



REPUBLIC OF KENYA



**Kiathe & 38 others v Unity 45 Housing Cooperative Society Limited (Enviromental and Land Originating Summons E020 of 2024) [2024] KEELC 6702 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6702 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E020 OF 2024  
MD MWANGI, J  
SEPTEMBER 24, 2024**

**BETWEEN**

- PETERSON KITHENGE KIATHE ..... 1<sup>ST</sup> PLAINTIFF**  
**STANELY KIHARA WANGUI ..... 2<sup>ND</sup> PLAINTIFF**  
**SAMWEL BOTO ..... 3<sup>RD</sup> PLAINTIFF**  
**GABRIEL NJENGA MUNIU ..... 4<sup>TH</sup> PLAINTIFF**  
**JULIUS MUNGATHA MBIKO ..... 5<sup>TH</sup> PLAINTIFF**  
**PHILIP MASILA WAMBUA ..... 6<sup>TH</sup> PLAINTIFF**  
**TABITHA WAMBUI MWANGI ..... 7<sup>TH</sup> PLAINTIFF**  
**MWENDA JEREMIAH BAITHAI ..... 8<sup>TH</sup> PLAINTIFF**  
**JOHN NDATHI RUKENYA ..... 9<sup>TH</sup> PLAINTIFF**  
**GEORGE MURITHI ..... 10<sup>TH</sup> PLAINTIFF**  
**JOSEPH KABERIA ISAAC ..... 11<sup>TH</sup> PLAINTIFF**  
**JOEL MWEMA MUTUKU ..... 12<sup>TH</sup> PLAINTIFF**  
**PETER KIMANI WANJIKU ..... 13<sup>TH</sup> PLAINTIFF**  
**JOEL KATAKA KENYAKISA ..... 14<sup>TH</sup> PLAINTIFF**  
**PETERSON NJAGI MICHENI ..... 15<sup>TH</sup> PLAINTIFF**  
**PAUL GATHURA KAMAU ..... 16<sup>TH</sup> PLAINTIFF**  
**JONATHAN MUTISYA MUTULU ..... 17<sup>TH</sup> PLAINTIFF**  
**AYUB GITONGA M'MUTHUIBA ..... 18<sup>TH</sup> PLAINTIFF**  
**SAMWEL OKOTH WIRE ..... 19<sup>TH</sup> PLAINTIFF**



CONSOLATA MUTWA KITAVI .....	20 <sup>TH</sup> PLAINTIFF
VICTOR CHARLES BOY MIGIREH .....	21 <sup>ST</sup> PLAINTIFF
ALLAN NJERU RIUNGU .....	22 <sup>ND</sup> PLAINTIFF
STEPHEN WAWERU MBURU .....	23 <sup>RD</sup> PLAINTIFF
JOHN HARUN NDIRITU MACHARIA .....	24 <sup>TH</sup> PLAINTIFF
JULIUS KIOKO MUNGUTI .....	25 <sup>TH</sup> PLAINTIFF
JOHN WAINAINA KINUTHIA .....	26 <sup>TH</sup> PLAINTIFF
JACTONE OMONDI MUGA .....	27 <sup>TH</sup> PLAINTIFF
CRISPIN NORMAN OTIENO .....	28 <sup>TH</sup> PLAINTIFF
MUTISYA WAMBUA .....	29 <sup>TH</sup> PLAINTIFF
JULIUS NZIVA NUNGU .....	30 <sup>TH</sup> PLAINTIFF
ANNA WANJIRA MUNYWOKI .....	31 <sup>ST</sup> PLAINTIFF
JOSEPH MUE MBATHA .....	32 <sup>ND</sup> PLAINTIFF
XAVIER MAINA NYAMU .....	33 <sup>RD</sup> PLAINTIFF
PAUL ODHIAMBO NAM .....	34 <sup>TH</sup> PLAINTIFF
CAROLINE NYAMBURA .....	35 <sup>TH</sup> PLAINTIFF
DANIEL MUSYOKA MASYA .....	36 <sup>TH</sup> PLAINTIFF
GICHANE JOE WANGONDU .....	37 <sup>TH</sup> PLAINTIFF
JULIANA WAIRIMU WANJIKU .....	38 <sup>TH</sup> PLAINTIFF
IBRAHIM OMONDI OMBOKE .....	39 <sup>TH</sup> PLAINTIFF

