



**Muteti & 9 others v Ngewa & 7 others (Environment & Land Case
E008 of 2023) [2025] KEELC 1011 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 1011 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E008 OF 2023
TW MURIGI, J
FEBRUARY 26, 2025**

BETWEEN

**GEOFFREY MWANGANGI MUTETI 1ST PLAINTIFF
JONATHAN PETER KILONZO 2ND PLAINTIFF
KATUKU NGITE 3RD PLAINTIFF
FRANCIS MUTISYA SILA 4TH PLAINTIFF
PAUL WAMBUA KYENGO 5TH PLAINTIFF
HARRISSON MUTUA NZIOKA 6TH PLAINTIFF
JOEL MALELU NZIOKA 7TH PLAINTIFF
MULILU KIMOTHO 8TH PLAINTIFF
KYENZE MUIA 9TH PLAINTIFF
DAVID KIVIEKO MUTETI 10TH PLAINTIFF**

AND

**GEOFFREY KITHOME NGEWA 1ST DEFENDANT
STEPHEN MWANZIA NGEWA 2ND DEFENDANT
GEORGE MAKAU NGEWA 3RD DEFENDANT
KIOO NDUNDA & 4 OTHERS & 4 OTHERS & 4 OTHERS 4TH DEFENDANT**

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 22nd May, 2024 raised by the Defendants on the following grounds:-



1. That the subject property and/or cause in the suit herein is res judicata to Makueni ELC Case No. 30 of 2018 Geoffrey Mwangangi Muteti & 9 Others vs Geoffrey Kithome Ngewa & 3 Others.
 2. That the suit herein does not raise any reasonable cause of action thus ought to be dismissed with costs.
2. The parties were directed to canvass the preliminary objection by way of written submissions.

The Plaintiffs' Submissions

3. The Plaintiffs filed their submissions dated 24th June, 2024.
4. On their behalf, Counsel submitted that ELC No. 30 of 2018 was consolidated with ELC No. 88 of 2017. That ELC No. 88 of 2017 became the lead file and judgment was delivered on 19th January 2021. Counsel relied on paragraphs 43 and 44 of the said judgment to submit that ELC No. 30 of 2017 was not heard and determined on merit. Counsel argued that it was incorrect and a misconception for the Defendants to allege that the suit herein is res judicata to ELC No. 30 of 2018. It was argued that no evidence was led in respect to ELC No. 30 of 2018. In defining res judicata, Counsel relied on the definition set out in Black's Law Dictionary 9th Edition. Counsel cited Section 7 of the *Civil Procedure Act* to submit on the doctrine of res judicata.
5. Concluding his submissions, Counsel submitted that the instant suit is not res judicata to ELC No. 30 of 2018 and urged the court to dismiss the preliminary objection with costs.

The Defendants' Submissions.

6. The Defendants filed their submissions dated 16th August, 2024.
7. On their behalf, Counsel cited Section 7 of the *Civil Procedure Act* which provides for the doctrine of res judicata.
8. Counsel submitted that the prayers sought in the Plaint dated 23rd February 2023 are similar as those in Makueni ELC No. 88 of 2017 which was heard and determined vide the judgment delivered on 19th January 2021. Counsel contended that the Plaintiffs ought to have appealed against the judgment instead of filing the present suit.
9. Concluding his submissions, Counsel urged the court to strike out the suit with costs.

Analysis and Determination

10. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
11. In *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd* (1969) EA 696, Law JA stated;

“So far as I'm aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



12. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

13. In *Oraro Vs Mbaja* (2005) eKLR Ojwang J (as he then was), described it as follows;

“I think 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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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 Court of Appeal in *Nitin Properties Ltd Vs Singh Kalsi & Another* (1995) eKLR also captured the legal principle when it stated as follows;

“A preliminary objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

15. Having considered the preliminary objection and the rival submissions, the only issue that arises for determination is whether the instant suit is *res judicata*.

16. The issue of *res judicata* can dispose of the matter preliminarily without having to ascertain the facts. The preliminary objection raised by the Defendants fits the description of a preliminary objection stated in the *Mukisa Biscuits* case (*supra*).

17. The doctrine of *res judicata* is anchored in Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides that:-

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.

18. The Black’s Law Dictionary, 10th Edition defines *res judicata* as follows:

“a thing adjudicated”

1. An issue that has been definitively settled by judicial decision.
2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or



series of transactions and that could have been but was not raised in the first suit.”

19. The elements which must be present to succeed on a defence of res judicata were enunciated in Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR where the Court of Appeal held that: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

20. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the five elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suit; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

21. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. The essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause.

22. The Defendants contended that the instant suit is res judicata to ELC No. 88 of 2017 as the same was heard and determined vide the judgment delivered on 18th January 2021. They further contended that the suit herein is res judicata on account of ELC No. 30 of 2018.

23. Counsel submitted that the parties in the present suit are the same as those in ELC No 88 of 2017 and are litigating under the same title. The Plaintiffs on the other hand relied on paragraphs 43 and 44 of the judgment to submit that ELC No. 30 of 2018 was not heard and determined on merit.

24. The Plaintiffs instituted this suit against the Defendants vide a Plaint dated 21st February seeking the following orders:-

- a. A Mandatory injunction compelling the Defendants to stop trespassing into and to remove the illegal structures they have put up on the Plaintiffs parcels of land known as Makueni/Ikayoni/1911, Makueni/Ikayoni/2215, Makueni/Ikayoni/2216, Makueni/Ikayoni/2217, Makueni/Ikayoni/1912, Makueni/Ikayoni/2210, Makueni/Ikayoni/2211, Makueni/Ikayoni/2212, Makueni/Ikayoni/2213, Makueni/Ikayoni/2214, Makueni/Ikayoni/1908, Makueni/Ikayoni/1909, Makueni/Ikayoni/1910, Makueni/Ikayoni/2224, Makueni/iKayoni/2222, Makueni/Ikayoni/2218, Makueni/Ikayoni/2219, Makueni/Ikayoni2220 and Makueni/Ikayoni/2221.



- b. In the alternative an order for demolition of the said structures and eviction therefrom.
 - c. Mesne profits till the date the Defendants shall remove the illegal structures and vacate from the properties or till they shall be evicted.
 - d. Costs of the suit and interest.
25. The judgement delivered on 19th January 2021 shows that by a consent dated 29th October 2018, ELC Case No. 88 of 2018 and ELC No. 30 of 2018 were consolidated and heard together since the parties and the subject matter in both suits were the same. ELC No. 88 of 2018 was treated as the lead file.
26. In ELC No. 88 of 2017 the Plaintiff (the Defendant herein) sought for the following orders:-
- a. An order declaring the registration of the suit properties herein in favour of the Defendants illegal, null and void and further directing that the register be rectified to remove the Defendants as proprietors thereof and instead vest ownership to the Plaintiff herein.
 - b. An order upholding the boundaries as per the judgment of 26/05/1960.
 - c. An order of permanent injunction restraining the Defendants whether by themselves, their servants or agents or otherwise from trespassing, occupying the suit property herein.
 - d. Costs of the suit plus interest thereon.
 - e. Any other or further relief as this Honourable court may deem fit and just to grant.
27. In ELC No. 30 of 2018 the Plaintiffs (the Defendants in ELC No. 88 of 2017) sought similar orders as in the present suit. It is not in dispute that the parties in this suit are similar as those in ELC No. 88 of 2017 and ELC No. 30 of 2018.
28. Counsel relied on paragraph 43 and 44 of the judgment to submit that ELC No. 30 OF 2018 was not heard and determined on merit. Paragraphs 43 and 44 of the judgment states as follows:-
- “As regards the prayers sought in ELC No 30 of 2018, from the statement of Geoffrey Mwangangi Mutetit(1st Plaintiff in the suit and 1st Defendant in ELC No. 88 of 2018), even though the statement which forms part of his evidence in support of his claim shows at paragraph thereof that the Plaintiffs and who are the Defendants in the said suit have trespassed and created illegal structures in parcels of land of the 1st to 10th Defendants, both the Plaintiffs and the 1st to 10th Defendants appear to have abandoned this evidence when they testified before me. The two parties concentrated their efforts in trying to convince the court that the judgments in Kilungu DMCC No. L14 of 1970, Machakos RMCC L137 and Nairobi HCCA No. 107 of 1977 were determined in their favour and hence the court should find for their respective positions.
44. As such, it is my finding that the 1st to 10th Defendants have not discharged the burden of proof on a balance of probabilities in their counter claim and their claim must also fail. Having noted that both parties constructively abandoned the said suit, I direct that each party bears their own costs. In the circumstances the 1st to 10th Defendants case is dismissed.”
29. The Judge was alive to the evidence and facts presented before him when he came to the conclusion that the parties had abandoned their suit. This by itself is a finding of the court.



30. I agree with the Defendants that the suit herein is res judicata as the issue herein is directly and substantially in issue in ELC No. 30 of 2018 and ELC No 88 of 2018. The parties are the same and were litigating under the same title. The issues raised in the present suit were determined vide the judgment delivered on 18th January 2021.
31. From the foregoing, the preliminary objection is merited and I uphold the same. The upshot of the foregoing is that the Plaintiffs suit is hereby struck out with costs.

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HON. T. MURIGI

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY
FEBRUARY, 2025.**

In the presence of:

Ms. Kyalo for the Defendants.

Ahmed – Court Assistant

