



**Hilltop Engineering and Technical Services Limited & 2 others v Kilonzo & 5 others
(Environment and Land Appeal 12 of 2020) [2025] KEELC 5446 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5446 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 12 OF 2020**

MD MWANGI, J

JULY 17, 2025

BETWEEN

**HILLTOP ENGINEERING AND TECHNICAL SERVICES LIMITED 1ST
APPELLANT**

STEPHEN NJUGE KIHU 2ND APPELLANT

ZAAK HAPASHAW 3RD APPELLANT

AND

DICKSON MWONGELA KILONZO 1ST RESPONDENT

AGNES MUMBU MWONGELA 2ND RESPONDENT

BENTA MUMBU MWONGELA 3RD RESPONDENT

EMMY MWENDE MWONGELA 4TH RESPONDENT

DIANA MWENDE MWONGELA 5TH RESPONDENT

SHEPHERD MWONGELA 6TH RESPONDENT

JUDGMENT

Background

1. This appeal is against the ruling of Hon. S.M. Shitubi, Chief Magistrate, in Kajiado CMCC 169 of 2015 delivered on 5th April 2018. The appeal was initiated by way of a memorandum of appeal dated 14th July 2020 filed in court on the same date. The appeal is premised on the grounds that;
 - i. The Learned Magistrate lacked pecuniary jurisdiction to hear and determine the matter.
 - ii. And in the alternative:-



- a. The Learned Magistrate erred in law and fact by denying the Plaintiffs/Appellants the right to fair trial on merit and thus greatly prejudiced the Plaintiffs by dismissing the Plaintiffs' suit summarily.
 - b. The Learned Magistrate erred in law and fact when she declared that the Plaintiffs' suit was res-judicata in the absence of any pleadings by the Defendants to that effect.
 - c. The Learned Magistrate misdirected herself when she failed to make a ruling / judgment based on the pleadings before the court.
 - d. The Learned Magistrate erred in law and fact by ignoring the fact that while Kajiado CMCC 24 of 2011 was about sale and purchase of Kjd/Kaputiei-Central/727 by one of the Defendants/Respondents from the Appellant's properties known as Kjd/Kaputiei-Central/2351, 2352, 2353, 2362, 2363 and 2364.
 - e. The Learned Magistrate erred in law by not taking into account that L.R. No. Kjd/Kaputiei-Central/2351, 2352, 2353, 2362, 2363 and 2364 were properties registered in the names of the Appellants/Plaintiffs and ipso facto, the Respondents/Defendants were in occupation of the said properties illegally.
 - f. The Learned Magistrate erred in law and fact in ignoring the fact that dismissing the Appellants' suit amounted to arbitrary depriving the Appellants their right to property which is unconstitutional.
2. The Appellants pray that;
- a. The appeal be allowed with costs to the Appellants.
 - b. The ruling of the lower court be set aside and be substituted with a finding that the Appellants herein be allowed to prosecute their suit on merit.
3. The Appellants were the Plaintiffs in CMCC 169 of 2015. In their plaint dated 17th April 2015, they accused the Defendants of invading their parcels of land aforesaid without an iota of right. They prayed for an order of eviction directing the Defendants to immediately vacate from the land parcels No. Kjd/Kaputiei-Central/2351, 2352, 2362-2364 and 2353 and that the Officer Commanding Station to assist in effecting the eviction.

The impugned ruling

4. The impugned ruling was a three sentences' ruling dated 5th April 2018 by Hon. S.M. Shitubi (Chief Magistrate) where she stated as follows;
- “I have heard counsel for the Defendant in this preliminary objection. I note that indeed it is unopposed meaning that the suit is res judicata the same issues having been heard and determined in the LDT case that was adopted for execution by the court in Kajiado Land Disputes Tribunal Case No. 24 of 2011. For this reason, I dismiss the Plaintiff's case with costs.”
5. The above ruling was in respect to the preliminary objection dated 17th September 2015 which was framed as here below;
- a. That the issues raised in Kajiado, Principal Magistrate's Civil Suit No. 169 of 2015 are res judicata and barred in law.



- b. That pursuant to Article 165 (2) and 65 (5) of *the Constitution*, Section 150 of the *Land Act* No. 6 of 2012 and Section 113 (2) (e) of the ELC Act 2011, the Honourable Court lacks jurisdiction.
6. The only stated basis for the ruling by the Learned Magistrate is that the preliminary objection was unopposed.

Court's directions.

7. The court's directions were that the appeal be canvassed by way of written submissions. The Appellants complied by filing their submissions dated 4th March 2022. The Respondents did not file any submissions.

