



REPUBLIC OF KENYA



KENYA LAW
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**Kassim v Kiende & 2 others (Environment & Land Case
E004 of 2022) [2025] KEELC 803 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 803 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE E004 OF 2022**

**JO MBOYA, J
FEBRUARY 25, 2025**

BETWEEN

ADAN KULLOW KASSIM PLAINTIFF

AND

JENNIFER KIENDE 1ST DEFENDANT

MINISTRY OF LAND & PHYSICAL PLANNING 2ND DEFENDANT

ISIOLO LAND REGISTRAR 3RD DEFENDANT

RULING

1. The Plaintiff herein has filed the Plaint dated 4th July 2022; and wherein the Plaintiff has sought for the following reliefs [verbatim]:
 - a. A declaration that the Plaintiff is the legal owner of all that property known as plot no. 105 Kiwanjani, Isiolo.
 - b. An order of Permanent injunction restraining the 1st defendant whether by himself, his agents, employees or otherwise howsoever, from interfering with the plaintiff's quiet possession of all that property known as plot no. 105 Kiwanjani, Isiolo.
 - c. An order of Eviction be issued against the 1st defendant.
 - d. General damages for trespass.
 - e. Such further orders as the court shall deem just, met and expedient.
 - f. Costs of the suit.
2. Upon being served with the summons to Enter appearance and Plaint, the 1st Defendant herein duly entered an appearance and thereafter filed a statement of defence. In addition, the 1st Defendant



proceeded to and filed a Notice of Preliminary Objection dated 29th February 2024 and wherein the 1st Defendant has raised the following grounds;

- i. That the instant suit offends the provision of Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya.
 - ii. That the suit herein is Res judicata as the matters before this court have already been determined in the Chief Magistrate Court at Isiolo ELC No. 100 of 2018.
 - iii. That the entire suit is brought in bad faith, is frivolous, vexatious and an abuse of the court process considering that the Plaintiff is trying to re-open a concluded litigation through the back door hence making the suit a good candidate for striking out with costs to the Defendants.
3. The preliminary objection came up for directions on 13th Mary 2024, whereupon the court [differently constituted] directed that the preliminary objection be canvassed and disposed of vide written submissions. In this regard, the 1st Defendant proceeded to and filed written submissions dated 20th June 2024. On the other hand, the Plaintiff herein has also filed written submissions dated 13th February 2025.
 4. The 1st Defendant has raised and canvassed two [2] pertinent issues for consideration by the court. The issues raised and canvassed by the 1st Defendant are namely; whether the suit by the Plaintiff is barred by the provisions of section 7 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya; and essentially the doctrine of res judicata; and whether the court is seized of jurisdiction on the basis of Section[s] 18 and 19 of the [Land Registration Act](#), 2012.
 5. Regarding the 1st issue, namely, whether the suit is barred by the doctrine of res judicata, learned counsel for the 1st Defendant has submitted that the Plaintiff herein had previously filed/mounted civil proceedings vide Isiolo CMC ELC No. 100 of 2018 which touched on and concerned the same suit property. In addition, it was contended that the said suit was also involving the same parties as the ones herein.
 6. Premised on the foregoing contention, learned counsel for the 1st Defendant has therefore submitted that the Plaintiff cannot now return to this court and file the current suit, wherein the issues which are directly and substantially in dispute, are the same as the ones which coloured the previous suit. To this end, learned counsel for the 1st Defendant has therefore invoked and relied upon the provisions of Section 7 of the [Civil Procedure Act](#), Cap 21 laws of Kenya.
 7. Additionally, learned counsel for the 1st Defendant has also cited and referenced various decisions including Abok James Odera vs John Patrick Machira Civil Application NO. 49 of 2001 [unreported] and Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others (2017) eKLR, respectively.
 8. The second issue that has been raised and canvassed by learned counsel for the 1st Defendant concerns the import and tenor of section 18 (2) of the [Land Registration Act](#), 2012. In this respect, it has been contended that the dispute that has been raised and canvassed by the Plaintiff touches on and concerns the boundary between plots No. 105 Kiwanjani, Isiolo [the suit plot]; and plot no. 106 Kiwanjani, Isiolo. To this end, it has been posited that the dispute beforehand touches on and concerns the boundaries between the two properties.
 9. Owing to the fact that the dispute touches on and concerns the boundaries between the named plots, learned counsel for the 1st Defendant has contended that the subject matter ought to have been referred to the Land Registrar in accordance with the provisions of sections 18 (2) and 19 of the [Land Registration Act](#), 2012.



