

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC LAND APPEAL CASE NO. E032 OF 2024.**

RICHARD MAKORI NYABUKU.....APPELLANT

versus

YOSABIA LEAH K. KEMUNTO .....1<sup>ST</sup> RESPONDENT

THE LAND REGISTRAR, KISII COUNTY ..... 2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup>  
RESPONDENT

*(Being an appeal from the ruling and Order(s) of Hon. D.O Mac'andere*

*(S.R.M) dated 7th day of August, 2024 in KISII CM ELC NO. E072 OF 2023.)*

**JUDGMENT**

1. The Appellant being dissatisfied with the Ruling of the hon trial magistrate dated 7<sup>th</sup> August 2024 lodged this appeal and in it he raised the following grounds
  - a. The Learned trial magistrate erred both in fact and in law by failing to properly evaluate and analyse the evidence on record, thus arriving at an erroneous decision of dismissing the appellant's entire suit prematurely, in which viable issues were

raised by the appellant in his pleadings, which required ventilation through a full trial hearing and determination.

- b. The learned trial magistrate erred in law and fact by finding that the legal issues, including the ownership of the subject matter in the trial, being Nyaribari Cache/B/B/Boburia/5092, were determined in the judgment in Kisii CM ELC No. E052 of 2021, although it is clear especially from the pleadings that the subject matter in that suit was Nyaribari Cache/B/B/Boburia/14705. The court held, in dismissing the first respondent's case, that the same was legally registered in the appellant's name.
- c. The learned trial Magistrate erred in law and in fact by holding that the appellant had acknowledged Nyaribari cache/ B/ B/ Boburia./ 5092 belonged to the 1<sup>st</sup> Respondent in KISII CM ELC No.E052 of 2021, yet the appellant clearly stated in the plaint in KISII CM ELC No.E072 of 2023 that she was the registered proprietor but only to the extent of holding the same in trust for the Appellant.
- d. The learned trial Magistrate erred in law and in fact by failing to give the appellant the opportunity to interrogate and adduce evidence challenging and/ or questioning the nature of the said

registration, which in this case was held in trust for the appellant herein.

- e. The learned trial Magistrate erred in law and in fact by holding that there was no evidence to support the fact that the appellant had a beneficial interest over the subject matter, yet the appellant was not given an opportunity to present evidence before and during the trial when the matter came up for hearing.
- f. The learned trial Magistrate erred in law and in fact by misunderstanding, misinterpreting, or selectively applying a decision/judgment of another court, KISII CM ELC No-E052 of 2021, which was dismissed in favour of the appellant and not vice versa, as alluded to in the ruling appealed from. This led to a decision that was factually and legally untenable.
- g. That learned trial Magistrate erred in law and in fact by failing to find that the subject matters as well as the claims in KISII CM ELC No. E072 of 2023 and KISII CM ELC -E052 of 2021, that is, Nyaribari Chache/ B/ B/ Boburia/ 5092 and Nyaribari chache/B/B/Boburia/14705 were unique and unrelated to each other.
- h. That the learned trial Magistrate erred in law and in fact by finding that entertaining the suit was an abuse of the court process and dismissing the suit with costs to the 1<sup>st</sup> Respondent

yet the appellant had a valid suit/ claim which issues had not been determined by a competent court of law, a pre- trial conference in the matter is yet to be done.

- i. The learned trial Magistrate erred in law and in fact by holding that the appellant was not acting in good faith as the issues had been dealt with in KISII MC ELC No.E052 of 2021 and that he should have appealed the decision if dissatisfied yet the case was dismissed in favour of the appellant hence no need to appeal as it was the 1<sup>st</sup> Respondent's suit.
2. The parties agreed to prosecute the appeal by filing written submissions. The Appellants filed submissions dated 24<sup>th</sup> November, 2025, and the Respondent's quarter page submissions are dated 13<sup>th</sup> February, 2026. The Appellant, in his submissions, stated that his suit was not res judicata, Kisii CM ELC E052 of 2021. He relied on the case of **John Florence Maritime Services & Another -v- Cabinet Secretary of Transport & Infrastructure & 3 others (Petition Number 17 of 2015 (2021) KESC Judgement** which decision reiterated the principles of res judicata as set out in section 7 of the Civil Procedure Act.
3. The Respondent relied on the record of proceedings and pleadings in the subordinate court and urged the court to dismiss the appeal.

