



REPUBLIC OF KENYA



**Sugut v Maiyo (Land Case (Originating Summons) E015 of 2024)  
[2025] KEELC 678 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 678 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
LAND CASE (ORIGINATING SUMMONS) E015 OF 2024  
GMA ONGONDO, J  
FEBRUARY 19, 2025**

**BETWEEN**

**ELKANA KIPYEGO SUGUT ..... APPLICANT**

**AND**

**DANIEL KIMUTAI MAIYO ..... RESPONDENT**

**RULING**

1. The instant ruling is in respect of a Notice of Preliminary Objection dated 6<sup>th</sup> January 2025 and lodged in court on 7<sup>th</sup> January 2025 by the respondent through M/s Kogo Kimutai and Company Advocates and it is based on two grounds thus:
  - a. That this Honourable court lacks jurisdiction over the suit herein by virtue of the express provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
  - b. That the Suit herein is res judicata as it is anchored on the same issues and is between the same parties that were conclusively determined by the Magistrate's Court in Kapsabet CM ELC Suit No. E125 OF 2021 where judgment was rendered on 26<sup>th</sup> November 2024. The matters directly and substantially in issue in the present suit have been heard and determined by a competent court, thereby barring this court from entertaining the suit.
2. The Preliminary Objection was heard by way of written submissions.
3. By the submissions dated 28<sup>th</sup> January 2025, the applicant's counsel, Ketter N K. Advocates, gave a brief summary of the facts and identified two issues for determination thus: whether the suit before this court is res judicata and who should bear the costs? Learned Counsel submitted that the matter before this Court is not res judicata for the reason that the Court that previously heard and determined the same lacked jurisdiction as held in the case of Pauline Chemuge Sugawara v Nairuko Ene Mutarakwa Kiruti (Sued in her Capacity as the Administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others [2024]



KECA 1417 (KLR). Thus, counsel urged the court to disallow the respondent's Preliminary Objection with costs to the Applicant.

4. The respondent's counsel, M/s Kogo, Kimutai and Company Advocates, filed submissions dated 27<sup>th</sup> January 2025 and submitted that the suit before this court is res judicata since there is a valid judgment in Kapsabet CMCC No. 125 of 2021 which was rendered on 26<sup>th</sup> November 2024 by a court of competent jurisdiction. That no appeal was preferred against the said judgment. Reliance was placed on various authoritative pronouncements including the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR, to buttress the submissions.
5. It must be noted that by an originating summons dated 11<sup>th</sup> December 2024 and filed herein on 13<sup>th</sup> December 2024, the plaintiff/applicant, Elkanah Kipyego Sugut, through his counsel, sought the orders infra;
  - a. That the applicant be registered as the owner of all that parcel of land known as Nandi-Hills/Kosoiywo/Block 1/711 measuring approximately 0.38 Hectares (the suit land herein) in which he has been in occupation, having acquired ownership and/or title thereto through adverse possession.
  - b. That the title of the defendant/respondent with respect to the suit land be declared as having been extinguished by operation of the law of adverse possession.
  - c. That costs of the originating summons be provided for.
6. Together with the originating summons, the applicant lodged an application by way of a notice of motion of even date seeking the following orders:
  - a. Spent
  - b. Spent
  - c. A temporary injunction be issued restraining the defendant/ respondent, his agents and/or servants from selling, transferring, surveying, entering upon, cutting trees, ploughing, fencing, building and/or erecting permanent and/or temporary structures therein or in any other way interfering with the plaintiff's possession, use and occupation of the suit land in any manner that will change, alter, qualify or extinguish the interest of the plaintiff/applicant pending the hearing and determination of this suit.
  - d. Costs be provided for.
7. By a Replying Affidavit sworn on 6<sup>th</sup> January 2025, the respondent opposed the suit. He deponed, inter alia, that the applicant vide Kapsabet Chief Magistrate's Court Environment and Land Case Number E125 of 2021, instituted a suit against him seeking similar prayers as those in the instant suit. That the suit proceeded to full hearing and on 26<sup>th</sup> November 2024, the court rendered its judgment dismissing the applicant's claim. That no appeal was lodged against that decision. That therefore, the instant suit is res judicata and the court lacks jurisdiction to hear and determine the same.
8. It must be noted that a Preliminary Objection ought to be on a point of law; see Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors (1969) EA 696 where the Court of Appeal pronounced itself on what constitutes a preliminary objection 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 a contract giving rise to the suit to refer the dispute to arbitration...” (Emphasis added).