10. In the premises, learned counsel for the 1st Defendant has invited the court to find and hold that having not referred the boundary dispute to the Land Registrar, the Plaintiff herein is non-suited. Furthermore, it has been posited that the court is devoid and divested of the requisite jurisdiction to entertain and adjudicate upon the subject matter.
11. The Plaintiff herein also filed written submissions and wherein same [Plaintiff] has also highlighted and canvassed two [2] issues namely; that the previous suit [Isiolo CMCC ELC 100 of 2018] was neither heard nor determined on merits; and that the suit properties have not been formally registered under the *land registration act* 2012.
12. As pertains to the first issue, learned counsel for the Plaintiff has submitted that even though the Plaintiff had previously filed/lodged Isiolo CMC ELC 100 of 2018, namely, the previous suit; the same suit was the subject of a preliminary objection raised by the 1st Defendant herein and wherein the 1st Defendant had contended that the court was not seized of the requisite jurisdiction, to entertain and adjudicate upon the said suit.
13. In addition, it has been contended that the previous suit, namely, Isiolo CMC 100 of 2018; was struck out or better still, the pleadings were ordered to be returned to the Plaintiff vide ruling rendered on 12th March 2019.
14. In the premises, learned counsel for the Plaintiff has submitted that in so far as the said suit [Isiolo CMCC ELC 100 of 2018], was never heard and determined on merits, the doctrine of res judicata does not arise or at all. In this regard, it has been submitted that the doctrine of res judicata is inapplicable in the circumstances.
15. Next is the issue as pertains to the applicability of the provisions of sections 18 and 19 of the *Land Registration Act* 2012. In this respect, learned counsel for the Plaintiff has submitted that the suit property has not been formally registered under the *Land Registration Act*, 2012. In this regard, it has therefore been posited that the provisions of the *Land Registration Act* 2012; are thus not applicable in respect of the subject matter.
16. To this end, the court has been invited to find and hold that the dispute beforehand legally falls within the jurisdiction/ purview of the court and thus same [suit] ought to be determined by this court.
17. Having reviewed the rival submissions and upon taking into account the pleadings on record, the determination of the preliminary objection turns on two [2] issues, namely; whether the suit is barred by the doctrine of res judicata and whether the provisions of sections 18 and 19 of the *Land Registration Act* 2012, are applicable. By extension, there is the issue of whether this court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject suit.
18. Regarding the doctrine of res judicata, it is my finding and holding that the said doctrine only applies and becomes relevant where it is shown/demonstrated that the previous suit was heard and determined by a court of competent jurisdiction. Instructively, for the doctrine to be applicable, the applicant/proponent of the contention must demonstrate that the previous suit was equally heard and determined on merits.
19. Additionally, it is also imperative to underscore that the applicant and in this case, the 1st Defendant must also demonstrate that the previous suit touched on and concerned the same subject matter as well as the same parties; or their representatives. Pertinently, the ingredients underpinning the provisions of section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya; must be satisfied conjunctively and not otherwise.



20. The law as pertains to the import and tenor of res judicata has been elaborated upon and expounded in a number of decisions. Suffice it to cite and reference just but a few. In the case of Kenya Commercial Bank Ltd vs Muiri Coffee Estate Ltd (2016) eKLR the Supreme Court of Kenya had an occasion to speak to the ingredients underpinning the doctrine of res judicata.

21. For coherence, the court stated thus

(52) 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.

Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.

(53) In *Silas Make Otuke v. Attorney-General & 3 Others*, [2014] e KLR, the High Court of Kenya agreed with the Privy Council decision in *Thomas v. The AG of Trinidad and Tobago* (1991) LRC (Const.) 1001, in which the Board was "satisfied that the existence of a constitutional remedy as that upon which the appellant relies does not affect the application of the principle of res judicata".

(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.

(55) It emerges that contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of Article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality and lies on the plane of a substantive legal concept.

(56) The learned authors of Mulla, Code of Civil Procedure, 18th Ed. 2012 have observed that the principle of res judicata, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p.293):

"The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or



lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

22. The Supreme Court [the apex court] also reverted to the doctrine of res judicata in the case of John Florence Maritime Services Ltd vs The Cabinet Secretary Transport, Infrastructure, Roads & Public Works [2021] eKLR where the court stated thus;

That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in ET v Attorney-General & another, (2012) eKLR, thus: The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’

In that case, the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final; b) The Judgment or order was on merit; c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and) There must be between the first and the second action identical parties, subject matter and cause of action. (See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR).

