



Lesira v Nenkash & 2 others; Lesira & 2 others (Interested Parties) (Environment and Land Petition E003 of 2024) [2025] KEELC 5468 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND PETITION E003 OF 2024
LC KOMINGOI, J
JULY 17, 2025
IN THE MATTER OF ARTICLE 10, 21, 22, 23, 27, 28, 40, 47,
48, 50, 64, 159, 165, 258 AND 259 OF THE CONSTITUTION
IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
IN THE MATTER OF THE LAND ACT
IN THE MATTER OF THE LAND DISPUTES TRIBUNAL
IN THE MATTER OF THE MAGISTRATE’S ACT**

BETWEEN

MIROIK NENKALASH LESIRA PETITIONER

AND

JUSTUS NENKALASH 1ST RESPONDENT

CHIEF MAGISTRATE’S COURT, KAJIADO 2ND RESPONDENT

CHIEF LAND REGISTRAR, KAJIADO 3RD RESPONDENT

AND

SUNTE NENKALASH LESIRA INTERESTED PARTY

SERENOI NENKALASH LESIRA INTERESTED PARTY

LERIONKA SUNTE NENKALASH INTERESTED PARTY

RULING

1. This Ruling is in respect of the Notice of Motion dated 5th January 2024 is brought pursuant to: Section 3A of the [Civil Procedure Act](#), Order 40 Rule 1, 2, 3, 4 and 5 of the Civil Procedure Rules



and Section 90, 91(2), 96(2), (3)(c) (f), 97(2), 103(1)(b), 104(2) (a, b), 105, 106(1) (b), (2) of the Land Act. It seeks:

- i. Spent.
 - ii. Spent.
 - iii. That pending the hearing and determination of this Petition an order of temporary injunction be and is hereby issued restraining the Land Registrar Kajiado whether by themselves, employees, servants and/or agents or otherwise assigns and/or any person whatsoever acting on their behalf and/or under their mandate and/or instructions from interfering, amending, deleting, cancelling, rectifying, subdividing and/or otherwise in any manner whatsoever interfering with the register or records or ownership of all that property known as LR No. Kajiado/Kaputiei South/838.
 - iv. The Hon. Court be pleased to issue any other orders that it deems fit and necessary.
 - v. That costs of this application be provided for.
2. The grounds are on the face of the application and the affidavit sworn by the Petitioner. She states that Miroik Nenkash Lesira as it appears in her National identity card, and/or Medrick Nenkash Lesira or Medrick Nenkash Mirdick as appears in other documents are all her names. She states that she is the owner of Land parcel number Kajiado/Kaputiei South/838 measuring approximately 300 acres currently registered in her sons names: Sunte, Serenoi and Lerionka, the Interested Parties herein. She further states that she has been in possession since 1996.
 3. She states that the Respondents filed a dispute against her at the Kajiado Central Land Dispute Tribunal case No. TC 679/8/2011 which was determined on 18th August 2011. She alleges that she was not aware of these proceedings, hence she did not participate. Following the decision from the Tribunal, the Respondents filed Land Dispute Tribunal Case No. 3 of 2012 at the Kajiado Magistrate's Court. She was not served. The Court adopted the Award from the Tribunal in a Ruling dated 7th February 2012 and ordered that the suit property be shared equally among Mpeon Nenkash, Nyamalo Nenkash, Sinkiyan Nenkash and herself -Medrick Nenkash.
 4. She claims that the award was defective because at the time, the operating Act had been repealed and thus the Tribunal did not have jurisdiction to hear and determine the dispute or interfere with a registered title. She further states that, the value of the land exceeded the pecuniary jurisdiction of the Resident Magistrate's Court which adopted the award. She prays that, the application should be allowed.
 5. She pointed out that she had filed a Judicial Review against the said proceedings, but it was struck out on technicality because the State was not the Applicant. It is her case that she is not estopped from seeking the orders in this Petition.
 6. The 1st Respondent, Justus Nenkash in his Replying Affidavit and Grounds of Objection sought for dismissal of the Application and Petition on the grounds that: The Petitioner was not the registered owner of the suit property because in Kajiado ELC Case No. 443 of 2017 it was found that the title she held was void having been issued contrary to the decree in Kajiado Resident Magistrate's Court Case No. 3 of 2012. That, by dint of that judgement, the Petitioner's proprietorship over the suit property was extinguished and was no longer tenable.
 7. The 1st Respondent also contested the Petitioner's claim that she was unaware of the proceedings at the Land Disputes Tribunal's because it is on record that the Tribunal arrived at the decision after