**AND**

**UNITY 45 HOUSING COOPERATIVE SOCIETY LIMITED ..... DEFENDANT**

## RULING

### Background

1. This ruling is in respect of a Preliminary Objection by the Defendant dated the 29th March, 2024. The Defendant's preliminary objection is on the grounds that the suit herein is Res Judicata for the reasons:
  - a. That a claim of adverse possession was dismissed by the High Court in ELC (OS) No. 353 of 2009; John Muchemi Ndungu, Peter Ngulu Kimuli Kori Kamuyu (As Chairman and Secretary respectively of Maili Saba Mwingenye Self-Help Group) -vs- Upsana Kent (sued as the administrator of the estate of Ranbir s/o Keharchard Kent and Unity 45 Housing Co-Operative Society Limited.



- b. That the High Court has issued orders of eviction of the Defendants and the interested parties from the suit property in ELC Civil Case No. 994 of 2014:Unity 45 Housing Co-op Soc. Ltd –vs- Peter Ngulu Kimuli & Others (Maili Saba Mwengye Self Help Group)
2. The Defendant further filed a Replying Affidavit deponed by Peter Mburu Kamau dated 7th May, 2024 in response to the Plaintiff’s application dated 19th March, 2024 and in further support of its Preliminary objection herein. The deponent avers that the Defendant is the registered owner of the parcel of land known as LR No. 11531/9, the suit property herein.
3. He avers that they have been in possession of the suit property since the year 2002 but have had to deal with threats of land grabbers trying to illegally acquire portions of it. The said attempts led to the filing of a suit being: ELC NO. 353 of 2009 (OS).

### **Court’ Directions**

4. The Court directed that the preliminary objection be canvassed by way of written submissions. None of the parties filed submissions as directed.

### **Issues for Determination**

5. The Preliminary objection by the Defendant raises one fundamental issue i.e. whether the issue of res judicata can properly be raised and addressed through a preliminary objection.
6. The Court of Appeal in Nitin Properties Ltd v Singh Kalsi & ano [1995] eKLR, succinctly captured the substance of a preliminary objection 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...”

7. In Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated 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”.(emphasis added).

8. Section 7 *Civil Procedure Act* is the legal basis for the doctrine of res judicata and 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 can 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.”

9. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“Explanation.

- (1)— The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.



(2)— For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation.

(3)— The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

10. In essence, therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction.

11. In making a decision on the Preliminary Objection, this court will be required to determine whether the matters raised in the instant suit have already been determined by a court of competent jurisdiction. Material evidence therefore has to be examined and interrogated.

12. In the case of Oraro -vs- Mbaja (2005) eKLR, the Court held that:

“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. Any assertion which claims to be a preliminary objection, and yet it bears 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.”

13. The salient question that begs for an answer then is whether the issue of res judicata can be competently raised by way of a preliminary objection. The court in the case of Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another (2014) eKLR, answered it in the negative and pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

14. I agree with the court’s holding in the above case. I am further persuaded by the court’s holding in George Kamau Kimani & 4 Others –vs- County Government of Trans Nzoia & Another (2014) eKLR, where the court stated: -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata.”

15. Based on my findings above, the Defendant’s Preliminary Objection is dismissed but with no orders as to costs.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**M.D. MWANGI**



**JUDGE**

In the virtual presence of:

Mr. Mbichire for the Defendant

Mr. Kalwa for the Plaintiffs

Court Assistant: Yvette

**M.D. MWANGI**

**JUDGE**