**Analysis and Determination:**

4. From the plaint filed by the Appellant in CMCC E072 of 2023, the cause of action is stated inter alia that he has a beneficial interest in the land L.R No. Nyaribari Chache/B/B/Boburia/5092. The Appellant cited what he considered to be the particulars of breach of the trust and, in the reliefs, urged the trial court to make a declaration that the Respondent was holding the said land in trust for his benefit.
5. The Appellant admits knowledge of a prior suit, Kisii CM ELC E052 of 2021, initiated by the 1<sup>st</sup> Respondent. I note from the record of appeal that a copy of the Plaint in suit E052 of 2012 was not included. It is also unclear whether it formed part of the annexures to the application whose ruling is now challenged. However, in her ruling, the trial magistrate referred to the defence filed in the previous suit as well as the judgment.
6. Be that as it may, as a first appellate court, the law allows me to re-evaluate the evidence available before the trial court as enunciated in the case of **Selle vs Associated Motor Boat Ltd & Others (1968) EA p.126**.
7. I have perused the plaint and statement of defence in E052 of 2021 as the file in MC ELC E052 of 2021 formed part of the record of this file. From my reading of the same, the gist of the claim concerned a contract of sale of Nyaribari Chache/B/B/Boburia 14705 between the Appellant and the 1<sup>st</sup> Respondent's deceased husband.
8. The 1<sup>st</sup> Respondent alleged that her husband purchased a portion of L.R No 14705 measuring 33m by 35m by 34m by 33m from the Appellant.

Thus, the 1<sup>st</sup> Respondent asked the court in the former suit to cancel the Appellant's title over L.R. No. 14705 and cause it to be registered in her name. Both parties testified and their testimonies revolved around the sale and purchase of the subject matter L.R No. 14705 which the Appellant vehemently denied.

9. Following the above brief summary, this court now sets out to determine the question of whether the latter suit, MCELC E072 of 2023, was res judicata of the former suit, MCELC E052 of 2021. The Appellant, in his submissions, admits that the judgment in the former suit was rendered by a court of competent jurisdiction, that it was on the merits of the case, and that it was final.

10. However, the Appellant argues that his suit cannot be res judicata because the parties, subject matters as well as the claims in KISII CM ELC NO. E072 OF 2023 and KISII CM ELC NO. E052 of 2021, that is, Nyaribari Chache/ B/ B/ Boburia/ 5092 and Nyaribari Chache/ B/ B/Boburia/ 14705 were unique and unrelated to each other.

11. He avers that although Richard Makori Nyabuku and Yosabia Leah Kemunto Kayago appear in both suits, it is critical to note that in the former suit, Yosabia has sued in her capacity as the administratrix of an estate while in the latter suit, she has been sued in her own capacity. On the argument that the 1<sup>st</sup> Respondent in this suit has been sued in her individual capacity and not as the legal administrator of the estate of her

late husband Philip Kayago Otoigo-deceased, the interests cannot be separated as the land remains one, and the 1<sup>st</sup> Respondent's relationship to the deceased would fall under the category of "*between parties under whom they or any of them claim.*"

12. Section 7 of the Civil Procedure Act which dictates the principle of res judicata states thus;

**"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. — (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.** (underline mine for emphasis).

13. Additionally, the Appellant argued that there were two additional parties sued in the latter suit, that is, the Land Registrar, Kisii County and the Attorney General. On this point, I wish to state that the Appellant

misinterpreted the law on res judicata in arguing that the addition of the Attorney General or the Land Registrar would prevent a matter from being res judicata if their addition does not vary the cause of action. The answer lies in explanation 4 of section 7, which states thus;

**“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.”**

14. The appellant also submitted that the subject matter/cause of action in the two suits was different. He avers that a close scrutiny of the parties' pleadings shows that the subject matter in KISII CM ELC NO. E072 OF 2023, as deducted from the appellant's plaint, is Nyaribari Chache/B/B/Boburia/5092, for which he seeks a declaration and an order directing the defendant to transfer the suit property, to him. While in KISII CM ELC NO. E052 of 2021, the Subject matter is Nyaribari Chache/B/BI Boburia/4705, since among other orders sought, a declaration, an order nullifying registration of, an order compelling the appellant to execute a permanent injunction and an order of eviction from Nyaribari Chache/B/Boburia/4705.