- considering evidence adduced by both parties. The members also visited the land. If she was not part of the proceedings as claimed, this was the first time this claim was being raised and there was an Appeal mechanism, which the Petitioner failed to utilise.
8. On the issue that the Petitioner was not aware of the proceedings at the Magistrate's Court, the 1st Respondent contested this allegation on the ground that the Petitioner had been duly served with notice to attend Court, but she failed to do so. The award was then adopted as an order of Court. Following this adoption, she filed a Judicial Review vide Machakos Civil Misc. App No. 46 of 2012 seeking a writ of certiorari to quash the decision of the Land Disputes Tribunal on grounds that it was in breach of the rules of natural justice, exceeded its jurisdiction and that the decision was erroneous. In the said Application the court found that she had taken part in the proceedings. The decision was therefore not reviewed. No appeal was filed. It is his case that the Petitioner's claim that she was not part of the proceedings at Land Disputes Tribunal was false. He avers that, bringing another suit on the same issue that has been litigated on was an abuse of the Court process.
 9. On the ground that the decision of the Tribunal was void for want of jurisdiction, the 1st Respondent stated that the award was given on 18th August before the *Environment and Land Court Act* was assented into law on 27th August 2011 and commenced on 30th August 2011. That therefore, the Tribunal had jurisdiction to hear and determine the dispute. The 1st Respondent also contested the issue of pecuniary jurisdiction stating that the Tribunal was not limited by the value of land, as the Petitioner had not demonstrated the value. The issue of jurisdiction ought to have been raised at the earliest opportunity. The petitioner instead sought a judicial review of the ruling of the Magistrate without any success and that this was another attempt to litigate on the same issues already dealt with. The same is couched as a Constitutional Petition, hence res judicata. The Petition is an attempt to stop implementation of the decision to subdivide the suit property into four equal portions as ordered. The petitioner wants to continue enjoying the estate of the late Nenkalah Lesire to the exclusion of the rest of the family.
 10. He urged that, the prayers sought in the Petition would have been canvassed as an Appeal and was thus time barred and should be dismissed with costs.
 11. The Petitioner in her Supplementary Affidavit reiterated that she was the registered proprietor of the suit property from 1994 and that the four wives of the late Nenkalah Lesire each had their own parcels of land having been allocated by Marrueshi and Imbuko Group Ranches. The 1st Respondent who was a former leader had thus singled out her land for distribution amongst her co-wives. She stated that the suit property was never registered in her husband's name and ordering for its subdivision amongst her co-wives was illegal. She reiterated that she never participated in the proceedings at the Land Disputes Tribunal and all the suits mentioned by the 1st Respondent never addressed the issue of the illegality of the award and its adoption. As such, the Application and Petition should be heard and determined on their merits.
 12. The 1st Respondent in his Further Affidavit pointed out that by a Ruling delivered on 24th September 2024 Gicheru J. in Kajiado ELC Case No. 443 of 2017, the court ordered cancellation of the Petitioner's title deed and the award of the Tribunal be implemented. Therefore, the Petitioner lacked locus standi to institute or sustain this Petition because she had no proprietary rights over the suit property. He reiterated that this Petition ought to be dismissed with costs.
 13. This application was canvassed by way of written submissions.



