

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**  
**ELCC NO.43 OF 2019**

**MARCLUS KIRANGA NIMROD .....**  
**PLAINTIFF**

**VERSUS**

**NIMROD KIBUKU KIRANGA .....1<sup>ST</sup>**  
**DEFENDAT**

**QUEKENDA HOLDINGS LTD ..... 2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

***[Notice of Preliminary Objection Dated 17<sup>th</sup> March 2025]***

1. The defendants filed the notice of preliminary objection dated 17<sup>th</sup> March 2025 raising three (3) grounds that:

- 1) That the suit as filed contravenes the provisions of **Section 7 of the Civil Procedure Act**, in that it is res judicata, the issues therein having been heard and determined in **Kerugoya ELC No. 737 of 2013** and the consequent **Nyeri Civil Appeal No. 61 of 2019**, involving the same parties and the same suit property, namely **LR No. Kiine/Rukanga/2336**.

2) That in the circumstances, the suit is incompetent, offends mandatory provisions of the law, and ought to be struck out in limine.

3) That the costs of the preliminary objection and the suit be borne by the Plaintiff.

2. Pursuant to the directions issued on 9<sup>th</sup> April 2025, the preliminary objection was canvassed by way of written submissions. The learned counsel for the Defendants filed their submissions dated 6<sup>th</sup> October 2025, while that for the plaintiff filed theirs dated 26<sup>th</sup> January 2026.

3. In their submissions, the counsel for the defendants framed three issues for determination namely: whether the preliminary objection is properly before the Court; whether the suit is res judicata and who should bear the costs of the preliminary objection.

On whether the preliminary objection is properly taken, counsel submitted that the objection raises a pure point of law, namely the applicability of the doctrine of res judicata under **Section 7 of the Civil Procedure Act**. It was contended that the objection does not call for ascertainment of contested facts, but is grounded on the existence of prior proceedings, **Kerugoya ELC No. 737 of 2013** and **Nyeri Civil Appeal No. 61 of 2019**, which

according to counsel, conclusively determined the dispute over **Land Parcel LR No. Kiine/Rukanga/2336** between the same parties litigating under the same title.

On that basis, counsel urged that the preliminary objection is properly before the Court.

4. On the substantive question of whether the present suit is res judicata, counsel submitted that all the requisite elements of the doctrine have been satisfied.

First, it was argued that the matter directly and substantially in issue in the present suit is identical to that in the earlier proceedings, the dispute in both instances revolving around ownership and interests in **LR No. Kiine/Rukanga/2336**.

Secondly, counsel submitted that the parties in the present suit are the same as those in the previous proceedings, or are litigating under the same title.

Thirdly, it was contended that the earlier suit was heard and determined by a court of competent jurisdiction, namely the Environment and Land Court at Kerugoya.

Fourthly, counsel submitted that the matter was heard and finally determined, and that the decision was subsequently subjected to appellate scrutiny in **Nyeri**

**Civil Appeal No. 61 of 2019**, which was dismissed, thereby affirming the finality of the dispute.

In support of these propositions, counsel relied on the decision in the case of **Moses Mbatia versus Joseph Wamburu Kihara (2021) eKLR**.

Counsel further invoked constitutional underpinnings of the doctrine, submitting that *res judicata* is reinforced by **Article 159(2)(b) and (c) of the Constitution**, which emphasize the expeditious disposal of disputes and encourage finality in litigation, as well as **Article 50(1)**, which guarantees the right to a fair hearing, including protection against repetitive litigation over matters already conclusively determined.

5. Counsel argued that the institution of the present suit amounts to an abuse of the court process, as it seeks to re-litigate issues that have already been determined by courts of concurrent and appellate jurisdiction. Reliance was also placed on the case of **E.T versus Attorney General & Another (2012) eKLR** and **John Florence Maritime Services Ltd & Another versus Cabinet Secretary for Transport & Infrastructure & 3 Others (2021) KECA 16 (KLR)** for the proposition that parties are barred from re-opening concluded litigation. Counsel concluded that the suit offends **Section 7 of the Civil Procedure Act, Article 159(2)(b) of the Constitution**,

and the overarching principle of judicial economy. It was therefore urged that this Court is divested of jurisdiction to entertain the suit and that the same ought to be struck out in limine.

