



**Gatithi v Kinyati (Environment & Land Case E029 of 2023)  
[2024] KEELC 4657 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4657 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E029 OF 2023**

**EK MAKORI, J**

**JUNE 12, 2024**

**BETWEEN**

**JACKSON WAWERU GATITHI ..... PLAINTIFF**

**AND**

**JOHN KAMAU KINYATI ..... DEFENDANT**

**RULING**

1. A Preliminary Objection has been raised in this matter; that the current suit is res judicata the decision in Malindi CMCC No. 299 of 2008 - *Jackson Waweru Gatithi v John Kamau Kinyati* - involving the same parties and subject matter (the decision of Hon. Liza Gicheha SPM delivered on 10<sup>th</sup> September 2014.
2. The critical question here, which I frame, is whether the Preliminary Objection has met the threshold to warrant the disposal of the matter under the doctrine of res judicata. Additionally, I must determine who should bear the costs.
3. In *Mukisa Biscuits v West End Distributors Ltd* [1969] EA 696 at page 700, as held by Law JA:

“...so far as I’m aware, 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. 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.”



4. The thrust of a Preliminary Objection rests directly on the jurisdiction of this Court, as held by Nyarangi JA., in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989]* eKLR:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

5. A Preliminary Objection responds to the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent time management as a Court resource by summarily flagging frail and hopeless suits that, if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable or not but look at the pleadings and discover that the suit is a none starter - see Ogola J. in *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:

“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. 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... a preliminary objection is like what used to be a demurrer. It 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”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

6. The defendant's main issue is that this matter contradicts the doctrine of res judicata. The issues here have been decided in *Jackson Waweru Gatithi v John Kamau Kinyati*—Malindi CMCC No. 299 of 2008, which involved the same parties and subject matter (the decision of Hon. Liza Gicheha SPM delivered on 10 September 2014).



7. In *Kefa Were v Benedict Chepkering* [2018] eKLR, the test for *res judicata* to hold was restated as follows:

“The test in determining whether a matter is *res judicata* was stated and summarised in *Bernard Mugo Ndegwa v James Nderitu Gitbae & 2 Others* [2010] eKLR as follows:

- (1) that the matter in issue is identical in both suits;
- (2) the parties in the suit are the same;
- (3) sameness of the title/claim;
- (4) concurrence of jurisdiction; and
- (5) finality of the previous decision.”

8. Yano J., in the same case, proceeded, after quoting leading decisions, to state that the rationale for the doctrine of *res judicata* as being:

“The doctrine of *res judicata* is important in adjudication of cases and serves two important purposes:

- (1) it prevents multiplicity of suits which would ordinarily clog the courts and cause parties to incur unnecessary costs to litigate and defend two suits which ought to have been determined in a single suit; and
- (2) it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.”

9. Is the Plaintiff clothed in the same garment as Malindi CMCC No. 299 of 2008? I have carefully perused the proceedings, judgment, and decree in Malindi CMCC No. 299 of 2008. The prayers sought in that suit were the award of General Damages for wrongful arrest and malicious prosecution, Special Damages of Kshs 87,500/-, Aggregate Damages, costs, and any other relief(s). This arose from the prosecution of the Plaintiff in Lamu Resident Magistrate Criminal Case No. 138 of 2007- trespass on private land. It was dismissed for lack of proof of the necessary ingredients for false imprisonment and malicious prosecution. This is what Hon. Gicheha said:

“In this case, I am satisfied that there is reasonable probable cause to charge the accused person. There is also no evidence that the defendant was malicious in any way. The Plaintiff threatened him after cutting his trees and he decided to make a report to the police. I therefore find that the Plaintiff’s case against the defendant has not been proven in a balance of probabilities, and this suit is hereby dismissed with costs.”

10. A decree was drawn based on the said findings by the Hon. Magistrate. In the current matter, Plaintiff seeks permanent injunction against Defendants for claiming and interfering with Defendant’s land parcel No. Lamu/Lake Kenyatta 1/27 situated in Mpeketoni, measuring 4.3 hectares, and that the Defendant be restrained from cutting down trees, wasting, damaging, constructing temporary or permanent structures, removing beacons, fences, interfering with the original boundary or any other development on the suit property. An order of specific performance compelling and directing the defendant to stop removing the existing boundary between the parties and cutting trees along the disputed area. An order to allow the Plaintiff to use his land peacefully. An order directing the defendant to cooperate in solving the dispute. Costs and interest and any other relief(s).



11. The issues raised in the complaint are obviously incongruent and different from those in CMCC No. 299/2008. The former suit involved false imprisonment, malicious prosecution, and other relief(s) corollary thereto. The only similarity I can see is that parties were still wrangling over the same land, leading to a criminal feud that ended in the criminal prosecution of the Plaintiff herein. In the current suit, we are significantly dealing with a boundary dispute - *res judicata* will not apply.
12. The Preliminary Objection is dismissed with no order as to costs since the Plaintiff did not participate in the motion before me.

**DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 12<sup>TH</sup> DAY OF JUNE 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Komora, for the Defendant

Happy: Court Assistant

In the Absence of:

The Plaintiff

