



**Mbuthi v Muoki & 2 others (Environment and Land Case
E038 of 2024) [2025] KEELC 5351 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5351 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE E038 OF 2024**

**EO OBAGA, J
JULY 17, 2025**

BETWEEN

STEPHEN KYALO MBUTHI PLAINTIFF

AND

MWALIMU MUOKI 1ST DEFENDANT

MUSASI MALII 2ND DEFENDANT

MWIKALI MUTISYA 3RD DEFENDANT

RULING

1. This is a ruling in respect of a preliminary objection dated 2nd December, 2024 in which the Defendants raise the following grounds:
 1. The suit herein is res judicata and an affront to Section 7 of the *Civil Procedure Act* (Cap 21) Laws of Kenya.
 2. The suit herein is otherwise res-sub judice, and offends the provisions of Section 6 of the *Civil Procedure Act*.
 3. That the suit herein is otherwise an affront to the doctrine of exhaustion, there being pending issues over the same subject matter before administrative tribunals.
 4. The dispute herein substantially relates to boundary dispute whose jurisdiction lies with the Land Registrar under the *Land Act* No. 6 of 2012 and this honourable court is not clothed with jurisdiction to entertain the same.
 5. That the Plaintiff/Applicant has in the last few years been filing numerous, multiferous and repetitive causes of action over the same subject matter and substantially the same parties, with



intent to vex, annoy, exhaust or otherwise coerce the Defendants to give up their legitimate right in the suit property.

6. That there has to be an end to litigation and this cause of action herein is an abuse of the court process and offends the overriding objective under Section 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The Plaintiff had filed a suit against the Defendants. He contemporaneously filed an application seeking injunctive orders. Before the application could be heard, the Defendants raised the preliminary objection which is the subject of this ruling.
3. The parties were directed to file written submissions. The Defendants filed their submissions dated 14th March, 2025. The Plaintiff filed his submissions dated 26th June, 2025. The Defendants submit that this court has no jurisdiction to deal with the Plaintiff's application or suit on the ground that the Plaintiff failed to invoke the provisions of the [Land Adjudication Act](#) and cannot therefore come to court having failed to do what was expected of him under the [Land Adjudication Act](#).
4. The Defendants also submit that the Plaintiff's claim relates to a boundary dispute which this court has no jurisdiction to entertain.
5. The Defendants further submit that the Plaintiff's case is res judicata in that there are suits which have been determined before but the Plaintiff is still filing more suits based on the same subject matter. The Defendants referred to Machakos HCCC No. 54 of 2005 and Makueni ELC No. 39 of 2019 both of which were dismissed.
6. The Defendants finally submitted that the Plaintiff's suit is an abuse of the process of court in that the Plaintiff has filed numerous suits in various courts with a view to vexing the Defendants. They cited the case of Beinosi –vs- Wiykey 1973 SA 721 (SCA) at page 734 F-G where it was held as follows:

“What does constitute an abuse of the process of the court is a matter which need to be determined by the circumstances of each case.... It can be said in general terms however, that an abuse of the process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of truth are used for purposes extraneous to that objective”.
7. The Plaintiff submitted that his claim is based on trespass which is a continuing act and cannot be said to be res judicata. He relied on the case of Thanthini Development Company Limited –vs- Coast Water services Board (Environment & Land case 371 of 2016) (2025) KEELC 4290 (KLR) 30th May, 2025 (Judgment) where it was held as follows:

“Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res-judicata simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts”.
8. A preliminary objection was defined in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696 as follows:

“So far as I am aware, preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which is argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of



the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

9. There is no pure point of law raised by the Defendants which is capable of disposing of the suit. What the Defendants are raising are contested facts which have to be ascertained. For instance they contend that the Plaintiff never purchased 4 acres; that he altered the agreement to show that he had purchased 4 acres when the agreement did not indicate the acreage he purchased. This is a matter which needs ascertainment of those allegations and cannot therefore be raised as a preliminary objection.
10. If there are any pending suits, this is a matter which can only be ascertained through evidence and cannot be raised as a preliminary objection. On the issue of res judicata, it is alleged that there was a case which was based on trespass. This case even though it was determined cannot be bar to the present suit which is based on trespass based on different acts of trespass. Each fresh act of trespass constitutes a fresh cause of action. This was the holding in the case of Thaathini Development Company Limited (Supra) which quoted the case of Isaack Ben Mulwa –vs- Jonathan Mutunga Mweke (2016) eKLR.
11. It is therefore clear that the preliminary objection is devoid of merit. The same is hereby dismissed with costs to the Plaintiff.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 17TH DAY OF JULY, 2025.

In the Presence of:

Ms. Okinyi for Mr. Kivindyo for Defendants.

Mr. Mutua for Plaintiff.

Court assistant – Steve Musyoki