24. Duly guided by the elaborate and comprehensive exposition of the law in terms of the decisions [supra], I am now disposed to determine whether or not the suit beforehand is res judicata. Notably, the previous suit which underpins the contention that the matter beforehand is res judicata, was never heard and or determined on merits. Simply put, the previous court found and held that same [court] was devoid of the requisite jurisdiction to entertain and adjudicate upon the said suit.
25. Having found and held that same was not seized of the requisite jurisdiction, the Court [previous Court] ordered and directed that the pleadings at the foot of the previous suit be [sic] returned to the Plaintiff. For coherence, the court did not render any determination on merit[s] or at all.
26. There being no effective determination of the previous suit, in terms of the ruling of the said court rendered on the 12th March 2019, I am afraid that the plea of res judicata, is inapplicable. In this regard, the preliminary objection espousing the plea of res judicata is therefore premature, misconceived and legally untenable.
27. Regarding the second issue, namely; whether the jurisdiction of this court is ousted by the provisions of section 18 [2] of the Land Registration Act 2012, it is imperative to state and underscore that the provisions of the Land Registration Act only apply to such parcels of land and or plots, which have



- formally been registered thereunder. However, there is the contention that the suit plots have neither been formally registered nor issued with the requisite certificate of title/ lease, where applicable.
28. For good measure, the court was addressed by learned counsel for the 2nd and 3rd Defendants, who brought to the attention of the court that the suit properties have not been brought under the regime of the Land Registration Act. In this regard, I am afraid that the provisions of the Land Registration Act and more particularly, the provisions of section 18 (2) of the Land Act, 2012, do not apply to the instant matter/ dispute.
29. Notwithstanding the foregoing, it is also apposite to state and underscore that this court is granted jurisdiction to entertain and adjudicate upon matters touching on boundaries. Consequently, the mere fact that the dispute being espoused by a party includes a claim touching on boundaries, does not automatically divest/oust the jurisdiction of the Environment and Land Court.
30. Without belabouring the point, I beg to reference the provisions of Section 13 (2) of the Environment and Land Court Act 2011, which underpins the jurisdiction of the Environment and Land Court; and in particular, highlights the areas of jurisdiction.
31. The said provisions are reproduced as hereunder;
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;[underlining supplied]
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
33. Furthermore, it is also important to point out that even where the court is confronted with a boundary dispute, the court is called upon to discern whether the boundary dispute is the sole or singular issue raised at the foot of the pleadings. For coherence, if there are other claims which have been raised and which claims cannot effectively be determined by the Land Registrar [where apposite] then the court is obligated to entertain and adjudicate upon the dispute.
34. Inevitably, the Supreme Court of Kenya had occasion to speak to the scope, extent and applicability of the doctrine of exhaustion. In the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment) where the court stated and held thus;
100. In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant's claim and not the true meaning of the provisions of either EMCA or the Energy Act. This is because the provisions of EMCA or the Energy Act do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction



is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*. In so saying, we are persuaded by the finding of the Court of Appeal in *Kenya Revenue Authority & 2 others vs Darasa Investments Ltd* [2018] eKLR which held as follows: “What then, is the consequence, if any, of the respondent’s failure to invoke the alternative remedies? As appreciated by the parties, the availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial review proceedings where such alternative remedies are not exhausted. This position is fortified by the decisions of this court in *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 Others* [2017] eKLR and *Kenya Revenue Authority & 5 others v Keroche Industries Limited* *CA No 2 of 2008*. Perhaps that is why the legislature at section 9(4) of the *Fair Administrative Action Act* stipulates that: “Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. Our reading of the above provision reveals that contrary to the appellant’s contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy.”

101. Reference to the High Court above must be read mutatis mutandis with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party. [Emphasis supplied].
35. Consequently and arising from the foregoing, my answer to issue number two is to the effect that the provisions of Section 18 (2) of the *Land Registration Act*, 2012; do not apply to the dispute beforehand. For good measure, the suit plot having not been formally been registered under the *Land Registration Act*, 2012; the provisions of the said act do not thus apply.
36. Moreover, I also hold the opinion that the consequential reliefs that have also been sought in respect of the instant matter including the issuance of an order of permanent injunction and general damages for trespass, [where appropriate] fall outside the purview of the jurisdiction of a Land Registrar.
37. Either way, it is my finding and holding that the provisions of Section 18 (2) of the *Land Registration Act* would not suffice and hence the second limb of the Preliminary objection equally fails.

Final Disposition

38. Having addressed and analyzed the two [2] pertinent issues that were raised and canvassed by the parties herein, I come to the conclusion that the preliminary objection dated 29th February 2024; which is underpinned by the doctrine of res-judicata and lack of jurisdiction, is clearly misconceived and untenable.
39. In the premises, the preliminary objection be and is hereby dismissed with costs to the Plaintiff; and the 2nd and 3rd Defendants, respectively.



40. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 25TH DAY OF FEBRUARY 2025.

OGUTTU MBOYA

JUDGE.

In the presence of

Mutuma Court Assistant

Miss Maisibo holding brief for Mr. Duwane for the Plaintiff

Mr. Caleb Mwiti for the 1st Defendant

Mr. Benjamin Kimathi Principal litigation counsel for the 2nd & 3rd Defendants

