



**Mutuku v Waema & 5 others (Sued as Administrators of the Estate of Mangu Ngolo (Deceased))  
(Environment & Land Case 12 of 2018) [2024] KEELC 7524 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7524 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 12 OF 2018  
CA OCHIENG, J  
NOVEMBER 12, 2024**

**BETWEEN**

**NAUMI WAYUA MUTUKU ..... PLAINTIFF**

**AND**

**MUTUA S WAEMA ..... 1<sup>ST</sup> DEFENDANT**

**MUTUKU MULI ..... 2<sup>ND</sup> DEFENDANT**

**RACHEL NDUKU MANGU ..... 3<sup>RD</sup> DEFENDANT**

**RHODA MUTIO MANGU ..... 4<sup>TH</sup> DEFENDANT**

**BENJAMIN MWANZIA MANGU ..... 5<sup>TH</sup> DEFENDANT**

**ALEX MBITHI MANGU ..... 6<sup>TH</sup> DEFENDANT**

**SUED AS ADMINISTRATORS OF THE ESTATE OF MANGU NGOLO  
(DECEASED)**

**RULING**

1. What is before Court for determination is the 1<sup>st</sup> Defendant’s Notice of Preliminary Objection dated the 4<sup>th</sup> September, 2023 premised on the following grounds:-
  - a. That the entire suit is time barred having been brought outside the statutory limited of (12) years prescribed under the provisions of Section 7 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya.
  - b. That entire suit herein is Res Judicata as the matters before this Court have been determined in Misc. No. 1093 of 1993 on the 24<sup>th</sup> September, 1994 by Justice Bosire and Plaintiff herein ordered to transfer the land parcel known as Donyo Sabuk/Komarock /Block No. 594 to Mangu Ngolo.



- c. That the entire suit is brought in bad faith, frivolous and an abuse of the Court process hence a good candidate for striking out with costs.
2. The Plaintiff opposed the Notice of Preliminary Objection by filing Grounds of Opposition dated the 16<sup>th</sup> October, 2024 where she stated as follows:-
  - a. That by way of the application dated 17<sup>th</sup> May, 2021 and filed in this court on the 19<sup>th</sup> May, 2021, the 1<sup>st</sup> Defendant sought to have this suit struck out on the grounds that the same is res judicata.
  - b. That in its ruling delivered on the 22<sup>nd</sup> February, 2022, the court dismissed the said application by holding that this suit, in view of the previous HCCC No. 1098 of 1993, is not res judicata.
  - c. That the said decision of this court has neither been set aside on review nor appealed against and is therefore in force and binding on all the parties in this matter.
  - d. That entertaining another application to have the suit struck out on grounds that the same is res judicata is therefore tantamount to this court sitting on appeal of its own decision.
  - e. That ground 2 of the preliminary objection is therefore, in itself, res judicata and should be struck out without even going into the merits.
  - f. That in any event, the issue as to whether this suit is res judicata is also a factual issue that will, by necessary implication, require the court to ascertain facts, weigh the evidence and exercise its discretion in one way or the other and cannot, therefore, be the subject of a preliminary objection. See *Mukhisa Biscuit Manufacturer Ltd vs West End Distributors Ltd (1968) EA 696*.
  - g. That similarly the issue as to whether this suit is statute barred under section 7 of the [Limitation of Actions Act](#) is a factual issue which will require the court to ascertain disputed fact and exercise its discretion in one way or the other. This ground cannot therefore be the subject of a preliminary objection. See *Mukhisa Biscuit Manufacturer Ltd vs West End Distributors Ltd (1968) EA 696*.
  - h. That the preliminary objection is therefore irresponsible, an abuse of the court process and therefore liable to be struck out in limine.
3. The Notice of Preliminary Objection was canvassed by way of written submissions.

### **Analysis and Determination**

4. Upon consideration of the instant Notice of Preliminary Objection, Grounds of Opposition and revalling submissions, the only issue for determination is whether this suit should be struck out with costs for being time barred and res judicata.
5. I note the 1<sup>st</sup> Defendant had previously sought for the Plaintiff dated the 19<sup>th</sup> January, 2018 and amended on 29<sup>th</sup> April, 2021 to be struck out for being res judicata and an abuse of the court process. This court after considering the arguments by both parties dismissed the said application vide its Ruling delivered on the 22<sup>nd</sup> February, 2022 where it observed that this suit is not res judicata as claimed by the Applicant. Further, it noted that the Plaintiff had made serious allegations against the Defendants' in the Amended Plaintiff and in the interest of justice, directed that this matter to proceed for full hearing on its merits.



6. The 1<sup>st</sup> Defendant did not seek review nor appeal against the said Ruling dated 22<sup>nd</sup> February, 2022 and has now filed the instant Notice of Preliminary Objection contending that this suit is statute barred and res judicata.
7. In the case of Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696; the Court held that:-

“A preliminary objection is in the nature of 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
8. Further, the Supreme Court of Kenya in the case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)* [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), held that:-

“Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”
9. Based on the facts before me, noting that I had previously made a determination on the issue of res judicata, I will decline to deal with it nor grant the order as sought. On the issue of the suit being statute barred, I find that the Applicant has not provided any proof that this suit is indeed statute barred and will hence decline to make an order to that effect. It is my considered view that the Applicant seeks to delay this matter. To my mind, this Notice of Preliminary Objection actually amounts to an abuse of court process.
10. In the circumstances, I find the Notice of Preliminary Objection dated the 4<sup>th</sup> September, 2023 unmerited and will dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of:**

Ayieko for 3<sup>rd</sup> Defendant

Munyambu for 1<sup>st</sup> Defendant

Omondi for Plaintiff

Court Assistant – Simon/Ashley