On costs, counsel submitted that having demonstrated that the suit is *res judicata* and improperly before the Court, the Applicants are entitled to the costs of both the preliminary objection and the suit.

6. The learned counsel for the plaintiff filed their submissions dated 26<sup>th</sup> January 2026 identifying the following three issues that of whether the preliminary objection raises a pure point of law; whether the suit is *res judicata* and whether the preliminary objection should be dismissed with costs.

On whether the ground on the notice of preliminary objection raises a pure point of law, counsel cited the case of **Mukhisa Biscuit Manufacturing Ltd versus West End Distributors Ltd [1969] EA 696**, where it was held that a preliminary objection ***“must raise a pure point of law, argued on the assumption that all facts pleaded by the other side are correct”***,

The counsel submitted that the defendants’ preliminary objection requires the court to examine pleadings from previous suits, compare causes of action determine

whether the issues were conclusively determined and ascertain whether new facts and reliefs exists. That the grounds are therefore not matters of pure law, but factual and cannot be resolved at the preliminary stage.

The counsel referred to the case of **Oraro versus Mbaja [2005] eKLR**, in support of their proposition that a preliminary objection cannot be raised, if any fact has to be ascertained or if what is sought is the exercise of judicial discretion, and submitted that the preliminary objection is not properly before the court and should fail.

7. On whether the suit was res judicata, counsel cited **Section 7 of Civil Procedure Act** and the case of **John Florence Maritime Ltd & Another versus Cabinet Secretary for Transport & Infrastructure & 3 Others [2021] KECA 16 (KLR)**, on the emphasizes that all elements must be proved conjunctively and not selectively, and submitted that the present suit raises distinct and fresh issues. Counsel pointed out that while the defendants allege similarities of parties and subject land, they have ignored the nature and foundation of the cause of action.

That the present suit is a challenge of subsequent actions, conduct, and consequences arising after the conclusion of previous proceedings, including allegations of fraud and illegalities not adjudicated upon previously; continuing

violations of proprietary rights and reliefs that were neither sought nor capable of being granted in the former suits.

Counsel cited the case of **Uhuru Highway Development Ltd versus Central Bank of Kenya [1996] eKLR**, where it was held that ***“res judicata does not apply where the cause of action is distinct or where new facts have arisen giving rise to a fresh claim.”***

It was also submitted that this suit is not a re-litigation, but a legitimate invocation of the court’s jurisdiction based on new and continuing grievances.

8. Counsel further submitted that res judicata cannot be used to shield illegality or fraud, as it is settled law that fraud vitiates everything. On that counsel cited the case of **Lazarus Estates Ltd versus Beasley [1956] 1 QB 702** where the court held that ***“No court will allow itself to be used as an instrument of fraud.”***

The counsel also cited the case of **Kibathi t/a Osoro Chege Kibathi & Co Advocates versus Musti Investments Ltd (Civil Appeal E134 of 2022) [2024] KECA 270 (KLR)**, where the court affirmed the rule that a party cannot retain a benefit obtained by fraud, and that fraud vitiates judgements and contracts, and submitted that **Article 159(2)(d) of the Constitution** obligates the court to administer justice without regard to technicalities.

It was submitted that the court has jurisdiction in this suit as jurisdiction can only be ousted where res judicata has been clearly and plainly established. That as that threshold has not been met, and this being a court of equity, the suit should be heard and determined on its merits.

In conclusion counsel submitted that as the preliminary objection was raised prematurely and is unmerited, the same should be dismissed with costs.

