

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CASE NO. 17 OF 2019

CHELESTINO NYAGA KIURA.....

.....PLAINTIFF

VERSUS

ZAWERIA WANGARI.....

DEFENDANT

RULING

A. Introduction

The matter before Court concerns a Preliminary Objection dated 20th January 2026 raised by the Defendant. The objection challenges the competence of the Plaintiff's suit on the principal ground that it is **res judicata**, in light of the dismissal of **Siakago SPMC ELC Case No. 10 of 2018** for want of prosecution. The Defendant further contends that the suit is misconceived and otherwise incompetent.

The parties agreed to canvass the Preliminary Objection by way of written submissions, which the Court has duly considered.

The **Defendant's position** is that the dispute revolves around land parcel **Evurore/Kathera/2129**, which was the subject of prior litigation between herself and the Plaintiff's brother, Cyrus

Ngari Kiura. It is argued that the dismissal of that suit under **Order 17 Rule 3 of the Civil Procedure Rules** bars any subsequent proceedings on the same subject matter. Reliance was placed on authorities including *Thomas K. Sambu v Paul K. Chepkwony (2018) eKLR* and *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others (1996) eKLR*.

On the other hand, the Plaintiff's position is that the present suit is distinct, being founded on **adverse possession**, whereas the earlier suit was based on allegations of fraud. Further, the Plaintiff asserts that the earlier matter was never heard and determined on its merits and therefore cannot sustain a plea of res judicata. He urges the Court to dismiss the objection.

Issue for Determination

The single issue for determination is:

Whether the Preliminary Objection is merited, particularly whether the present suit is barred by the doctrine of res judicata, and whether dismissal for want of prosecution constitutes a final determination.

The principles governing preliminary objections are settled. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*, the Court held that a preliminary objection must raise a **pure point of law**, argued on the assumption that all facts pleaded are correct.

The objection herein raises the plea of res judicata, which is a proper point of law and thus competently before the Court.

The doctrine is codified under **Section 7 of the Civil Procedure Act**, which bars a court from trying a matter that has been:

- i) Directly and substantially in issue in a former suit;
- ii) Between the same parties or those claiming under them;
- iii) Litigating under the same title;
- iv) Before a competent court; and
- v) Heard and finally determined.

All these elements must be satisfied conjunctively.

The previous suit at Siakago was grounded on **fraud in registration of title**, while the present suit is based on **adverse possession**, which is a statutory claim arising under limitation of actions and premised on long, uninterrupted occupation.

These are **distinct causes of action**, requiring different legal thresholds and evidence. Courts have consistently held that res judicata does not apply where the causes of action differ, even if the subject matter is the same.

It is also to be noted that the earlier suit involved **Cyrus Ngari Kiura**, whereas the present suit is brought by **Celestino Nyaga Kiura**. While they may be related, there is no material placed before Court to demonstrate that the Plaintiff is litigating **under**

the same title or as a privy of the earlier litigant within the meaning of Section 7.

The next issue for determination is whether the former suit at Siakago Court was heard and determined. this is the crux of the objection.

From the evidence, the earlier suit was dismissed for want of prosecution under Order 17 of the Civil Procedure Rules. The question is whether such dismissal constitutes a final determination for purposes of res judicata.

Kenyan jurisprudence leans toward the position that a dismissal for want of prosecution **does not** amount to a determination on the merits and that it is a procedural disposition, not a substantive adjudication of rights.

Courts have distinguished between dismissal after hearing as constituting final determination while a dismissal before the matter is heard and determined as a procedural default and not determination on merits.

Although Order 12 Rule 6 suggests a bar to filing a fresh suit in certain circumstances, courts have interpreted this cautiously to avoid shutting out litigants where substantive issues were never adjudicated.

This Court therefore finds that a dismissal for want of prosecution is not a conclusive determination of the dispute and does not satisfy the “heard and finally determined” requirement under Section 7 of the Civil Procedure Act.

Having considered all the elements, this court concludes that the causes of action are different and that the parties are not identical nor clearly privies and finally, the previous suit was not determined on merits

The plea of res judicata therefore fails.

FINAL ORDERS

1. The Preliminary Objection dated 20th January 2026 is without merit and the same is hereby dismissed.
2. The suit shall proceed to hearing on its merits.
3. Costs of the Preliminary Objection shall be in the cause.

DATED, SIGNED AND DELIVERED AT EMBU THIS 07TH DAY OF MAY, 2026.

**HON. E.C CHERONO,
JUDGE
ENVIRONMENT AND LAND COURT, EMBU**

In the presence of;

1. M/S Njuguna H/B Gikonyo for the Defendant

2. Plaintiff in person-present

3. M/S Ruth C/A