

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT EMBU

ELC CASE NO. E015 OF 2023(O.S)

JAMES MUTHEE KARIUKI.....
PLAINTIFF

-VERSUS-

MARY GICHUKU NJOMO.....
DEFENDANT

RULING

1. I am called upon to determine the Defendant's Notice of Preliminary Objection dated 12th of February 2024 which seeks the dismissal of plaintiff's suit. The objection is as follows:

- 1. THAT the suit is res judicata as the issues in question were heard and determined in Embu Chief Magistrate's Civil Suit No.210 of 2013, wherein a judgment was entered in favour of the Defendant (the Plaintiff herein) on the 3rd of May 2023.*
- 2. The Plaintiff's suit is frivolous, vexatious and a waste of the court's time and it is with that knowledge the Plaintiff has failed to disclose that the issues were*

the basis of its counterclaim which was dismissed in the Embu CMCC No.210 of 2013.

2. This suit was instituted via the Originating Summons dated 28th December 2023 seeking, in the main, to determine the question whether the Plaintiff has acquired title to Land Parcel No. Gaturi/Nembure/6876 by way of adverse possession, having allegedly taken possession of it in the year 1994.
3. The Defendant on her part swore a replying affidavit on the 4th of November 2024 deposing that the issue of adverse possession was raised by the Plaintiff in Embu CMCC 210 of 2013 through a counterclaim. A copy of the counterclaim was annexed to the affidavit. The suit was fully ventilated and canvassed and judgment was issued by the Court on 3rd May 2024 in favour of the Defendant. The plaintiff's counterclaim was dismissed, hence the averment that this suit offends the principle of *res judicata*.

The Defendant's submissions on the preliminary objection

4. Counsel for the Defendant submitted that the issues raised in this suit were canvassed before the Chief Magistrate's

Court at Embu in CMCC No. 210 of 2013, relating to Title number Gaturi/Nembure/6876. She submitted that she received the land as a gift from her late father and a succession court grant confirmed it in her name.

5. It is the Defendant's submission that she noticed some activity on the suit land and learnt that it was the Plaintiff who was interfering. Attempts to engage the Plaintiff amicably fell on deaf ears, thus the Defendant filed this suit. Judgment was delivered on the 3rd of May 2024 in the Defendant's favour and she submits that the Plaintiff has moved to this court seeking a second chance with regard to the issue of adverse possession.
6. Counsel for the Defendant invited this court to agree that the issue of adverse possession was a substantive issue before the Chief Magistrate's Court, which, according to him was comprehensively considered and determined via the judgment delivered by that court.
7. Counsel quoted and relied upon Section 7 of the Civil Procedure Act CAP 21 on the definition of *res judicata* as well as the cases of **Independent Electoral and Boundaries Commission -vs- Maina Kiai & 5 Others (2017) eKLR**

and **Kennedy Mokuu Ongiri -vs- John Nyasende Mosioma & Florence Nyamoita Nyasende (2022) eKLR.**

8. The Defendant submits that the cardinal purpose that underpins the doctrine of *res judicata* is to save the costs of litigation, avoid multiplicity of suits which wastes the court's time, and to ensure that litigation comes to an end. Thus, their position is that the Plaintiff is making an attempt to appeal the lower court's decision through the back door. She asked that the Honourable Court be pleased to dismiss this suit and application with costs to the Defendant.

The Plaintiff's submissions on the preliminary objection

9. The Plaintiff filed submissions in response to the preliminary objection. He submitted that according to the judgment delivered, a claim of adverse possession is one that can only be handled by a superior court by dint of Section 38 of the Limitation of Actions Act. He relied on the case of **Moses Mbatia & Another -vs- Joseph Wamburu Kihara ELC No. 37 of 2020 at Murang'a.**

10. The Plaintiff's submission therefore is that the Learned Magistrate in Civil Suit No.210 of 2013 pronounced herself

as lacking in jurisdiction. Accordingly, the issue of adverse possession was never heard and finally decided.

ANALYSIS & DISPOSITION

11. The Defendant's preliminary objection raises the issue that this suit is *res judicata*, as the claim of adverse possession had been previously determined by the Chief Magistrate's Court at Embu in CMCC No. 210 of 2013.

12. According to the Black's Law Dictionary 10th edition, 2014 a Preliminary Objection is defined as being: "*an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.*"

13. The improper raising of preliminary objections was decried in the now famous case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd. [1969] E.A. 696.** The Court held that:

"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 has to be ascertained or if what is sought in 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. This improper practice should stop.”