15. From the record, it is not in dispute that the Appellant's late mother was the owner of L.R No Nyaribari Chache/B/Boburia/1846 which was subdivided into three portions to create titles; Nyaribari

Chache/B/Boburia/5090, 5091 and 5092. It is also not in dispute that the Respondent's late husband was registered as the owner of L.R. No. 5092.

16. Further, it is not in dispute that parcel number 14705 resulted from the subdivision of parcel number 5090. In the former suit, the Respondent had claimed that a portion of 14705 measuring 33m by 35m by 33m by 34m had been sold to her late husband. She sought for an order revoking the Appellants title to 14705 and that the same be transferred and registered in her (1<sup>st</sup> Respondent's) name.

17. In the judgment in the previous suit (MCELC 52 of 2021), the trial magistrate found that the sale agreement relied upon by Respondent had been impeached for the reasons she stated. She also stated that the Appellant had demonstrated that he came into possession of L.R. No. 14705 (a subdivision of 5090) through transmission. The judgment on record only referred to the subject matter 5092 in passing as it was not before that court for determination.

18. The learned magistrate in impugned ruling the subject of this appeal only referred to a paragraph of the defence where the Appellant pleaded that the 1<sup>st</sup> Respondent was the registered owner of L.R. No. 5092. She also referred to the analysis section which acknowledges that the 1<sup>st</sup> Respondent was registered as owner of 5092 and the Appellant as owner of 14705. She then proceeds to state thus;

**“There is no evidence coming out of there being any beneficial trust of the Plaintiff over parcel 5092.”**

19. The above statement clearly shows that the learned trial court failed to identify the cause of action in MCELC E052 of 2021, which did not require the Appellant to prove the existence of a trust over parcel no 5092. The claim of trust by the Appellant over parcel number 5092 in MCELC E072 of 2023 had not yet been heard, and therefore, he could not present evidence in an interlocutory application seeking to strike out his suit.

20. It is apparent from the record that the title L.R. No. 5092 was not contested in the previous case, as that case focused on whether there was a valid contract of sale for a portion of parcel number 14705. The subsequent case filed by the Appellant asserts ownership, claiming trust in the 1<sup>st</sup> Respondent's title 5092. Moreover, the origin of L.R. No. 14705 was separate from that of 5092, and therefore, these issues could not be resolved in the same case.

21. The 1<sup>st</sup> Respondent may incorporate the appellant's statement of defence into the supporting documents of her defence. However, the appellant's suit does not operate as res judicata to the previous case, in which ownership of parcel 5092 was not in dispute. The allegations made by the Appellant in her statement of defence in E052 of 2021 regarding ownership of L.R. No. 5092 did not constitute a cause of action. It is my

considered opinion that, although raised as a defence, it did not constitute the issues in the previous case.

22. I am therefore persuaded by the Appellant's arguments in grounds 7 and 8 of the memo of appeal to hold that the cause of action in the former suit, MC ELC E052 of 2021, is not the same as the cause of action in MCELC E072 of 2023. The learned magistrate erred in finding that the latter suit was res judicata.

23. Consequently, I enter judgment for the Appellant and grant the following orders:

- a. The Ruling and orders of Hon. D.O. MacAndere (SRM) dated 7<sup>th</sup> August, 2024, are hereby set aside.**
- b. I do hereby substitute the order dismissing the Appellant's suit for being res judicata with an order directing that the suit MCELC E072 of 2023 is reinstated and shall proceed to be heard and determined on its merits.**
- c. Costs of the Appeal to be borne by the 1<sup>st</sup> Respondent.**

**Dated, Signed and Delivered at Kisii this 9<sup>th</sup> day of April, 2026**

**A. OMOLLO**

**JUDGE**