



REPUBLIC OF KENYA



KENYA LAW
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**Gichinga v Sayiore & another (Environment and Land Case
752 of 2017) [2026] KEELC 2163 (KLR) (16 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 752 OF 2017**

MD MWANGI, J

APRIL 16, 2026

BETWEEN

CHARLES GATONYE GICHINGA PLAINTIFF

AND

WAITITU OLE SAYIORE 1ST DEFENDANT

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED 2ND
DEFENDANT**

RULING

{In respect of the Plaintiff's Preliminary Objection by the Plaintiff dated 19th January 2026 against the 1st Defendant's Notice of Motion dated 16th December 2025}

Introduction

1. Through a Notice of Motion dated 16th December 2025, the 1st Defendant entreats this court to vacate its judgement of 20th April 2020, set aside the ex-parte proceedings, re-open the Plaintiff's suit and grant him leave to enter appearance and file a defence out of time. There is a further prayer that the court declares that execution of the judgement cannot proceed until a legal representative is appointed for the deceased Plaintiff.
2. The Plaintiff opposed this application by filing a Preliminary Objection on 19th January 2026. This objection was supported by affidavits sworn on the same date by Serah Musiani and the Plaintiff's counsel, Jonathan Omangi. The preliminary objection is anchored on the following primary grounds:
 - a. The matter is res judicata and cannot be litigated anew.



- b. Substituted service was properly effected pursuant to a court order dated 18th October 2018.
 - c. The 1st Defendant acknowledged the availability of the land during Criminal Case No. 4843 of 1997 in Machakos.
 - d. The Chief Magistrate's Court issued letters ad colligenda bona on 25th August 2025, substituting the deceased Plaintiff with his wife.
3. Jonathan Omangi's affidavit asserts that reopening the case would severely prejudice the deceased Plaintiff, who bought the property in 1984 and initiated legal action in 1997. He refutes the 1st Defendant's claim of ignorance, pointing out that the 1st Defendant previously filed a defence in this matter. Furthermore, the deponent notes that following the judgment, Empakasi sub-location's Assistant Chief, Nelly Mutunkei convened a meeting in which he, the 1st Defendant, the Assistant Chief, and two others had attended. During this meeting, the 1st Defendant was handed the judgment of this court and advised to comply.
 4. Serah Musiani's affidavit corroborates this narrative, stating that since her late husband purchased the Empakasi land number 9 in 1984, they have remained in uninterrupted possession, planting trees therein and farming. She contends that the 1st Defendant cannot feign ignorance, as he was served, attended the settlement meeting, and confessed to selling them the land during the criminal proceedings. Based on the court's earlier directive, the property has been surveyed and is awaiting physical beaconing to hive off 2 acres as ordered by the court.

Court Directions & Submissions

5. On 18th February 2026, the court directed that the Preliminary Objection be dealt with first by way of written submissions.
6. The Plaintiff's submissions, dated 11th March 2026, argue that the 1st Defendant's application should be dismissed with costs as it is brought in bad faith (*mala fides*) and wastes judicial time. They argue that re-litigating the suit offends the doctrine of *res judicata*, noting that the court's judgment already determined that the 1st Defendant filed a defence and sold 2 acres to the Plaintiff for Kshs. 16,000. Despite originally seeking 5 acres, the Plaintiffs were satisfied with the judgment and did not appeal. Having occupied the land for 42 years without the 1st Defendant seeking eviction, the Plaintiff argues that litigation cannot continue indefinitely (*ad infinitum*). Furthermore, the Plaintiff asserts that substituted service was justified due to the 1st Defendant's prior hostility, and his admissions in Criminal Case No. 4843 of 1997 confirm he gave them the property. Finally, the letters *Ad Colligenda Bona* issued on 25th August 2025 at the Kajiado Chief Magistrate's Court validate Serah Musiani's authority to act as the legal representative of her late husband.
7. Conversely, the 1st Defendant's submissions of 12th March 2026 urge the court to strike out the Preliminary Objection with costs, arguing that it fails to raise pure points of law and relies on disputed facts requiring evidentiary analysis. To emphasize that a preliminary objection must strictly concern points of law, the 1st Defendant relies on *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696, as referenced in *Margaret Nyiha Gatambia & 2 others V Peninah Ngechi Njaaga & 3 Others*. Additionally, the 1st Defendant cites *Patel & another v United Credit Limited & another* (Civil Suit E532 of 2025) [2025] KEHC 18361 (KLR); *Nthenge v Muoki & another* (Environment & Land Case E005 of 2024) [2025] KEMC 126 (KLR); *Henry Wanyama*



Khaemba v Standard Chartered Bank Ltd & Another [2014]eKLR; and George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another [2014]eKLR to establish that res-judicata cannot form the basis of a preliminary objection. Citing Oraro v Mbaja [2005] 1KLR 141, the 1st Defendant further argues that issues regarding substituted service and criminal proceedings are not pure legal issues and demand evidentiary proof.