14. The matter of res-judicata is a jurisdictional issue and can be raised as a preliminary point of law. This is because the court cannot make any further steps in a case if it lacks the requisite jurisdiction. It ought to down its tools and dismiss the matter. The often-cited case on jurisdiction is **Owners of the Motor Vessel “Lillian S” -vs- Caltex Oil (Kenya) Ltd [1989] eKLR** where the Court held thus:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the

moment it holds the opinion that it is without jurisdiction.”

15. The law against *res judicata* is found in Section 7 of the Civil Procedure Act which provides:

“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.”

16. Counsel for the Defendant relied on the case of **Independent Electoral & Boundaries Commission -vs- Maina Kiai & 5 Others [2017] eKLR** where the Learned Judges of Appeal held:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection

against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

17.A preliminary objection ought to be determined without probing into matters of evidence and ascertainment of facts.

This was aptly stated by Gikonyo J, in **Henry Wanyama Khaemba v Standard Chartered Bank (K) Ltd & Another [2014] eKLR**. Gikonyo J. observed thus:

“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 in improperly. See the words of Newbold P. in registering a strong deprecation on such improper preliminary objections in the Mukisa Biscuit case that: “That the improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

18.The Defendant has annexed the Plaintiff’s defence, counterclaim, as well as the judgment in Chief Magistrate’s Court at Embu CMCC No. 210 of 2013. There is no denying that the concept of res judicata is a pure point to law. But it is another matter altogether as to whether it is based on uncontested facts.

19.The Plaintiff herein, who was the defendant in CMCC 210 of 2013 filed a counterclaim in which he averred that he bought the suit land. He claims that he has been in uninterrupted occupation and possession of it. He claims it by way of adverse possession.

20.Judgment in the lower court suit was delivered on 27th March 2023 by Hon. Lucy Ambasi, Chief Magistrate Embu. She

found in favour of the Defendant herein, who was the Plaintiff in that suit. She was found to be the rightful owner of the suit land.

21. However, I note that on the issue of adverse possession, the Learned Chief Magistrate held as follows:

“As for his claim that he is entitled to adverse possession, it is my considered opinion that this is a claim that can only be handled by a superior court by dint of Section 38 of the Limitation of Actions Act and this Court lacks jurisdiction to grant the orders sought in the counterclaim.”

22. Thus, the issue of adverse possession raised by the Plaintiff in this suit was not canvassed and determined upon as the Court found itself to be lacking in jurisdiction.

23. This was in line with the Court of Appeal decision in **Sugawara -Vs- Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment)** where that court had already stated that the

lower courts do not have jurisdiction. The Court of Appeal had stated as follows at paragraphs 49 and 50 of its judgement:

“49 We come to this conclusion also bearing in mind that the jurisdiction of Magistrates’ Courts is largely determined by the pecuniary interest designated for determination by each level of the Magistracy specified in the hierarchy of courts, in terms of section 7 of the Magistrates Courts Act. In claims for adverse possession where the value of the land in question may be unknown, as in the instant case, it could be that by the time of filing, the value of the land subject of determination may be far in excess of the particular Magistrates’ Court’s pecuniary jurisdiction, which for all intents and purposes was not what was intended by the Act.

“50 In the circumstances, in view of the express provisions of section 38 of the [Limitation of Actions Act](#), as did the Environment and Land Court, we find that Magistrates’ Courts do not have jurisdiction to determine the claims of adverse possession. As a consequence, the trial magistrate in the instant case rightly disregarded hearing and determining it. In

the result, this ground is without merit and is accordingly dismissed.”

24. My view therefore is that this suit is properly before this Court as it is the only Court clothed with jurisdiction to determine claims of adverse possession. The same was not determined by the Chief Magistrate’s Court at Embu in CMCC No. 210 of 2013, as that court did not have jurisdictional competence to do so. The objection raised herein is therefore bereft of merits and is hereby dismissed with costs to the plaintiff.

RULING DATED, SIGNED and DELIVERED online at **KITUI** this **28th** day of **April, 2026** pursuant to notice dated **21/4/2026**.

In the presence of,

Court Assistant – Musyoki

M/S Njage for Kathungu Joe for plaintiff

Njuguna Ng’ang’a (absent) for defendant

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI