



**Chepkorir (Suing as legal representative of the Estate of Paul Rotich Ngeny) v Yegon & another
(Environment & Land Case E018 of 2022) [2025] KEELC 865 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E018 OF 2022
LA OMOLLO, J
FEBRUARY 27, 2025**

BETWEEN

**NANCY CHEPKORIR (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE
OF PAUL ROTICH NGENY) PLAINTIFF**

AND

CHRISTOPHER KIPNGETICH YEGON 1ST DEFENDANT

ABDIKADIR ADOW ABDULLAHI 2ND DEFENDANT

RULING

1. This ruling is in respect of the 2nd Defendant's Preliminary Objection dated 7th May, 2024. It is on the following grounds;
 - a. That the application and the main suit is fatally and incurably defective as the Plaintiff has failed to comply with the provisions of Section 18(2) of the [Land Registration Act](#) No. 3 of 2012 and no minutes by the Land Registrar has been annexed herein therefore this suit should be dismissed with costs.
 - b. That the application and the main suit should be dismissed for want of jurisdiction and for failure to disclose any or reasonable cause of action against the 2nd Defendant.
 - c. That the application and the suit herein is res judicata and the same had already been adjudicated in Kericho CMELC No. E021 of 2020 and a ruling delivered on 9th June, 2021 hence the same should be struck out with costs. That the application and the main suit is an abuse of the Court process and a waste of Courts time.



Factual Background.

2. The Plaintiff commenced the present proceedings vide the Plaint dated 24th November, 2022 where she seeks the following prayers;
 - a. A declaration that the estate of Paul Rotich Ng'enyi is the lawful proprietor of the parcel of land known as Kericho/Chemoiben/967.
 - b. An order for eviction to issue against the Defendants from the suit property.
 - c. Vacant possession of the suit property.
 - d. A permanent injunction restraining the Defendants whether by themselves, servants, goons, hooligans, hoodlums, agents, employees, relatives or any other person from occupying, entering, encroaching, cultivating, remaining on or continuing in occupation of the suit property.
 - e. Mesne profits.
 - f. General, punitive and exemplary damages for trespass.
 - g. Costs of this suit.
 - h. Interest on (c) and (d) above at Court rates.
3. The 2nd Defendant entered appearance but has not filed a Statement of Defence to date. The 1st Defendant has neither entered appearance nor filed a Statement of Defence.
4. The preliminary objection first came up for directions on 8th May, 2024. The Court directed that it be heard by way of written submissions.
5. It was mentioned severally to confirm filing of submissions and finally reserved for ruling on 16th October, 2024.

Issues for determination.

6. The Plaintiff filed her submissions on 30th April, 2024 while the Defendants did not file any submissions.
7. The Plaintiff submits on the following issues;
 - a. Whether the preliminary objection is merited.
 - b. Whether the application and the main suit offends Section 18(2) of the *Land Registration Act* as to oust the jurisdiction of this Court.
 - c. Whether the application and the main suit are res judicata.
 - d. Whether the application and the main suit disclose a reasonable cause of action against the 2nd Defendant.
8. With regard to the first issue, the Plaintiff relies on the judicial decisions of *Okoti v Parliament of Kenya & 2 Others*; *County Government of Taita Taveta & 3 Others (Interested Parties)* (Petition 33 of 2021) [2022] KEELC 33 (KLR) (23 March 2022) (Ruling), *Republic v Chief Magistrate Nairobi Ex parte Gatheru Gathemia* [2007] eKLR and submits that the 2nd Defendant has filed the preliminary objection two years after the suit was instituted.



9. It is the Plaintiff's submissions that the 2nd Defendant has been actively participating in the proceedings and his preliminary objection is therefore an after thought and an abuse of the Court process.
10. With regard to the second issue, the Plaintiff relies on Sections 15, 18(1) & 18 (2) of the [Land Registration Act](#) and submits that the Land Registrar can only determine disputes where boundaries have not been established or where the land is unsurveyed.
11. The Plaintiff also relies on the judicial decision of Fredrick Nganga Thuo v Peter Mungai Njuho [2017] eKLR and submits that the Court has jurisdiction to hear and determine matters where boundaries have been fixed.
12. The Plaintiff further submits that the boundaries of the suit property in the present matter have already been established as a Surveyor's report dated 5th January, 2024 has been filed in Court.
13. It is the Plaintiff's submissions that the issue in contention in the present matter is not a boundary dispute but a case of encroachment.
14. With regard to the third issue, the Plaintiff relies on the judicial decisions of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, Njue Ngai v Ephantus Njiru Ngai & another [2016] eKLR, Moses Mbatia v Joseph Wambura Kihara [2021] eKLR, Diwafa Investments Ltd v Joakim Musyoki Kiiio [2019] eKLR and submits that res judicata only applies to matters that have been heard and fully decided.
15. The Plaintiff submits that the suit alluded to by the 2nd Defendant was not decided on merit and therefore this suit cannot be said to be res judicata.
16. The Plaintiff also submits that the 2nd Defendant has not annexed the pleadings and the decision of the said lower Court matter for this Court to analyze.
17. With regard to the fourth issue, the Plaintiff submits that she has pleaded at paragraph 5 of the plaint that the Defendants trespassed onto her land.
18. The Plaintiff also submits that she annexed photographs which show the encroachment. She also submits that she has demonstrated that she is a beneficial owner of the suit property and therefore she has disclosed a reasonable cause of action against the 2nd Defendant.