Submissions of the Petitioner

14. On whether a proper basis has been laid for a Preliminary Objection on Res Judicata, counsel submitted that a preliminary objection should be on a point of law citing Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696. It was submitted that for determination of the question of res judicata, the Court cases referred to by the 1st respondent ought to be reviewed and this was not a matter of law but fact as was held in: Henry Wanyama Khaemba... Vs...Standard Chartered Bank Ltd & Another (2014) eKLR: "...The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence.." and George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR. Counsel went on to submit that the Petition was not res judicata as per Section 7 *Civil Procedure Act* because the cases outlined by the Respondent: Machakos Civil Miscellaneous Application No. 46 of 2012 which sought judicial review orders, was dismissed on the form not on the substance. And Kajiado ELC No. 443 of 2017 which was on trespass was also dismissed. Therefore, whereas the suit property was the same, the issues in the other suits were not similar to the issues in the Petition; the suits were not between same parties and the issues had not been heard and determined. Reference was made to: Suleiman Said Shabhal vs Independent Boundaries Commission & 3 Others Electoral & [2014] eKLR which held: "...To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy..." and Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97 which held: "...Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim..."
15. On whether the principles for Grant of Injunction had been established, it was submitted that the Petitioner had met the laid threshold in Giella vs Cassman Brown (1973) EA358, Mrao versus First American Bank Of Kenya Limited & 2 Others (2003) KLR 125 and Order 40 Rule 1(a) the Civil Procedure Rules having established that she had a prima facie case because her property was in danger of being wasted away and dispossessed which could not be compensated by way of an award of damages with reference to Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR. The balance of convenience therefore tilted with the Petitioner whose rights were in danger of violation citing Chebii Kipkoech vs Barnabas Tuitoek Bargarioria & Another [2019] eKLR and Paul Gitonga Wanjau vs Gathuthis Tea Factor Company Ltd & 2 Others [2016] eKLR.

The 1st Respondent's submissions

16. Counsel began by submitting that the 1st respondent had not filed a Preliminary Objection as argued by the Petitioner but what they had filed were grounds of objection which was different from a preliminary objection.
17. On whether the Petitioner had locus standi to institute the suit, it was submitted that the Petitioner and the Interested Parties were no longer the legal proprietors of the suit property as per the Judgement delivered in Environment and Land Court Case No. 443 of 2017 on 7th October 2021 and the Order on 24th September 2024. Reference was made to: Alfred Njau & 5 others v City Council of Nairobi [1983] eKLR, BV Law society of Kenya vs Commissioner of Lands and Others and Julian Adoyo Ongunga v. Francis Kiberenge Abano Migor Civil Appeal No.119 of 2015.



18. Counsel also argued that the Petition was res judicata contrary to Section 7 of the Civil Procedure Act because the dispute has been conclusively determined in: Kajiado Land Tribunal Case No. TC 679/8/2011 where the land was ordered to be shared equally among the four wives of the deceased; Kajiado Magistrate's Court Land Case No. 3 of 2012 where the Tribunal's award was adopted as a judgment of the court; Machakos Misc. Application No. 46 of 2012 which sought judicial review but was dismissed and Kajiado ELC No. 443 of 2017 which was also dismissed. It was submitted that the issues at hand having been determined in several forums meant that this Petition was res judicata because the issues were substantially the same; the previous suits were between same parties and the issues had been heard and determined. As such, this Court had no jurisdiction to entertain it. The following cases were cited in support of res judicata: Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd [2017] eKLR, Nathaniel Ngure Kihii v Housing Finance [2018] eKLR, ET v. Attorney-General & Another (2012) eKLR and John Florence Maritime Services Ltd & another vs Cabinet Secretary for Transport and Infrastructure.
19. On the issue that the Tribunal did not have jurisdiction to hear and determine the dispute, it was submitted that Section 3(1) and (4) Land Disputes Tribunal Act mandated Land Dispute Tribunal with the authority to hear and determine disputes relating to the division of, boundaries, claim to occupy as well as claims of trespass. Therefore, the dispute was competently determined and if the Petitioner was aggrieved she ought to have appealed against the award to the Provincial Appeals Committee within 30 days of the award as per the then Section 8(1) Land Disputes Tribunal Act. Counsel also argued that by dint of Section 44 Evidence Act, the judgement in rem of the Tribunal, Magistrate's Court and this Court took away the Petitioner's right of claim over the suit property.
20. This Petition was thus an abuse of the Court's process and should be dismissed.
21. On whether the Petitioner had met the threshold for grant of interlocutory relief, counsel submitted that with the foregoing, the Petitioner had not established a prima facie case because she was no longer the proprietor of the suit property. She therefore did not have locus standi to file the Petition which was equally res judicata and should be dismissed with costs.

