



**Wainaina v Njii & another (Environment and Land Case
E233 of 2023) [2026] KEELC 2180 (KLR) (21 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E233 OF 2023
CA OCHIENG, J
APRIL 21, 2026**

BETWEEN

SAMUEL NGUGI WAINAINA PLAINTIFF

AND

SIMON MWANGI NJII 1ST DEFENDANT

**ERIC MUHINDI MUIGAI (SUED AS THE ADMINISTRATOR OF THE ESTATE
OF THE LATE MUIGAI MWAURA) 2ND DEFENDANT**

RULING

1. What is before the court for determination is the 1st Defendant's Notice of Motion dated 8th October 2025 where he seeks the following orders;
 - a. That the Plaintiff's suit and the 2nd Defendant's amended counterclaim be struck out with costs to the 1st Defendant.
 - b. That costs be provided for.
2. The application is premised on grounds on its face and on the supporting affidavit of Simon Mwangi Njii. He avers that the Plaintiff's suit and the 2nd Defendant's amended counterclaim are res judicata to proceedings in Nairobi ELC Suit No. E023 OF 2022(OS) Samuel Ngugi Wainaina v Simon Mwangi Njii & Estate of Muigai Mwaura, where the Plaintiff's claim of ownership over LR No. 209/11388/40 was dismissed vide a judgement delivered on 2nd February 2023. Further, that the parties in this suit were parties in the former suit and the subject matter in the former suit is similar to the subject matter in the instant suit. He explains that in the former suit, the 2nd Defendant filed a replying affidavit raising the same issues he is raising in his amended counterclaim thus it is an abuse of court process.
3. He also contends that the 2nd Defendant's action in his amended counterclaim which is based on fraud, is statutorily time barred under Section 4(2) of the *Limitation of Actions Act*.



Response

4. In opposition, the Plaintiff filed a replying affidavit in which he avers that res judicata does not arise in the matter. He points out that the central issues for determination in ELC No. E023 of 2022 (O.S) were whether he had met the strict legal threshold for acquisition of title by adverse possession, and whether the Land Register could be rectified as a consequence while the present suit is founded upon a distinct cause of action being an alleged unlawful eviction process and threatened demolition by 30th June 2023, which are facts that did not exist for adjudication at the time he filed the former suit. He reiterates that reliefs sought herein are different in character from the former suit.
5. He asserts that the doctrine of res judicata targets repetitive litigation of the same dispute, not fresh controversies arising from subsequent unlawful acts and contends that the issue of estoppel is equally untenable since this suit and the former suit are distinct.
6. The 2nd Defendant also filed a replying affidavit in opposition. He avers that the cause of action in the former suit is distinct and severable from the cause of action in his amended counterclaim and points out that in the former suit, the Plaintiff's suit was solely on adverse possession against his late father's title to the suit property while his amended counterclaim is an action to recover land against the acts of trespass and interference by the Plaintiff on one hand and the unlawful purported acquisition of the suit property by the 1st Defendant on the other hand.
7. He asserts that the judgement in the former suit only dismissed the Plaintiff's plea for adverse possession but it did not pronounce itself on the propriety of the 1st Defendant's alleged title to the suit property vis a vis his late father's title.
8. He also contends that his participation in the former suit was that of an interested party which is peripheral, and that there are exceptional circumstances in which the doctrine of res judicata may be inapplicable, like in the instant suit where the cause of action has mutated and has multifaceted dimensions.
9. He contends that at the core of his counterclaim is the violation of his constitutional right to own property guaranteed under Article 40 of *the Constitution* and as such the *Limitation of Actions Act* does not apply. Further, that he also has a claim against the Plaintiff's continuing trespass and that the 1st Defendant's illegal attempts to dispose him by fabricating documents to procure registration is subsisting injury that is not statute barred. He argues that Section 26 of the *Limitation of Actions Act* provides for extension of limitation period for actions founded on fraud.
10. The application was canvassed by way of written submissions.

