



REPUBLIC OF KENYA



**Kisilu & 9 others v Kivevo & 2 others (Land Case (Originating Summons)
E001 of 2023) [2026] KEELC 2071 (KLR) (16 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2071 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
LAND CASE (ORIGINATING SUMMONS) E001 OF 2023**

EO OBAGA, J

APRIL 16, 2026

BETWEEN

JOSEPH KIOKO KISILU 1ST PLAINTIFF
CHRISTOPHER MAILU KISILU 2ND PLAINTIFF
SILVESTER MUTISYA KISILU 3RD PLAINTIFF
BENARD MUNYAO KALUNGU 4TH PLAINTIFF
CHRISTOPHER KATUVYA KITUA 5TH PLAINTIFF
MAULUKO NYAMAI 6TH PLAINTIFF
DUNCAN MUNYAO KITUA 7TH PLAINTIFF
KYALO NYAMAI 8TH PLAINTIFF
PATRICK WAMBUA NYAMAI 9TH PLAINTIFF
BRIAN KYALO LISA 10TH PLAINTIFF

AND

STEPHEN KIVEVO 1ST DEFENDANT
COSMAS KIILU KIVEVO 2ND DEFENDANT
THE COUNTY LAND REGISTRAR MAKUENI 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs filed the above suit vide the Originating Summons dated 6th June, 2023 claiming to be entitled to ownership of all that land Parcel No. Kiteta/kakuswi/1091 by adverse possession. A determination of the following questions was sought by the Plaintiffs:-



- a. Whether the Plaintiffs are entitled by virtue of adverse possession to all that parcel of land known as Kiteta/kakuswi/1091 which is registered in the name of Kivevo Kiilu (Deceased);
 - b. Whether the Plaintiffs should be registered as proprietors of all that parcel of land known as Kiteta/kakuswi/1091 which is registered in the name of Kivevo Kiilu (Deceased);
 - c. If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the Makueni County Land Registrar to give effect to the said findings; and
 - d. Whether the Plaintiffs should be paid costs of this suit.
2. Opposing the originating summons, the 1st Defendant filed a replying affidavit sworn by himself on 6th December, 2023 urging the court to dismiss the suit with costs for being res judicata on account of the judgment of this court in Makueni ELC NO. 14 OF 2019.
 3. At the hearing of the Plaintiffs' case, PW1 Joseph Kioko Kisilu adopted his averments in the supporting affidavit sworn by himself on 24th May, 2022 in support of the originating summons. He further produced the Exhibits annexed to the supporting affidavit as PEX 1 – 7 respectively.
 4. It was PW1's case that land Parcel No. Kiteta/kakuswi/1091 was hived from Parcel No. Kiteta/kakuswi/459 pursuant to an award by the Minister in Land Appeal Case No. 63 of 1984 which was delivered in favour of Kivevo Kiilu on 20th December, 1985. He averred that the subdivision was done in 2007 and a title deed issued to Kivevo Kiilu on 11th July, 2007. It was PW1's testimony that they had been residing in the suit property even before it was declared to be in an adjudication area. He added that together with his Co-plaintiffs, they had been farming the suit property and that the neither the Defendants nor their deceased father had ever set foot on the land.
 5. It was stated that despite the land having been registered in the name of Kivevo Kiilu, neither the Deceased nor the Defendants had taken any steps to remove the Plaintiffs from the land. He insisted that the limitation period for the Defendants to recover possession of the suit property had already lapsed since the Plaintiffs had been in continuous occupation of the land ever since 1985 when the land was awarded to Kivevo Kiilu by the Minister.
 6. He urged the court to award ownership of the suit property to the Plaintiffs by virtue of adverse possession.
 7. On cross-examination by Ms. Adongo, PW1 averred that he had brought this suit in respect of Parcel No. Kiteta/kakuswi/1091 which is registered in the name of Kivevo Kiilu. He further averred that he had been residing in the suit property ever since he was born there on 1/10/1989. PW1 stated that he was aware that the suit property was the subject of Makueni ELC Case No. 14 of 2019 which was filed by his mother. He went on to state that Makueni ELC Case No. 14 of 2019 was dismissed and that there had been no appeal from that judgment. PW1 further testified that he did not have a witness to confirm that he had been residing on the land.
 8. On re-examination by Mr. Kasimu, PW1 stated that the people residing in the suit property were listed in the undated letter by the Area Chief Kiteta Location produced as PEX 4.
 9. DW1, Stephen Kivevo, adopted his statement dated 27/2/2025 as his sworn evidence in chief. He also produced the list and bundle of documents dated 28/2/2025 as DEX 1 – 6 respectively in support of his evidence.



