



Mwau v Kivumbu (Administrator of the Estate of the Late Kivumbu Ndwiwa - Deceased); Makueni (Interested Party) (Environment & Land Case E005 of 2022) [2023] KEELC 530 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEELC 530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E005 OF 2022**

**TW MURIGI, J
JANUARY 25, 2023**

BETWEEN

FRANCIS KIMILU MWAU PLAINTIFF

AND

HALLAN MUTUA KIVUMBU (ADMINISTRATOR OF THE ESTATE OF THE LATE KIVUMBU NDWIWA - DECEASED) DEFENDANT

AND

LAND REGISTRAR MAKUENI INTERESTED PARTY

RULING

1. By a Plaint dated March 22, 2022, the Plaintiff prays for judgment against the Defendant for:-
 - a. That pending the hearing and determination of this suit the *status quo* obtaining at the time of filing this suit to be preserved. For avoidance of doubt, the Plaintiff to remain in actual possession of the disputed area.
 - b. That the Land Registrar Makueni County be and is hereby directed and ordered to visit land parcels Nzau/Kalamba/594 and Nzau/Kalamba/638 and to establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed and in accordance with boundary established by the District Surveyor's Report dated September 27, 1991 and adopted by the Court in Machakos Civil Case No 43 of 1991 Francis Kimilu Mwau & Another versus Kivumbu Ndwiwa.
 - c. The Land Registrar be and is hereby directed to effect rectification of the registers of the said parcels of land referred to in (a) above in case it is necessary on the basis of the boundaries that he will have ascertained.



- d. The Land Registrar to cause the Registry Index Map (RIM) relating to the affected parcels of land to be appropriately amended.
 - e. The Land Registrar be and is hereby directed and ordered to rectify the Plaintiff's title to reflect the actual ground acreage ascertained in (b) above.
 - f. Cost of the suit.
2. Alongside the Plaintiff, the Plaintiff filed a Notice of Motion application of even date in which he sought the following orders:-
1. Spent.
 2. That pending the hearing and determination of this suit the *status quo* obtaining at the time of filing this suit be preserved. For avoidance of doubt, the Plaintiff to remain in actual possession of the disputed area.
 3. Costs of the application be provided for.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.
4. In response to the suit and the application, the 1st Defendant filed a Notice of Preliminary Objection dated April 14, 2022 on the following grounds:-
1. That this suit and application dated March 22, 2022 are *res judicata* in that similar matters being Machakos RMCC No 43 of 1991, HCCA No 80 of 1992, Makueni HC ELC No 13 of 2017 have already been heard and determined.
 2. That this Honourable Court lacks jurisdiction to hear any issue touching on the boundary between land parcel No Nzai/Kalamba/594 and Nzai/Kalamba/638 because the issue is *res judicata*.
5. The Preliminary Objection was canvassed by way of written submissions.

The 1st Defendant's Submissions

6. The 1st Defendant's submissions were filed in Court on September 16, 2022.
7. Counsel for the 1st Defendant submitted that the issue for determination in the instant suit relates to the boundary dispute between land parcel number Nzai/Kalamba/594 and Nzai/Kalamba/638 which matter was directly and substantially in issue in Machakos RMCC No 43 of 1991, Machakos HCCA No 80 of 1992 and Makueni HC ELC No 13 of 2017.
8. Counsel went on to submit that in Makueni ELC Case No 13 of 2017, the Defendant who is the Plaintiff herein, successfully argued through a preliminary objection that the suit was *res judicata*. Counsel submitted that the parties in the former suits are similar to the parties in the present suit and are litigating under the same title.
9. It was further submitted that Francis Kimilu Mwau, the Plaintiff herein was a Co-Plaintiff in Machakos RMCC No 43 of 1991 while Kivumbu Ndwiwa(deceased) was the Defendant. That the Plaintiff herein has sued Hallan Mutua Kivumbu, the Administrator of the Estate of Kivumbu Ndwiwa, who was the Defendant in Machakos RMCC No 43 of 1991.