Submissions

11. The 1st Defendant reiterates that the issue of ownership of the suit parcel having been determined in ELC Suit No. E023 OF 2022 (O S), this suit is res judicata. To this end, he relies on the case of Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR.
12. He argues that the effect of dismissal of the Plaintiff's claim of ownership in the former suit is that the court acknowledged his title over the suit property thus this suit is a belated attempt to re-litigate over the same title. Further, that the 2nd Defendant's action is a claim in fraud, which is a tort and since the 2nd Defendant alleges that the 1st Defendant obtained a sale and transfer of the suit land in October 2017, he knew about his legal interest in the suit property as early as 2017, thus the three year limitation period for an action in fraud lapsed in the year 2020.



13. He also submits that contrary to the 2nd Defendant's assertion that his counterclaim is based on violation of his rights to property under Article 40 of *the Constitution*, his amended counterclaim cannot be regarded as a constitutional petition, to which the *limitation of actions act* does not apply.
14. On his part, the Plaintiff submits that the 1st Defendant's attempt to rely on "same land and earlier dismissal" to paint this suit as being res judicata fails to meet the bar for declaration as such under section 7 of the *Civil Procedure Act*. To this end, he relies on the following decisions: Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, John Florence Maritime services Ltd & another v cabinet secretary for transport & Infrastructure & 3 others [2017]eKLR and Kemunye & others v Pioneer General Assurance Society Ltd [1971] EA 263.
15. He submits that the present cause of action arose post-judgement in the former suit and that res judicata cannot bar claims based on events that had not occurred at the time of the earlier proceedings.
16. On the 1st Defendant's invitation to strike out the suit, he submits that it would be draconian to do so and that such jurisdiction is reserved for the clearest of cases, of which this suit is not. To this end, he relies on the case of DT Dobie & company (Kenya) Ltd v Muchina [1982] KLR.
17. The 2nd Defendant submits that the 1st Defendant has failed to prove that the cause of action in the former suit is similar to the one in his amended counterclaim, thus the suit is not resjudicata. Further, that the mere fact that the suit property is the same in both suits is not a bar to the determination of the amended counterclaim. He argues that the doctrine of resjudicata has exemptions, which include evolution of facts. He points out that after delivery of the judgement in the former suit, it emerged that the 1st Defendant has unlawfully attempted to acquire ownership of the suit property, which changed the matrix of the facts warranting determination on the legitimacy of the 1st Defendant's title.
18. On time bar, he cites the case of Wamwere & 5 others v Attorney General [2023] KESC 3 (KLR) to submit that the doctrine of res judicata is not applicable where a claim for violation of fundamental rights is made and that its counterclaim is founded on violation of his Constitutional right to property. Further, that his cause of action is also a continuing injury which is not statute barred as was the holding in the case of Odhiambo v Ochieng (Environment and Land Appeal E003 OF 2022) [2023] KEELC 17276 (KLR) (11 May 2023) (Judgement).
19. He further submits that an action is fraud cannot be subjected to the time limitation in a blanket manner and that fraud in acquisition of land cannot be defeated by a plea of limitation. To this end, he relies on the case of Kenya Anti-Corruption Commission v Gigiri Court Limited & 3 others [2025] KEELC 7315 (KLR).
20. He also argues that since his counterclaim is an action to recover land, then the governing provision on limitation should be section 7 of the *Limitation of Actions Act*.

Analysis and Determination

21. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the following are the issues for determination:
 - a. Whether this suit and the 2nd Defendant's amended counterclaim are resjudicata.
 - b. Whether the 2nd Defendant's amended counterclaim is time barred.
22. The 1st Defendant contends that this court is bereft of jurisdiction to determine this matter, since the issue of ownership of the suit property which was also the main issue in the suit, was determined in



Nairobi ELC Suit No. E023 OF 2022(OS). He insists that the 2nd Defendant's claim in his amended counterclaim is time barred.

23. On his part, the Plaintiff contends that his cause of action arose after the former suit had been determined and that res judicata cannot bar claims based on mutating events.

24. As for the 2nd Defendant, he contends that the question as to who has proper ownership and legal title between the 1st Defendant and his late father's original root title to the land, is a legitimate issue that has never been determined before. Further, that the claim in his amended counterclaim is not statutorily barred as it concerns continuing trespass, and constitutional violations to property rights under Article 40 of *the Constitution* as well as fraud.