10. DW1 stated that land Parcel No. 1091 is registered in the name of Kivevo Kiilu who is his late father. He added that the Plaintiffs' parents had previously filed cases against them. That beginning with the Minister's Appeal Case No. 63 of 1984, the suit property was awarded to Kivevo Kiilu and the decision of the Minister was not appealed.
11. DW1 went on to state that in Makueni HCSC No. 218 of 2017, Agnes Kavindu wanted to include the suit property as part of the Estate of Kioko Katuvya Mailu. He averred that the court declined the inclusion of the suit property as part of the estate of the deceased.
12. DW1 further averred that Makueni ELC Case No. 14 of 2019 was filed by Agnes Kavindu who is the mother of the 1st Plaintiff in the present suit. He maintained that together with the 2nd Defendant, they have tried to access the suit property, but the Plaintiffs have been violent.
13. On cross-examination, DW1 averred that no one was occupying the suit property and that he had not pleaded for eviction orders. DW1 added that the ruling delivered by the probate court on 24/1/2019 was not on adverse possession and that the 1st Plaintiff resides in the portion of land adjacent to the suit property.
14. On re-examination, DW1 averred that in Makueni ELC Case No. 14 of 2019, Agnes Kavindu was representing the Estate of Musembi Katuvya Mailu. He added that the listed names on the Chief's letter Kiteta Location are the same names of the Plaintiffs in the present suit. DW1 confirmed that the Plaintiffs in Makueni ELC Case No. 14 of 2019 claimed adverse possession against the suit property and that no appeal was filed following the dismissal of the suit.
15. The sole issue for determination is whether the Plaintiffs have a valid claim to the suit property by virtue of the doctrine of adverse possession.
16. The 1st Defendant raised a defence of res judicata to the Plaintiffs' claim under paragraphs 12 to 15 of his replying affidavit sworn on 6th December, 2023 in response to the originating summons. It has long been held that the doctrine of res judicata acts as a jurisdictional injunction which debars the court from entertaining a suit or application which has been determined previously between the same parties by a competent court.
17. Res judicata, is embodied in Section 7 of the [Civil Procedure Act](#) which outlines 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 1st Defendant produced a copy of the Plaint in Makueni ELC NO. 14 OF 2019 as DEX 3. The reliefs sought from the court by the Plaintiffs therein were as follows: -
 - a. A Declaration that land title Number Kiteta/Kakuswi/1091 measuring 5.3 Ha or thereabouts registered in the name of Kivevo Kiilu (deceased) is so registered in trust for the benefit of the Estates of the late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya and that the said trust be terminated and the County Land Registrar, Makueni be compelled to sign the necessary papers to cause the reversal and/or transfer of the suit parcel in favor of the estates of late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya and in default the same be executed by the Deputy Registrar of this Honourable Court.