10. That in Makueni ELC Case No 13 of 2017, Francis Kimilu Mwau the Plaintiff herein was sued by Hallan Mutua Kivumbu the 1st Defendant herein.
11. Counsel argued that the Plaintiff has in the present suit, raised the same issues that were raised and determined in the previous suits by a Court of competent jurisdiction. That in a bid to escape the doctrine of *res judicata* the Plaintiff has added the Land Registrar Makueni County, in the current suit.

The Plaintiff's Submissions

12. The Plaintiff's submissions were filed in Court on September 29, 2022.
13. Counsel for the Plaintiff identified the following issues for the Court's determination: -
 1. Whether the suit is *res judicata*.
 2. Whether the Honourable Court has jurisdiction to hear this matter.
 3. Who should bear the cost of the suit.
14. On the first issue, Counsel submitted that the doctrine of *res judicata* is embodied on Section 7 of the [Civil Procedure Act](#) and went on to submit on the elements thereof.
15. On whether the issue in the present suit is directly and substantially the issue in the former suit, Counsel submitted that the Plaintiff in Machakos Civil Suit No 43 of 1991 together with Kakwasi Mwau Kituku instituted the suit against Kivumbu Ndwiwa and sought for a permanent order restraining the Defendant from further interfering and or wasting the Plaintiff's land parcel number Nzaiu/Kalamba/594. Counsel went on to submit that the suit was determined in favour of the Plaintiffs vide a judgment delivered on October 1, 1992. That being aggrieved, the Defendant appealed against the decision in Machakos HCCA 80 of 1992, which was later on dismissed for want of prosecution.
16. Counsel went on to submit that Hallan Mutua Kivumbu instituted Makueni ELC Case No 13 of 2017 against Francis Kimilu Mwau seeking for a declaration that land parcel No Nzaiu/Kalamba/638 is owned by the Estate of Kivumbu Ndiwa. He went on to state that the suit was struck out vide a preliminary objection raised by the Defendant on the grounds that the Plaintiff had no capacity to institute the suit and was trying to achieve what the late Kivumbu Ndwiwa failed to achieve on appeal.
17. Counsel submitted that the issue in the present case is not directly and substantially in issue in Machakos RMCC No 43 of 1991, Machakos HCCA No 80 of 1992 and Makueni ELC Case No 13 of 2017.
18. On the issue of whether the former suit was between the same parties or parties under whom they claim, Counsel submitted that the parties in the previous suits are not similar to the parties in the present suit.
19. Counsel contended that though the Plaintiff and the 1st Defendant were parties in Makueni ELC Case No. 13 of 2017, the Court declared that the 1st Defendant had no capacity to act as a representative of the Estate of the late Kivumbu Ndwiwa. He argued that the 2nd Defendant in the present suit was not a party in the former suits.
20. Counsel went on to submit that the 1st and 2nd Defendants in the present suit were not parties in Machakos Case No 43 of 1991 and Machakos HCCA No 80 of 1992.
21. On whether the issue was heard and finally determined in the former suits, Counsel submitted that in Machakos Case No 43 of 1991 the issue for determination was a boundary dispute between land



- parcels number Nzai/Kalamba/594 and Nzai/Kalamba /638. That in that case, the Court ordered the Land Registrar to fix the boundary as per the Surveyor’s report filed in Court on October 24, 1991.
22. Counsel further submitted that in Makueni ELC Case No 13 of 2017, the Plaintiff sought for a declaration that land parcel number Nzai/Kalamba/638 belongs to the Estate of Kivumbu Ndwiwa while in the present suit, the Plaintiff is seeking for an order to maintain the status quo of the boundary established in Machakos Case No. 43 of 1991 amongst other orders. Counsel contended that although the dispute between the parties has already been determined, the 1st Defendant has been acting in total disregard of the judgment delivered in Machakos RMCC No 43 of 1991. Counsel argued that although the issues raised in the present suit arise from the issues that have already been determined, the same have not been determined by a Court of competent jurisdiction.
 23. On whether the Court that formerly heard and determined the suit was competent to try the subsequent suit or suits in which the issue is raised, Counsel submitted that under Section 13 of the [ELC Act](#) this Court has jurisdiction to hear and determine any disputes concerning land.
 24. On the issue of whether the Court has jurisdiction to hear and determine this matter, Counsel submitted that the Court has jurisdiction to hear this matter on the basis that the boundaries have already been established by the Land Registrar and the Surveyor’s report filed in Machakos No 43 of 1991.
 25. On the issue of costs, Counsel submitted that the Defendants preliminary objection has no merit and should be dismissed with costs to the Plaintiff in line with Section 27 of the [Civil Procedure Act](#).
 26. To buttress his submissions, Counsel relied on the list of authorities dated September 15, 2022.