25. Res judicata it is anchored on Section 7 of the *Civil Procedure Act* which provides that:

“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.”

26. In *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] KESC 53 (KLR), the Supreme Court held as follows:

“(317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....There are conditions to the application of the doctrine of res judicata: i. the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title...”

27. The Supreme court also held as follows in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR;

“59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a. There is a former Judgment or order which was final; b. The Judgment or order was on merit; c. The Judgment or order was 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.”

28. On whether the 2nd Defendant's counterclaim is statute barred, Section 4(2) of the *Limitation of Actions Act* provides that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”



29. The 2nd Defendant argued that Limitation of Actions does not apply where the cause of action concerns fraud. Section 26 of the same Act provides that:

“Where, in the case of an action for which a period of limitation is prescribed, either -a.the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or b.the right of action is concealed by the fraud of any such person as aforesaid; or c.the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

30. In *Nyagah v Nyaga & 2 others* [2022] KEELC 3203 (KLR) it was stated that:

“My interpretation of Section 26 of the Act is that it does not grant the court jurisdiction to enlarge time. All that the section does is to automatically extend the prescribed limitation period by prescribing the point at which the cause of action is deemed to have accrued. For a claim founded on fraud or mistake, Section 26 provides that the limitation period [time] does not begin to run until the plaintiff discovers the fraud or mistake or is reasonably deemed to have discovered the fraud or mistake.”

31. I note the 2nd Defendant has not denied he was an Interested Party in the previous suit, Nairobi ELC Suit No. E023 OF 2022(OS), where Justice Oguttu Mboya delivered judgment on 2nd February 2023, in which the learned Judge dismissed the Plaintiff's claim for adverse possession over LR No. 209/11388/40, against the 1st Defendant herein. Since he was a party to the previous suit, that means he was aware of the dispute and ought to have raised the issues of fraud that he now seeks to raise in his amended counterclaim; It appears to me that he did not find it necessary to raise the said issues, despite the fact that proprietorship of the suit property formed the fulcrum of the dispute in the said suit. Since he was privy to the issues in his amended counterclaim and the previous suit, I find that he is bound by the determination of that suit.

32. Having found that the 2nd Defendant was a party in the previous suit and was aware of the issues he now raises in his amended counterclaim, it cannot be said that the said issues are freshly discovered. I opine that they fall under the scope of Section 26 of the *Limitation of Actions Act*.

33. From the facts before Court, I note that this suit was filed after ELC Suit No. E023 OF 2022 (OS) whose fulcrum revolved around the suit property had been determined. I find that the Court cannot deal with issues that were dealt with in the former suit, which purportedly have arisen post judgment: In my view parties are seeking relitigation again. To my mind, the Plaintiff and 2nd Defendant cannot litigate in piecemeal and expect to find audience in this court.

34. In the foregoing, while associating myself with the decisions cited as well as the legal provisions quoted, and applying them to the circumstances at hand, I find that the fulcrum of the dispute herein is similar to the previous suit. It seems to me that the Plaintiff and 2nd Defendant seek to restore the status quo ante, before judgement in the previous case. I find that since a court of competent jurisdiction already heard and determined the ownership of the suit property, parties cannot turn around to claim proprietary rights on it and seek re litigate on its title once more.

35. It is trite that Litigation must come to an end and the Plaintiff and 2nd Defendant should not be allowed to bring forth another suit on the same title, whose validity had been dealt with.

36. It is against the foregoing that I find that the Plaintiff including the 2nd Defendant's Counterclaim are indeed res judicata.



37. In the circumstances, I find the instant Notice of Motion application merited and will proceed to strike out the instant suit including the 2nd Defendant's amended Counterclaim.
38. Costs are awarded to the 1st Defendant.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2026

CHRISTINE OCHIENG

JUDGE

In the presence of:

Miano holding brief for Okoth for Plaintiff

Ligunya for 2nd Defendant

Mukami Boore for 1st Defendant

Court Assistant: Vena