9. The Preliminary Objection is on jurisdiction. The same takes priority over all other matters herein and calls for prompt pronouncement; see *Kakuta Maimai Hamisi –vs- Peris Pesi Tobiko & 2 others* (2013) eKLR.
10. I have considered the preliminary objection and the reply thereto. Therefore, the issues that arise for determination are:
  - a. Whether the instant suit is res judicata?
  - b. Is the Preliminary Objection merited?
  - c. Who bears the costs of the Preliminary Objection?
11. On the first issue, Section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya 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”
12. In Black’s Law Dictionary 10<sup>th</sup> Edition at page 1506, the term ‘Res Judicata’ means an issue that has been definitively settled by judicial decision.
13. Additionally, the essential elements of ‘Res Judicata’ are stated thus:
  - a. A decision on the issue
  - b. A final judgment on merits
  - c. The involvement of the same parties or parties in privity with the original parties.
14. It is common ground that Environment and Land Case Number E125 of 2021 at Kapsabet Chief Magistrate’s Court was heard and determined on its merits. That the issues in dispute herein were directly and substantially in issue in that suit and the parties are the same as in that suit.
15. Nonetheless, the applicant avers that the matter before this Court is not res judicata for the reason that the Court that previously heard and determined the same lacked jurisdiction.
16. Article 162 (2) (b) of the *Constitution* of Kenya, 2010 anchors the jurisdiction of this court. The same is operationalized by Section 13 (1) of the *Environment and Land Court Act*, 2015 (2011) and other relevant statutes.
17. The jurisdiction of the Magistrates’ Courts to hear and determine disputes relating to environment and the use and occupation of, and title to, land is provided for under Section 9(a) of the *Magistrates’ Courts Act*, 2015 that:

“A magistrate’s court shall in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (No. 19 of 2011) and subject to the pecuniary limits under Section 7(1) hear and determine claims relating to:



- i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - ii. compulsory acquisition of land;
  - iii. land administration and management;
  - iv. public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
  - v. environment and land generally.
18. Notably, Section 38 (1) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya stipulates that it is the High Court, and in this case the Environment and Land Court and not the Magistrates' courts that has jurisdiction to hear and determine a claim for adverse possession; see also Section 37 of the same Act.
19. This court subscribes to the decision in the case of Samuel Kamau Macharia & another –vs- Kenya Commercial Bank Ltd & 2 others [2012] eKLR, wherein the Supreme Court of Kenya rendered itself in part that;
- “A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
20. It is on that basis that the Court of Appeal in the case of Sugawara vs Kiruti (supra) held that:
- “...in view of the express provisions of Section 38 of the *Limitation of Actions Act*, .... we find that Magistrates’ Courts do not have jurisdiction to determine the claims of adverse possession...”
21. I bear in mind that the judgement in Environment and Land Case Number E125 of 2021 at Kapsabet Chief Magistrate’s Court was delivered on 26<sup>th</sup> November 2024. Notably, the applicant did not lodge an appeal in respect to that judgment but filed a fresh suit herein by way of an Originating Summons dated 11<sup>th</sup> December 2024 and duly lodged on 13<sup>th</sup> December 2024.
22. In view of the foregoing, it is my considered view that the instant suit is res judicata. This is because the parties are the same, the suit land is the same and the issues for determination herein were also directly and substantially in issue in Environment and Land Case Number E125 of 2021 at Kapsabet Chief Magistrate’s Court, which was heard and determined on its merits. If the appellant was aggrieved by the decision thereby, he ought to have lodged an appeal against that decision instead of filing a fresh suit.
23. The cardinal principle is that litigation must come to an end; see Halsbury’s Laws of England, 4<sup>th</sup> Edition Volume 22 at page 273.
24. Afortiori, it is the finding of this court that the Preliminary Objection dated 6<sup>th</sup> January 2025 and lodged in court on 7<sup>th</sup> January 2025 is merited. The same is hereby allowed with costs to the respondent.
25. Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAPSABET THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2025.**



**G.M.A. ONG'ONDO**

**JUDGE**

Present

1. Ms. Kogo, Learned Counsel for the respondent
2. Mr. Keter N. K, Learned Counsel for the applicant
3. Walter, Court Assistant