Analysis and Determination

27. The law on Preliminary Objection is settled. A Preliminary Objection must be on a pure point of law.
28. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
29. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 had 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 issue. The improper practice should stop.”



30. In *Oraro Vs Mbaja* (2005) eKLR Ojwang J (as he then was) described it as follows;

“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. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

31. The Court of Appeal in *Nitin Properties Ltd Vs Singh Kalsi & Another* (1995) eKLR also captured the legal principle when its 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.”

32. The preliminary objection if allowed may dispose of the entire suit without giving the parties an opportunity to be heard. Having considered the objection raised by the Defendant, the Court finds that the issue of *res judicata* can dispose of the matter preliminarily without having to ascertain the facts. The preliminary objection raised by the Defendant fits the description of a preliminary objection stated in the Mukisa Biscuits case *supra*.

33. Having considered the preliminary objection, the pleadings and the rival submissions, I find that the issue that arises for determination is whether this suit is *res judicata* on account of Machakos RMCC No 43 of 1991, Machakos HCCA of 1992 and Makueni ELC No 13 of 2017.

34. The doctrine of *res judicata* is anchored on Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides as follows:-

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.

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. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

Explanation. -(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

35. The doctrine of *res judicata* has been defined in the *Black’s Law Dictionary*, 9th Edition at page 1425 as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same



claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

36. The elements which must be present to succeed on a defence of *res judicata* were enunciated in *Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others* [2017] eKLR where the Court of Appeal held that:-

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

37. From the foregoing, it is clear that for *res judicata* to suffice, a Court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

38. The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of *Nicholas Njeru Vs the Attorney General and 8 Others* Civil Appeal No 110 of 2011 [2013] eKLR. The essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. That was the holding in *Omondi Vs National Bank of Kenya Ltd and Others* (2001) EA 177.

39. Firstly, the matter in issue should be directly and substantially the same as in the former suit. The Plaintiffs Francis Kimilu Mwau and Kakwasi Mwau Kimilui instituted Machakos Civil Case No 43 against Kivumbu Ndiwa and sought for the following orders:-

- a. Permanent order restraining from further interfering and on wasting the Plaintiff’s land Nzai/Kalamba/594.
- b. General damages.
- c. Costs of the suit.

40. The matter was heard and judgment was delivered on October 1, 1992. In its judgment delivered on October 1, 1992, the Court stated in part as follows:-

“It is clear that the only dispute before the court is of the boundary between plot no 638/594, which all belong to the defendant and the plaintiff respectively. It is clear from the evidence that the defendant has trespassed into the land of the plaintiffs but he has all refused. The



title deeds of both parties have also been produced and I have no doubt that the titles produced as exhibit 1 for the plaintiffs shows the land parcel 594 belongs to them. The plot no 638 belongs to Mr Kivumbu. Only problem is to fix the boundaries between the two numbers. This was done. The report of the land registrar was filed in court on October 24, 91. The plaintiffs and the defendants were all there. The 12 sisal plants were established to mark the boundary.”