9. The following are the issues arising for determinations in the defendants' preliminary objection:
  - a. *Whether the preliminary objection raises a pure point of law.*
  - b. *Whether the present suit is res judicata under Section 7 of the Civil Procedure Act.*
  - c. *Who pays the costs?*
  
10. The court has carefully considered the grounds on the notice of preliminary objection, submissions by the learned counsel, superior court decisions cited thereon , the pleadings filed and come to the following conclusions:
  - a. For purposes of background, it is important to note that the Plaintiff instituted this suit by a plaint dated 8<sup>th</sup> October 2019 seeking for inter alia:

1) A declaration that the registration of the suit property in the name of the 1st Defendant was in trust for the Plaintiff and that such trust be declared dissolved;

2) An order directing the Land Registrar, Kerugoya, to cancel the registration of the 1st Defendant in LR No. Kiine/Rukanga/2336 and to register the same in the name of the Plaintiff;

3) *A declaration that the suit property belongs to the Plaintiff, the 1st Defendant having been registered merely as a trustee for the Plaintiff's beneficial interest;*

4) *Costs of the suit and any other appropriate relief.*

b. The Plaintiff's case as pleaded, is that on or about the year 2010, he purchased the suit property from his late sister, Tabitha Wathoni, for a consideration of **Kshs. 1,000,000/=**. He avers that although the land was registered in the name of the 1<sup>st</sup> Defendant, such registration was intended to be in trust for him and for his children born and unborn.

He further pleads that the suit property constituted family land, having been bequeathed to the said Tabitha by their father. According to him, the property was at one point fraudulently registered in the name of his former wife, Nussy Kuthii Justus. That registration was, however, successfully challenged in **Kerugoya ELC No. 737 of 2013**, resulting in the land reverting to the name of the 1st Defendant. The Plaintiff contends that during the institution and pendency of the said suit, the 1st Defendant was cooperative and assisted him. However, he avers that the 1<sup>st</sup> Defendant later became uncooperative and disinterested, allegedly due to the involvement of his mother in that suit as a defendant.

He states that all attempts to have the 1<sup>st</sup> Defendant transfer the land to him have been met with hostility and threats, and that there exists a real apprehension that the 1<sup>st</sup> Defendant may dispose of the suit property to the detriment of the Plaintiff and the alleged beneficiaries.

- c. The defendants' preliminary objection is anchored on the doctrine of res judicata. As a threshold matter, it is necessary to determine whether the objection is properly taken. The law is settled that a preliminary objection must raise a pure point of law, argued on the assumption that all the facts pleaded by the

opposing party are correct, and must not invite the Court to ascertain contested facts or to exercise discretion. A plea of *res judicata*, where properly founded on undisputed previous proceedings and determinations, constitutes such a point of law and is therefore amenable to determination by way of a preliminary objection.

In the present case, the Defendants have identified specific previous proceedings, namely **Kerugoya ELC No. 737 of 2013** and **Nyeri Civil Appeal No. 61 of 2019**, and contend that those proceedings involved the same parties, the same subject matter being **LR No. Kiine/Rukanga/2336**, and culminated in a final determination. To that extent, the objection is properly taken and is competently before this Court.

- d. The substantive question, however, is whether the present suit is barred by the doctrine of *res judicata* as codified under **Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya**. This Section 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.***

***Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***

***Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.***

***Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

***Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***

***Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

***Explanation. — (6) 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.”***

- e. For the *res judicata* doctrine to apply, it must be shown that the matter directly and substantially in issue in the present suit was directly and substantially in issue in a former suit between the same parties, or parties claiming under them, litigating under the same title, before a court of competent jurisdiction, and that such issue was heard and finally determined. There is no dispute that the subject property in both the earlier proceedings and the present suit is **LR No. Kiine/Rukanga/2336.**

It is also evident from the material placed before the Court that the earlier proceedings were conducted before a court of competent jurisdiction and that the decision therein was subjected to an appeal in before the **Court of Appeal in Nyeri Civil Appeal No. 61 of 2019**, which was dismissed, thereby affirming the finality of that litigation.

- f. The critical question, however, is whether the matter directly and substantially in issue in the present suit is the same as that which was determined in the previous proceedings.

