27. Should the determination necessitate an inquiry into extraneous factual matters, or the exercise of judicial discretion, a P.O would be deemed procedurally inappropriate. See 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".
 28. A P.O cannot be raised if any fact has to be ascertained from elsewhere, or if the court is called upon to exercise judicial discretion. The court will also take into account that the P.O must stem from the pleadings and raise pure point/s of law. It should not deal with disputed facts, nor should it derive its foundation from factual information.
14. The present objection is that issues raised in this suit are *res judicata* having been raised and determined in *Nyamira ELC No. 95 of 2021*. A perusal of the Amended Complaint herein shows that at paragraph 16 thereof, the Plaintiff averred as follows:

It is contended by the Plaintiff that his brother one James Onyango Oriango having been allocated a portion of 10 Ha of the ancestral land by their deceased father, same successfully sued the 1st and 3rd Defendants vide *Nyamira ELC Case No. 95 OF 2021* whereby the court therein decreed that the Plaintiff therein was entitled to 9 Ha out of LR NO. North Mugirango/Magwagwa II/403 same being part of the ancestral land of the Deceased herein.
15. I have also perused the Plaintiff's witness statement dated 26th September 2024, which was filed alongside the Amended Complaint, and I note that at paragraph 13 thereof, the Plaintiff reiterated the existence of *Nyamira ELC No. 95 of 2021* and stated that the Court therein decreed as he averred at paragraph 16 of the Amended Complaint. By "decreed" I understand the Plaintiff to mean that *Nyamira ELC No. 95 of 2021* was heard and finally determined.
16. That *Nyamira ELC No. 95 of 2021* was heard and finally determined is supported by the Plaintiff's own pleadings filed on 9th August 2024, at the commencement of this suit. On that date, the Plaintiff filed "Plaintiff's Bundle of Documents" dated 6th August 2024. Item number 8 in the said bundle or list is "Copy of the Judgment vide *Nyamira ELC NO. 95 OF 2021*." A copy of the judgment is included at pages 45 to 66 of the bundle. In the circumstances, there are no disputed factual matters. The preliminary objection arises fully from the Plaintiff's case and pleadings. I do not need to travel beyond the Plaintiff's case and pleadings as they existed as of 26th March 2025, when the objection was filed, to enable me to hear and determine the objection. Consequently, I find and hold that the Preliminary Objection herein is a valid preliminary objection.



17. I now turn to the question of whether the suit is res judicata. The doctrine of res judicata is embodied in 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.

18. The effect of res judicata is that it deprives a Court of jurisdiction to hear and determine any matter that falls within the four walls of the doctrine. For an objection based on the doctrine to succeed, there must be a previous suit in which the matter was in issue; the parties in both matters were the same or litigating under the same title; the previous matter was heard and determined by a competent court and the issue is raised once again in the new suit. The doctrine is a complete estoppel against any suit that runs afoul of it. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR and *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others* [2018] eKLR.

19. In *Kenya Commercial Bank Limited v Muiji Coffee Estate Limited & another* [2016] eKLR, the Supreme Court stated that res judicata allows a litigant only one bite at the cherry by preventing the litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action or submitting to court issues that have been heard and determined by a competent court. The effect of the doctrine is to prevent a multiplicity of suits and to ensure that litigation comes to conclusion.

20. I have perused the judgment in *Nyamira ELC No. 95 of 2021*. The Plaintiff therein was James Onyango Oriango who is a brother to the present Plaintiff. The First and Third Defendants herein were First and Fifth Defendants, respectively, in *Nyamira ELC No. 95 of 2021*. A perusal of the judgment reveals that the Court (Mugo Kamau, J.) found in favour of James Onyango Oriango and held as follows:

I therefore find that the Plaintiff is entitled to Judgment against the Defendants jointly and severally which I hereby grant him in the following terms:

- a. A declaration be and is hereby issued that the Plaintiff is the owner of 9 Hectares out of land parcel North Mugirango/Magwagwa II/403 to be registered in the name of the 1st Defendant the same being ancestral land.
- b. An order is hereby made that the 1st Defendant do forthwith transfer to the Plaintiff 9 Hectares out of land parcel No. North Mugirango/ Magwagwa II/403 in lieu of which the Deputy Registrar of this Honourable Court do execute transfer documents in place of the 1st Defendant.
- c. A permanent injunction do issue against the Defendants and/or their agents or servants, to desist from interrupting the Plaintiff's quiet enjoyment of the land in the designated 9 Hectares out of land parcel No. North Mugirango/ Magwagwa II/403.
- d. Kshs. 1,250,000/= General Damages, Exemplary Damages and Aggravated Damages for unlawful eviction, destruction of property and for the attendant nervous shock, emotional distress, psychological, mental anguish and the unconstitutional, cruel, degrading and inhuman treatment meted



on and occasioned to the Plaintiff and his family when carrying out the unconstitutional and illegal eviction.

The Plaintiff is also awarded the costs of this Suit and Interest on the same and on (d) above at court rates the same to be calculated from the date of filing this Suit until payment in full.

21. A reading of the judgment reveals that James Onyango Oriango claimed 9 hectares of the suit property for himself. He contended that Oriango Sambare who was his deceased father, had allocated him approximately 10 hectares of the suit property in 1964. In the present case, the Plaintiff is claiming 1.7 hectares of the suit property on his own behalf and as legal representative of the estate of his mother Loyce Oduka Oriango (deceased). A reading of paragraph 8 of the Plaintiff reveals that according to the Plaintiff, the 1.7 hectares which he is claiming is different from the 9 hectares which Onyango Oriango claimed in Nyamira ELC No. 95 of 2021. Put differently, the portion claimed in this suit is different from that which was in issue in the earlier case. Thus there is neither similarity of parties nor subject matter in the two cases. While the First Defendant may harbour a feeling that it is dealing with a multiplicity of suits over the same issue, the reality is that the Plaintiff herein is a new claimant with a claim on a different portion of the suit property. The parties should have their day in court.
22. In the circumstances, res judicata has not been established. I find no merit in Notice of Preliminary Objection dated 20th March 2025 and I therefore dismiss it with costs to the Plaintiff.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 29TH DAY OF JULY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Mulisa for the Plaintiff

Ms Moeche for the First Defendant

Mr Ndiritu for the Second and Third Defendants

Court Assistant: K Misiko