Issue for Determination

8. The central issue before this court is whether the Plaintiff's Preliminary Objection is warranted and meets the requisite legal threshold.

Determination

9. As correctly submitted by the 1st Defendant, a valid preliminary objection must strictly rely on pure points of law. This principle was foundational in the Mukisa Biscuits Manufacturing Co. Ltd case, where the court held as follows:

“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... 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. The Court of Appeal reiterated these core elements in Nyakerario & 5 others vs Professional Clean Care Limited [2025] KECA 2036 (KLR) as follows:

“The essential elements of a preliminary objection are: it must be pleaded or must arise from a clear implication out of pleadings; it must be an objection which, if argued as a preliminary point, may dispose of the suit; and since it is based on the assumption that all the facts pleaded are correct, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Examples of instances where preliminary objections may be raised are identified as 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, as long as the facts relied upon in arguing them are not in dispute.”

11. To contextualize this, it is necessary to review the history of this suit, which was finalized on 20th April 2022 through a judgment delivered by M.N. Gicheru J. The Plaintiff filed a Plaint on 30th June 2016 seeking to be declared the owner of 5 acres allocated in 1984, or alternatively, compensation for the land and developments valued at Ksh.25,000,000/= (or the exact value determined at judgment). The Court record indicates that the 1st Defendant entered an appearance through PGNK & Associates on 29th July 2016, filed a statement of defence, and supported the 2nd Defendant's Counterclaim against the Plaintiff via a Reply to Defence and Counterclaim filed on 4th December 2021. Following testimony from Charles Gatonye Gichinga in 2019 and 2020, the trial court ordered the 1st Defendant to transfer 2 acres of formerly Land No.9 Empakasi Ranching to the Plaintiff, failing which the Deputy Registrar would execute the transfer.

12. In pursuit of executing this judgment, the Plaintiff secured orders on 2nd October 2025 for police security (via OCS - Kitengela Police Station) to allow surveyors to hive off the 2 acres from L.R.



NO. 14785 in Kitengela Town. This execution prompted the 1st Defendant's application dated 16th December 2025, wherein he alleges that he was never served with summons, pleadings, or the judgment, and further argues that execution was commenced without his knowledge and after the Plaintiff died on 18th June 2025.

13. Upon reviewing the grounds of the Plaintiff's Preliminary Objection, it is glaringly evident that it rests on factual issues. Ascertaining these claims requires this court to probe the evidence before arriving at a decision. The distinction between points of law and fact was clearly elucidated in *J N & 5 others v Board of Management, St. G School Nairobi & another* [2017] KEHC 9629 (KLR) by JM Mativo J (as he then was) as follows:

“In Law a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. In law a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a "finding of fact") usually depends on particular circumstances or factual situations”

14. The Plaintiff relies heavily on the doctrine of res judicata (established in Section 7 of the *Civil Procedure Act*, Cap. 21) to support the objection. While res judicata rightfully bars the re-litigation of issues already finally determined between the same parties, it cannot serve as a valid ground for a preliminary objection because establishing it necessitates the verification of facts and documentary evidence. This rationale was articulated in *Henry Wanyama Khaemba v Standard Chartered Bank (K) Ltd & another* [2014] KEHC 4804 (KLR) by F Gikonyo J through the following judicial pronouncement:

“That re-statement of the limited scope of a preliminary objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly.”

15. Because the Plaintiff's objection is rooted in factual matters rather than pure points of law, I concur with the 1st Defendant's submissions that it is procedurally untenable and fails to meet the required legal threshold.
16. Consequently, I hereby proceed to dismiss the Preliminary Objection dated 19th January 2026 but with no orders as to costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 16TH DAY OF APRIL 2026.

M.D. MWANGI

JUDGE

In the virtual presence of:



Mr. Omangi for the Plaintiff/Objector

Ms. Parseina for the 1st Defendant

Mr. Wachira for the 2nd Defendant

Court Assistant: Alex

M.D. MWANGI

JUDGE