The Interested Parties' submissions

22. On whether the preliminary objection is merited, counsel submitted that the Petitioner had locus standi to file the Petition as the registered owner of the suit property. On the issue of res judicata, counsel reaffirmed that the Petition was not res judicata because the Petitioner was not party to the proceeding at the Tribunal and the Machakos Misc. Application No. 46 of 2012 (JR) did not determine the issues because the application was struck out for being incompetent and misconceived. And similarly Kajiado ELC Case No. 443 of 2017 did not consider the merits of the case. Therefore, the proceedings at Kajiado Central Land Dispute Tribunal Case No. TC 679/8/2011 remained unchallenged. Counsel also argued that the Petitioner raised the issue of violation of right to fair hearing under Article 50 (1) of the constitution which issue had never been heard or determined and thus res judicata was inapplicable citing John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015).
23. On whether the Petitioner's application was merited, it was submitted that it was imperative to preserve the suit property pending the hearing and determination of the suit with reference to Order 40 of the Civil Procedure Rules since the Petitioner had raised triable issues. Counsel also submitted that the balance of probability tilted in favour of the Petitioner who stood to lose her property if the orders are not issued.



Analysis and determination

24. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions and the authorities cited. I find that the issues for determination are:
- i. Whether this Petition is Res judicata;
 - ii. Whether the Petitioner is entitled to relief of temporary injunction as sought in the application dated 20th May 2022;
 - iii. Who should bear the costs of this application?
25. This Petition is premised on the grounds that the Petitioner is the rightful owner of property Kajiado/ Kaputiei South/838 from sometime in 1994 but she was about to be divested of the property through Kajiado Land Dispute Tribunal Case No. TC 679/8/2011 and the award adopted in Kajiado Magistrate's Court Land Dispute Tribunal Case No. 3 of 2012 as an order of the Court. She therefore, sought a temporary injunction restraining the Land Registrar from subdividing the suit property.
26. The 1st Respondent filed grounds of opposition opposing the application. The Petitioner in her submissions contested this on grounds that a Preliminary objection should be on a pure point of law. However, the 1st Respondent in his submissions pointed out that he did not file a preliminary objection, but grounds of opposition which was not the same.
27. Therefore, the first issue for determination is whether there is difference between grounds of opposition and preliminary objection.
28. Order 51 Rule 14 of the Civil Procedure Rules provides:
- (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents -
 - (a) a notice of preliminary objection; and/or;
 - (b) replying affidavit; and/or
 - (c) a statement of grounds of opposition;
29. A plain reading thus shows that a Respondent can oppose an application either as a preliminary objection or through a statement of grounds of opposition. The Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 (KLR) stated: "...It is evident that the plea of res judicata was raised and not as a preliminary objection as argued by the appellants... Instead, and contrary to the appellants submissions, the plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the appellants application..."
30. The 1st Respondent in his grounds of opposition contested the Application as well as the Petition on the grounds that the Petition was Res judicata because there have been several cases filed by the Petitioner regarding the same subject matter and all the matters had been conclusively determined. The Petitioner however claimed that the Petition was not res judicata because the matters outlined by the 1st Respondent were different and had not been determined on their merit. A Preliminary Objection in a point of law can be raised at any stage of the proceedings.



31. Section 7 of the *Civil Procedure Act* provides as follows on res judicata:

“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.

32. The Supreme Court in *Kenya Commercial Bank Limited & another v Muiri Coffee Estate Limited & 3 others* [2016] KESC 6 (KLR) held as follows regarding the issue of res judicata:

“... Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...

...

Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v James Nderitu Githae & 2 others*, [2010] eKLR, under five distinct heads:

- (i) the matter in issue is identical in both suits;
- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction; and
- (v) finality of the previous decision.”

33. This Court will therefore begin by reviewing the cases cited to determine whether this Petition is res judicata or not based on whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction.

34. In *ELC Kajiado Case No. 443 of 2017* the suit is between the Petitioner and the Interested Parties herein as the 2nd, 1st, 3rd and 4th Plaintiffs respectively and one Mboi Lemaron. They sought an eviction and demolition of structures on Kajiado/Kaputiei South/838 (the suit property in this Petition) and a permanent injunction restraining trespass or interference with the suit property. In that case, the Plaintiffs claimed that they were jointly registered as proprietors of the suit property on 10th April 2014. The Defendant in that suit argued that the suit property belonged to his late father who was the Petitioner’s husband as well as the Interested Parties father. But upon his demise, the Petitioner refused to have the said land devolve to his Estate. A dispute was filed at the Tribunal and the Tribunal ordered for the suit land to be divided equally among the four wives of the late Nenkash.

35. The Court notes the following similarities between this Petition and the *ELC Case No. 443 of 2017*. The Subject matter- Kajiado/Kaputiei South/838 is the same in both suits; and the parties are also the



same because the Petitioner and Interested Parties herein are the Plaintiffs in that suit. It goes without saying that, the parties are the same and are litigating under the same title.

36. The next question to be determined in ascertaining whether the Petition is res judicata is whether ELC Case No. 443 of 2017 substantially determined?

37. On 7th October 2021, Gicheru J. delivered a judgement in this case where he held:

“ 21. On the second issue of the effect of the decree in Kajiado Magistrate’s Court Case Number 3 of 2012, I find that it stands. After the *Environment and Land Court Act (Act No. 19 of 2011)* commenced on 30th August 2011, the Hon. Chief Justice issued practice directions on proceedings relating to the Environment and the use and occupation of, and title to land on 9th February 2012 vide gazette notice number 1617 of 17th February, 2012

Direction number 3 provided as/ follows:

“All proceedings which were pending before the Provincial Land Appeals Committees as at the date of enactment of the *Environment and Land Court Act, 2011*, shall be moved to the nearest High Court for hearing and determination.

22. Going by the above practice directions, it was not open to the plaintiff file a fresh suit in the High Court or the Environment and Land Court. The only open option to them was to appeal. The Judicial review at the High Court having failed, the Plaintiffs could have appealed but they chose not to.

23. On the third and final issue, I find that the title deed issued to the plaintiffs for the suit land is void for having been issued contrary to the decree in Kajiado Resident Magistrate’s Land Case No. 3 of 2012.

24. For the above stated reasons, I dismiss the plaintiffs’ suit with costs and order that the award of the tribunal and the decree in Kajiado Resident Magistrate’s Land Case No. 3 of 2012 be implemented in full.

38. The Petitioner has brought this Petition claiming that the award by the Land Dispute Tribunal adopted by the Magistrate’s court was defective and should therefore be set aside. From the excerpt of ELC Case No. 443 of 2017, it is clear that judgement of a competent Court of equal status endorsed the decree in Resident Magistrates Land Case No. 3 of 2012 and ordered that the award of the Tribunal and the decree be implemented. To affirm this, the Supreme Court in the Muiri Coffee Case (supra) stated:

“ 54. The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

39. The Petitioner through this Petition is asking this Court, to determine issues that a Court of equal status has already rendered a decision. This indeed falls within the confines of res judicata no matter



in what shape or form the suit is brought as and it should be shunned upon. If the Petitioner was aggrieved with the Judgement, her recourse would be on Appeal because once a judgement is entered, it is conclusive. Litigation must come to an end.

40. I therefore find that Application and the Petition are res judicata and are hereby dismissed with no order as to costs.

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

L. KOMINGOI

JUDGE.

In the Presence of:

Mr. Wesonga for the Petitioner.

Mr. Mukuha for the 1st Respondent.

N/A for the 2nd, 3rd Respondents.

Court Assistant – Mateli.