Issues for determination

8. Having carefully read the Appellants' memorandum of appeal, the consolidated record of appeal, as well as the submissions on record, the issues for determination in the court's opinion are;
 - i. Whether the learned Magistrate erred in determining the issue of res judicata by way of a preliminary objection.
 - ii. Whether the Appellants' suit was res judicata.
 - iii. What orders should issue in respect of costs of this appeal.

Analysis and determination.

9. This being a first appeal, the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent conclusion on whether or not to allow the appeal. A first appellate court is allowed to subject the whole of the evidence to fresh scrutiny and make conclusions about it.
10. *Mativo J (as he then was) in the case of Mursal & another -vs- Manese (suing as the legal administrator of Dalphine Kanini Manese) (Civil Appeal No. E20 of 2021) {2022} KEHC 282 (KLR) (6TH April 2022) (Judgement)*, had this to say on the responsibilities of a first appellate court,

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand”.
11. The Learned Judge emphasize on the critical role of a first appellate court further stating that;

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust. The 1st appeal has to be decided on facts as well as on law.

In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of the *Civil procedure Act*, a court of first appeal can appreciate the entire evidence and come to a different conclusion”.



A. Whether the Learned Magistrate erred in determining the issue of res judicata by way of a preliminary objection.

12. For the umpteenth time, I reiterate that the issue of res judicata is not an issue that can be raised by way of a preliminary objection. A preliminary objection as held in the case of Mukisa Biscuits Manufacturing Company Limited –vs- West End Distributors Limited (1969) EA;

“...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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion”.

13. The court in the case of Oraro- vs- Mbaja (2005) eKLR, reiterated that,

“...the principle is abundantly clear. A preliminary objection correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed”.

14. The Respondents’ preliminary objection was that the Appellants’ suit was res judicata on the basis that the issues raised in the suit had been heard and determined by the Land Disputes Tribunal which decision had been adopted for execution in Kajiado Land Disputes Tribunal Case No. 24 of 2011.

15. For the court to make a determination whether the matter before it was res judicata, it was obligated to establish that,

- i. There was a former judgment or order which was final.
- ii. The former judgment or order was on merit.
- iii. The former judgment or order was rendered by a court having jurisdiction over the subject matter and the parties, and
- iv. There was between the first and the second action identical parties, the subject matter and cause of action.

16. For the court to do that, it needed to have been supplied with material evidence about the alleged former suit; in form of pleadings and the judgment or decree, in order to confirm the above requirements. That cannot be done by way of a preliminary objection; it would only be possible by way of an ordinary application supported by an affidavit where the material evidence will be attached for the court’s consideration.

17. I agree with the holding in the case of George Kamau Kimani and 4 others -vs- County Government of Trans-Nzoia (2014) eKLR, where the court was emphatic that one cannot raise a ground of res judicata by way of a preliminary objection. The best way to raise a ground of res judicata is by way of a notice of motion where pleadings are annexed to enable the court to determine whether that current suit is res judicata.



18. A similar holding was made in the case of Henry Wanyama Khaemba -vs- Standard Chartered Bank Limited & another (2014) eKLR, to the effect that,

“The issues of res judicata, duplicity of suits and suits having been spent will require probing of evidence... They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection”.

B. Whether the Appellants’ suit before the trial court was res judicata.

19. I have had the advantage of perusing and considering the decision by the Kajiado Central Land Disputes Tribunal in TC 612/01/2011 between Kanko Ole Lepen & Dishon Mwangela. The dispute as clearly indicated on the heading of the decision by the Tribunal was in respect of Kjd/Kaputiei-Central/727. The Objector’s case was that he had purchased 5 acres from the Claimant for Kshs. 400,000/- and which portion was to be excised from the suit property Kjd/Kaputiei-Central/727. The Tribunal found in favour of the Objector and directed that the suit property be subdivided to excise the five (5) acres in favour of the Objector and the excised portion to be registered in his favour.
20. Even without delving into the issues in that former case or the competence of the Tribunal to handle the dispute, it is clear that the parties in the case before the Learned Magistrate and the parties before the Land Disputes Tribunal were not identical, neither was the subject matter nor the cause of action.
21. The Learned Magistrate outrightly erred in finding that the Appellant’s suit was res judicata. The appeal by the Appellant is therefore merited and the same is allowed. Consequently, the ruling by the Learned Magistrate is hereby set aside.

C. What orders should issue in respect of this appeal.

22. On the issue of costs, the general rule is that costs will follow the event. The Appellants’ appeal having succeeded, they are entitled to the costs of the appeal which I hereby award them against the Respondents.
23. Therefore, The ruling of the lower court is hereby set aside and is substituted with a finding that the Appellants herein be and are hereby allowed to prosecute their suit, Kajiado CMCC 169 of 2015 on its merit.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 17TH DAY OF JULY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Wadegu h/b for Mr. Karanja for the Appellants

N/A by the Respondents

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