- b. A Declaration in the alternative that the Plaintiffs are the rightful heirs of the estates of the late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya and are the rightful owners of parcels of land Title Number Kiteta/Kakuswi/459 measuring 5.76 hectares or thereabouts and Kiteta/Kakuswi/1091 measuring 5.3 hectares or thereabouts having been purchased and taken into possession respectively by way of adverse possession, peacefully and enjoying a continuous uninterrupted occupation for more than 20 years.
 - c. An order directing the County Land Registrar, Makueni in any event to rectify the land register in respect of land Title numbers Kiteta/Kakuswi/459 and Kiteta/Kakuswi/1091 thereby cancel the name of Kivevo Kiilu (deceased) as proprietor thereof and revert the land back to the estates of the late Munyao Katuvya Mailu, the late Kioko Katuvya and the late Musembi Katuvya.
 - d. Any other relief that this Honourable Court may deem fit and expedient to grant.
 - e. Costs of the suit.
19. At the hearing of the instant suit, it came out clearly that the 1st Plaintiff in Makueni ELC NO. 14 OF 2019, Agnes Kavindu Kisilu is mother of the 1st Plaintiff in the present suit. At paragraph 7 of the replying affidavit of Stephen Kivevo, he averred as follows: -
- “THAT I know of my own knowledge that the Plaintiffs herein are the children of Agnes Kavindu Kisilu, Douglas Kalungu Munyao and Nyamai Musembi a fact the Plaintiffs have deliberately concealed from the court.”
20. The above averment was not rebutted by the Plaintiffs nor challenged at the hearing of the suit. Delivering its decision in Makueni ELC NO. 14 OF 2019 (DEX 4) the court found that the Plaintiffs had failed to prove their case on a balance of probabilities and went ahead to dismiss the suit with costs.
21. In the Black’s Law Dictionary, 9th Edition at page 1425, the doctrine of res judicata has been defined as follows:
- “a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”
22. In the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, the Court of Appeal aptly held as follows: -
- “Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the Civil Procedure Act, 2010;
- “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 the 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.”



Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms.”

23. Similarly, the Court of Appeal expressed the elements which must be demonstrated when the doctrine of res judicata has been invoked in *Uhuru Highway Development Ltd v Central Bank of Kenya* [1999] eKLR as follows: -

- “(a) The former judgment or order must be final;
- (b) The judgment or order must be on merits;
- (c) It must have been rendered by a court having jurisdiction over the subject matter and the parties; and
- (d) There must be between the first and the second action identical parties, subject matter and cause of action.”

24. With those principles in mind, it is evident that the defence of res judicata herein was properly raised by the 1st Defendant in his replying affidavit and the Plaintiffs were sufficiently aware about it. The Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR, eruditely observed as follows: -

“The appellants were aware of the defences and opposition raised against their application and petition including the plea of res judicata. The plea of res judicata was raised but not as a preliminary objection. A preliminary objection consisted of a point of law which had been pleaded, or which arose by clear implication out of pleadings, and which if argued as a preliminary point could dispose of the suit. The plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the appellants' application.”

25. Explanation (6) of Section 7 of the *Civil Procedure Act*, outlines as follows: -

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.

26. Quite evidently, the Plaintiffs in *Makueni ELC NO. 14 OF 2019* were the parents and or kin of the Plaintiffs in the instant suit. Their claim to the suit property arises from the same chronology of events which ultimately rests upon their kin who were the Respondents in *Minister's Appeal Case No. 63 of 1984*.
27. There is a further commonality on the issue raised by the Plaintiffs in the present suit which is their claim of entitlement to the suit property by way of adverse possession. The said issue was directly and substantially in issue in the former suit as it appeared as the alternative prayer (b) in the *Plaint* dated 8th March, 2019.
28. This court rendered a final determination dismissing the previous suit vide its judgment dated 8th February, 2023 which has not been appealed and or set aside by a higher court. In the case of Kenya



Commercial Bank Limited v Muiri Cofee Estate Limited & another [2016] eKLR, the Supreme Court aptly held as follows: -

“That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in E.T v. Attorney-General & Another, (2012) eKLR, thus:

“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 v. 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 v. 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 face-lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata.....’”

29. In the end, it is indisputable that the Plaintiffs’ claim in the present suit is caught by the doctrine of res judicata and is therefore invalid. It is an outright instance of abuse of the court process. The suit is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF APRIL, 2026.

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HON. E. O. OBAGA

JUDGE

In the absence of the parties who were aware of the date of delivery of the same.

Court assistant - Deodata

