



**Cheruiyot & 447 others v Angata Bargo Farmers Co-operative  
Society & 2 others (Environmental and Land Originating Summons  
E017 of 2024) [2025] KEELC 883 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 883 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E017 OF 2024  
MN MWANYALE, J  
FEBRUARY 27, 2025**

**BETWEEN**

**SAMWEL KIPKOROSS CHERUIYOT & 447 OTHERS ..... APPLICANT**

**AND**

**ANGATA BARGOI FARMERS CO-OPERATIVE SOCIETY ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, TRANSMARA ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling relates to the Notice of Preliminary Objections dated 17/01/2024 filed by the 1<sup>st</sup> Respondents in respect of this suit and the Notice of Motion Application dated 25<sup>th</sup> November 2024. The P/O is premised on grounds that the whole suit offends the rule on *res judicata*.
2. The hearing of the P/O was directed to be by way of written submissions and highlighting of the same. At the highlighting of the submissions the court, required the parties to address it on the sole issue as to whether the Notice of preliminary objection as filed met the threshold of a preliminary objection which issue shall be the sole issue for determination as framed by the court.
3. In her brief submissions Ms. Saika learned counsel for the 1<sup>st</sup> Respondent placed reliance on her written submissions dated 28<sup>th</sup> January 2025 and further submitted that the preliminary objection as filed met the threshold of a preliminary objections as the same was premised on the issue of *res judicata*.
4. It was her submissions that this suit was similar to a former suit that she had attached to her submissions where the parties, the suit properties and issues in tis suit were directly in issue in the former suit. She submitted that at paragraph 12 of the Applicants written submission the Applicants had conceded that the parties herein, subject matter being the suit properties were similar in the former suit and that the



only the issues directly in issue in the former suit were not conceded to. She submitted that at paragraph 2 of the judgment delivered on 23.12.2020 in the former suit the issue of occupation of the parties was considered and the court had found that some of the occupants had not established the right of ownership. She urged the court to find the suit *res judicata*.

5. On his part Mr. Kipkoech Learned counsel for the Applicants' submitted that there was no preliminary objection before the court as the document dated 17.01.2025 was not filed in court and that it was not in the CTS Either. He further submitted that the details of the former suit were not captured in the preliminary objection. On *res judicata* the Applicants Advocates indicated that no elements had been established, no pleadings of the previous suit disclosed, parties not disclosed and the decision not annexed he conceded that there had been previous litigations in the Angata Baragoi area but that no material had been placed before court. He urged the court to dismiss the preliminary objection. Counsel equally relied on his written submissions already on record.

### Issues for Determination

6. Having analysed the Notice of preliminary objection as well as the rival submissions by the parties, the court frames the sole issue for determination as follows,

Whether the Preliminary objection before court meets the threshold of a Preliminary Objection capable of determining the suit in limine?

This is essentially what the court required the Learned counsels to address it on, but both counsels went on to submit on the issue of *res judicata* and did not quite address this issue.

### Analysis and Determination

7. The plea of *res judicata* is undoubtedly a point of law as it is based on section 7 of the [Civil Procedure Act](#) and it has the potential of determining a matter summarily.
8. The Court shall now consider whether the Preliminary objection as filed in this Matter meets the threshold of Preliminary Objections as was observed in the decision in the case of *In Mukisa Biscuit Manufacturer Limited v Westend Distributors Limited*; the Court held in respect of a preliminary objection, that

“so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary objection 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 the acts 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....”

9. Similarly in the decision in the case of [Omondi v National Bank of Kenya Limited and 2 others](#); as quoted in the decision of [J. N. and 5 others v Board of Management St. G. School Nairobi and Another](#) where it was held that;

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with



disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

10. From the above excerpts a Preliminary Objection must not deal with issues of ascertainment of the facts and evidence and this what the court expected the counsels to address it on. The issue of the existence of the previous suit determined by this court is a factual issue which requires examination of facts and evidence to be availed before court through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence. It follows therefrom as drawn the preliminary objection fails to meet the threshold of a preliminary objection as this P/O involves ascertainment of facts through the rules of evidence as indeed the 1<sup>st</sup> Respondents advocates referred to a judgment that she had irregularly annexed to her submissions being Narok ELC no.1270 of 2017 (formerly Kisii ELC no. 601 of 2016). Instead of annexing the same in an affidavit, and P/O must therefore fail, as it hereby does, and the court shall not dwell on its merits or otherwise.
11. The court shall consider the issue of *res judicata* raised in the Preliminary Objection as part of the response to the application dated 25.11.2024., that way it shall be possible to ascertain the facts and evidence lending credence or otherwise to the claim of Res-judicata as pleaded.
12. The upshot is that the preliminary objection dated 9.10.2024 is hereby struck out with costs in the cause.

**DATED AND DELIVERED AT KILGORIS THIS 27<sup>TH</sup> DAY OF FEBRUARY 2025.**

**HON. M.N. MWANYALE**

**JUDGE**

In the presence of

Mr. Wangui h/b for mMs Saika for the 1<sup>st</sup> Respondent/Defendant.

Ms. Chepkulul h/b for Mr. Kipkoech the Applicant/Plaintiff.

C/A Emmanuel/Slyvia