41. It was the finding of the Court that the Plaintiffs had established their claim on a balance of probabilities. The Court entered judgment in favour of the Plaintiffs against the Defendant as sought in the Plaint. Being aggrieved, the Defendant appealed against the decision in Machakos HCCA No 80 of 1992. The Defendant submitted that the appeal was dismissed for want of prosecution.
42. With regards to Makueni ELC Case No 13 of 2017 the Plaintiff Hallan Kivumbu sued Francis Kimilu and sought for the following orders:-
 - a. A declaration that land parcel Nzai/Kalamba/538 is solely and legally owned by the estate of the late Kivumbu Ndwiwa.
 - b. That the County land officer do establish a permanent boundary between land parcel No Nzai/Kalamba/638 and land parcel no Nzai/Kalamba/594.
 - c. A permanent injunction restraining the Defendant either by himself, his servants, relatives and/or agents from trespassing into and/or interfering in any way with land parcel No Nzai/Kalamba/638.
43. The Defendant vide a Notice of Preliminary Objection argued that the Plaintiff's suit was *res judicata* and/or sub judice to Machakos RMCC No 43 of 1991 and Machakos Appeal No 80 of 1992. The Court upheld the preliminary objection and struck out the Plaintiffs suit with costs to the Defendant.
44. Similarly, in the instant suit, the Plaintiff has sought for similar orders. Prayers (b) of the Plaint states as follows-
 - b) That the Land Registrar Makueni County be and is hereby directed to visit land parcels numbers Nzai/Kalamba/594 and Nzai/Kalamba/638 and to establish and fix the boundaries on the basis of the boundaries established and maintained after the land adjudication process was completed and in accordance with the boundary established by the District Surveyors Report dated September 27, 1991 and adopted by the Court in Machakos Civil Case No 43 of 1991 *Francis Kimilu Mwau & Another Vs Kivumbu Ndwiwa*.
45. The present suit entirely arises from the same cause of action. It is purely about fixing of boundaries between land parcel numbers Nzai/Kalamba/594 and Nzai/Kalamba/638 which issue was determined in Machakos Civil Suit No 43 of 1991. The Plaintiff conceded that the boundary between land parcels number Nzai/Kalamba/594 and Nzai/Kalamba/638 was established in Machakos RMCC No 43 of 1991. The Plaintiff in the present suit has sought for similar prayers in ELC No 43 of 1991 in respect to the same parcels of land.
46. This Court finds and holds that the cause of action and the reliefs sought in the previous suit is wholly similar to the present suit.
47. The second and third tests are closely intertwined. That the former suit must have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. The parties in Machakos RMCC No 43 of 1991 were Francis Kimilu Mwau & Kakwasi Mwau Kitiku the Plaintiffs versus Kivumbu Ndiwa the Defendant. The Plaintiff in the present suit was the



Respondent in Appeal No 80 of 1992 while Kivumbu Ndiwa was the Appellant. The Plaintiff herein was sued in Makueni ELC No 13 of 2017 by the 1st Defendant herein.

48. In the present suit the Plaintiff has sued the Defendant and the Land Registrar as the Interested Party. The 1st Defendant herein is the legal administrator of the Estate of Kivumbu Ndiwa who was the Defendant in Machakos RMCC No 43 of 1991 and the Appellant in Machakos HCCA No 80 of 1991. It goes without saying that the parties in both cases are similar and indeed litigating under the same title.
49. Lastly for *res judicata* to be sustained, the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided. It is not in dispute that the Court seized with RMCC No 43 of 1991 and Makueni ELC No 13 of 2017 had the requisite jurisdiction to determine the dispute therein. Machakos RMCC No 43 of 1991 was heard and determined vide the Judgment delivered on October 1, 1992. The appeal lodged by the Respondent in Machakos HCCA No 80 of 1992 was dismissed for want of prosecution while Makueni ELC No. 13 of 2017 was struck out for being *res judicata*.
50. In the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the Court of Appeal pronounced itself as follows;

“The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unravelling uncontrollably.”

51. It follows therefore, that the Preliminary Objections raised by the Defendant was based on a pure point of law, that is the doctrine of *res-judicata*, and did not require additional evidence to substantiate the objection. From a perusal of the Judgment dated October 1, 1992 in Machakos RMCC No 43 of 1991, it is clear boundary dispute between the two parcels of land was dealt with in previous litigation. This Court is of the view that the issue of establishing and fixing of the boundary between land parcels number Nzau/Kalamba/594 and Nzau/Kalamba/638 is therefore *res judicata*.
52. The upshot of the foregoing is that I find merit in the 1st Defendant’s Preliminary objection and the same is upheld.
53. Accordingly, the suit dated March 22, 2022 is struck out with costs to the Defendant.

HON T MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF JANUARY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr Kwemboi

Ms Singi for the 1st Defendant



Mbatie for the Plaintiff