Analysis and determination.

19. I have considered the 2nd Defendant's preliminary objection and the Plaintiff's submissions. The only issue that arises for determination is whether the Preliminary Objection dated 7th May, 2024 is merited.
20. The 2nd Defendant's preliminary objection is on the following two grounds;
 - a. That the Plaintiff's suit is fatally defective for failing to comply with Section 18 (2) of the [Land Registration Act](#).
 - b. That the suit is res judicata.
21. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.



22. In the judicial decision of Oraro vs Mbaja 2005 1 KLR 141 the Court held as follows:

“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 process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek 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.”

23. As set out in the preceding paragraphs, the 2nd Defendant contends that the Plaintiff’s suit is fatally defective for failure to comply with the provisions of Section 18(2) of the *Land Registration Act*.

24. Section 18(2) of the *Land Registration Act* provides as follows;

“(2) The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

25. In response, the Plaintiff submits that the Court has jurisdiction to hear and determine matters where boundaries have been fixed. The Plaintiff also submits that in the present matter, boundaries of the suit property have already been determined and a Surveyor’s report filed.

26. The court record shows that a survey report dated 5th January, 2024 was filed on 11th January, 2024. An excerpt of the survey report is as follows;

“Background information.

Parcel No. Ker/Chemoiben/967 is located on Chemoiben map sheet No. 6 which was published by Survey of Kenya in August 1970 on a scale of 1 in 5,000. The parcel is a new number from the old parcel No. 905, which originated from P/No. 889. The parcel houses the Red Sea Petrol Station.

Survey Methodology.

The survey team collected data around the perimeter of P/No. 967, including all compoints of the land and the yellow line of the Sotik-Kericho road. The data was later processed and plotted on the Chemoiben map sheet No. 6.

Survey Findings.

The Red Sea Petrol Station is located 60m west of P/No. 905.

P/No. 906 is west of P/No. 905, but it appears vice-versa on the inset of P/No. 905.

P/No. 966 and 967 were shifted westwards on the inset of P/No 905 ahead of P/No. 890.

The Red Sea Petrol Station is on the southern portion of P/No. 46.

The Short tarmac road west of the Red Sea Petrol Station runs on P/No. 46.

Recommendations.

The inset of P/No. 905 does not accurately represent the actual ground position, leading to discrepancies between the map and ground positions. It is recommended that this issue be addressed for accurate interpolation of the actual ground position.”



27. The Surveyor in his report identifies the issue in dispute as discrepancies between the map and ground positions of the suit parcels. He makes recommendation that it should be addressed for accurate interpolation of the ground position.
28. The county surveyor in his report, stated that he found that there is a disparity between the map and what is on the ground and recommended that it be addressed.
29. The court record shows that on 9th November, 2023 the Court issued the following orders;
- “That the matter be and is hereby referred to the Land Registrar Kericho to determine the position on the ground (Land Parcel Number Kerocho/Chemoiben/96) where he/she shall file his/her report within 30(thirty) days from which report the Court shall make a determination on whether it has jurisdiction to deal with the matter.”
30. The Court record does not have any report filed by the Land Registrar. The only report on the Court record is the one filed by the County Surveyor.
31. The land Registrar is yet to file his/her report. Before that report is filed, it cannot be said with certainty that the dispute before this court is a boundary dispute. The Plaintiff is categorical that it is a case of encroachment.
32. My view is that the 2nd Defendant filed his preliminary objection prematurely as the matter had already been referred to the Land Registrar. The 2nd Defendant ought to wait and/or follow up with the Land Registrar on filing of the report. It is after the filing of the report by the Land Registrar that the Court will determine whether or not it has jurisdiction.
33. The second ground on the 2nd Defendant’s preliminary objection is that the Plaintiff’s suit is res judicata.
34. The 2nd Defendant contends that the present suit is res judicata as the issues raised in this suit have already been adjudicated in Kericho CMELC No. E021 of 2020 and a ruling delivered on 9th June, 2021.
35. In response, the Plaintiff submits that Kericho CMELC No. E021 of 2020 was not determined on its merits and therefore the present suit cannot be said to be res judicata.
36. Section 7 of the [Civil Procedure Act](#) provides as follows;
- “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.”
37. In the judicial decision of *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another* [2014] eKLR the Court held as follows;
- “I have considered the points raised by the first defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata. Professor Sifuna did not raise



the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection.” [Emphasis Mine]

38. The law, as seen from the decision cited above, is that the question of res judicata cannot be raised by way of a preliminary objection. This is because res judicata requires analyzing pleadings. These pleading can only be presented to court by way of affidavit evidence.

Disposition.

39. Consequently, I find that the 2nd Defendant’s preliminary objection dated 7th May, 2024 lacks merit and it is hereby struck out with costs.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 27TH DAY OF FEBRUARY, 2025.

L. A. OMOLLO

JUDGE

In the presence of: -

The firm of Obando Koko for Defenants - Absent

Miss Chepkemoi for Koech for the Plaintiff/Respondent.

Court Assistant; Mr. Joseph Makori