From the material on record, it is not in dispute that in **Kerugoya ELC No. 737 of 2013**, the Plaintiff herein and the 1<sup>st</sup> Defendant herein were co-plaintiffs, while Nesy Kuthii Justus and Quekenda Holdings Limited were the defendants. In that suit, the plaintiffs sought, inter alia, a declaration that the sale of **LR No. Kiine/Rukanga/2336** to Quekenda Holdings Limited was null and void, and an order for cancellation of that registration and restoration of the title. The judgment in that matter allowed the plaintiffs' claim, resulting in the cancellation of the impugned registration and reversion of the suit property. That determination, as presented to this Court, conclusively settled the question of the validity of the impugned transfer and restored the title as between the parties then before the Court.

It is further uncontroverted that the decision was the subject of an appeal before the **Court of Appeal in Nyeri Civil Appeal No. 61 of 2019**, which was dismissed, thereby affirming the finality of that judgment. It is against that backdrop, that the present suit must be examined.

- g. In the instant proceedings, the Plaintiff now seeks to assert that the 1<sup>st</sup> Defendant holds the same property in trust for him and his children, and seeks orders for cancellation of the 1<sup>st</sup> Defendant's title and transfer of the suit property into his name.

In effect, the Plaintiff invites this Court to interrogate and re-determine the entitlement to the same property as between himself and the 1<sup>st</sup> Defendant, parties who, in the earlier suit, were aligned as co-plaintiffs and who prosecuted their claim jointly to a successful conclusion.

The question that arises is whether the issue now framed as one of trust was, or ought to have been, raised in the earlier proceedings. The doctrine of *res judicata* extends not only to issues that were actually raised and determined, but also to those that properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, ought to have brought forward for determination. Parties are bound to bring their whole case before the Court and are not permitted to litigate in instalments.

- h. In **Kerugoya ELC No. 737 of 2013**, the Plaintiff and the 1st Defendant jointly asserted their interest in the suit property and successfully obtained orders

restoring the title. If, as is now alleged, the 1<sup>st</sup> Defendant held the property in trust for the Plaintiff, nothing prevented the Plaintiff from raising that issue in those proceedings, or at the very least seeking appropriate relief to secure his alleged beneficial interest at the point when the title was being restored.

Indeed, the Plaintiff's own pleadings acknowledge that the 1<sup>st</sup> Defendant was initially cooperative during the pendency of that suit, but later became uncooperative. That development, if material, ought to have been addressed within the framework of those proceedings, including by way of amendment or appropriate relief.

- i. Instead, having successfully litigated alongside the 1<sup>st</sup> Defendant and secured restoration of the title, the Plaintiff has now returned to Court seeking to re-open the question of entitlement to the same property, albeit under the guise of a trust. This, in my view, falls squarely within the mischief that the doctrine of res judicata is intended to prevent.

The issue of entitlement to **LR No. Kiine/Rukanga/2336**, as between the parties now before the Court, was a matter that properly belonged to the earlier litigation and ought to have

been raised and determined therein. The Plaintiff cannot be permitted to split his cause of action and litigate it piecemeal.

Accordingly, I am satisfied that the present suit is *res judicata* within the meaning of **Section 7 of the Civil Procedure Act**. This Court is therefore divested of jurisdiction to entertain it.

- j. On costs, the general principle is that costs follow the event, unless where the court directs differently on good grounds. The defendants having succeeded in their preliminary objection they are entitled to the costs thereof as well as the costs of the suit.

11. In view of the above determinations, the court finds and orders as follows:

- a. That the defendants' preliminary objection has merit and is hereby upheld.**
- b. That consequently, the plaintiff's suit is struck out for being *res judicata* the previous proceedings.**
- c. The defendants are awarded costs.**

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS  
13<sup>TH</sup> DAY OF MAY 2026.**

**Kibunja**

**S. M.**

**ELC**

**JUDGE**

**In the presence of:**

Plaintiff – M/s Njao for Makimi

Defendants – No Appearance

Court Assistants - Kinyua/Charles

**Kibunja**

**S. M.**

**ELC**

**JUDGE**