



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muturi v Sifuna (Civil Case E008B of 2023)  
[2024] KEHC 11299 (KLR) (27 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11299 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL CASE E008B OF 2023  
AC MRIMA, J  
SEPTEMBER 27, 2024**

**BETWEEN**

**NELSON HARUN MUTURI ..... PLAINTIFF**

**AND**

**DAVID KINISU SIFUNA ..... DEFENDANT**

**RULING**

**Background**

1. Through the Plaint dated 5<sup>th</sup> November 2015, NelsonHarun Muturi, an Advocate of the High Court of Kenya, sued David Kinisu Sifuna, then the Honourable Speaker of Trans-Nzoia County Assembly, for lodging a complaint against him at the Law Society of Kenya in respect to a property transaction they undertook.
2. The Plaintiff was aggrieved by the letter of complaint. According to him, it was defamatory. He sought general, exemplary and aggravated damages for defamation.
3. In opposition to the suit, the Defendant lodged a Notice of Preliminary Objection dated 9<sup>th</sup> March 2023.
4. The objection was heard by way of written submissions which were highlighted upon, hence, this ruling.

**The Preliminary Objection:**

5. The objection was tailored in the following terms;
  1. That the suit before this Court contravenes and offends Article 1(3)(c), 47, 48, 50, 159, 165 and 169 of *the Constitution*.



2. That the suit before this Court is Res-judicata and as such, one that ought to be struck out in-limine being a clear case of abuse of court process.
3. That the suit before this Court offends and it is contravention of sections 57, 58(4), (5) and section 60 and 62 of the Advocates Act Cap 16, Chapter XI of the Penal Code Cap 63 and the Evidence Act Cap 80 Laws of Kenya.
4. That the suit before this Contravenes and offends section 6 of the Defamation Act Cap 36.
5. That the suit before this Court offends an is in contravention of the Civil Procedure Act and Order 4 Rule 1 of the Civil Procedure Rules in that the Plaintiff is prosecuting a total of 4 separate suits between the same parties before this Court arising from the same dispute or cause of action.
6. That this suit ought to be dismissed as the earliest on the basis of the doctrine of estoppel.
7. That this Court lacks jurisdiction to entertain the suit any further.
8. That any further proceedings in respect of this suit will amount to the court sitting on its own appeal.

**The Defendant's submissions:**

6. The Defendant urged the objection through written submissions dated 17<sup>th</sup> November 2023.
7. It submitted that the objection met the test of raising pure points of law as laid out in Mukisa Biscuit manufacturing Company -vs- West End Distributors Limited (1969) EA 696.
8. It was the Defendant's case that the suit was res-judicata and sub-judice since the issues raised had been raised in several other suits including HCC No. 104 of 2016 which is pending Judgment and in Petition No. 485 of 2019 which was dismissed to which the Plaintiff appealed in Nairobi Civil Appeal No. E314 of 2023 which is pending determination.
9. The Defendant further submitted that the issue of defamation streamed from similar issues being the complaint against the Plaintiff at the Law Society of Kenya.
10. The Defendant submitted that the instant suit and HCC No. 104 of 2016 are both defamatory suits filed by the Plaintiff on the basis of the affidavit sworn on 9<sup>th</sup> February 2016 by the Defendant in support of his complaint before the Law Society of Kenya.
11. The Defendant argued that in filing this case, the Plaintiff contravened Section 6 of the Civil Procedure Rules and Order 4 Rule 1(f) of the Civil Procedure Rules which prohibit resolution of a dispute over similar issues by same parties concurrently by different Courts.
12. The Defendant asserted that the Plaintiff never disclosed both in HCC NO. 40 of 2016 and in the instant dispute that there were proceedings in this Court arising from the same cause of action.
13. On the doctrine of res-judicata, the Defendant submitted that the issues in the instant suit have been resolved by the Advocates Disciplinary Tribunal in Tribunal Cause No. 19 of 2016 and this Court cannot interfere with the decision of the Tribunal unless it is handling it as an appeal under Section 62 of the Advocates Act.
14. The Defendant submitted further that the Plaintiff's suit in Kericho ELC No. 75 of 2013, where the Plaintiff sought to institute suit was struck out on the basis that it was res-judicata.



15. He asserted further that the Plaintiff having filed *Petition No. 485 of 2019* in respect of the same issues as those before this Court and having been dismissed renders the instant suit res-judicata.
16. The Defendant argued that this Court is bereft with jurisdiction and the Plaintiff ought to be estopped from abusing process.

**The Plaintiff's case:**

17. In opposition to the objection, the Plaintiff filed written submissions dated 6<sup>th</sup> December 2023.
18. From the outset it was his case that the objection was bad in law and did not emanate from the Plaintiff filed on 5<sup>th</sup> November 2015.
19. The Plaintiff submitted that the Defendant had not placed before this Court the ruling and pleadings in the suits he referred to as to enable this Court ascertain the facts he relied on.
20. He submitted that documents had not been introduced to the Court record by way of Affidavit but disingenuously as a list of document and authorities.
21. In rebutting the claim of res-judicata, the Plaintiff submitted that as of 27<sup>th</sup> January 2015 when he instituted the instant suit, no Court had rendered judgment on the dispute to operationalize the doctrine.
22. As regards the doctrine of sub judice, the Plaintiff submitted that the Defendant had not demonstrated its relevance on the issues before this Court.
23. The Plaintiff rebuffed the claim that there were *Petition No. 485 of 2019* and Nairobi HCCC No. 104 of 2016 Nairobi and Advocates Disciplinary Tribunal Cause No. 19 of 2016 Nairobi by referring to the Defendants own Statement of Defence where he stated that nothing would stop him from lodging a disciplinary complaint with the Law Society of Kenya even if there was a pending suit in Court since the remedy sought before the Law society of Kenya is totally different from a remedy in civil suit and or criminal case.
24. With the foregoing, the Plaintiff asserted that the Defendant was bound by his own pleadings and the different suits can all run concurrently.
25. In respect to the instant suit, the Plaintiff submitted that in order for the Defendant to succeed on the claim of res-judicata he had to show that there was a judgment pursuant to the letter dated 3<sup>rd</sup> September 2015 on the pronouncement of Court on the defence of truth, justification and privilege and the award of damages.
26. As for HCCC No. 14 of 2016, the Plaintiff submitted that this suit is based on the letter of complaint dated 13<sup>th</sup> September 2015 while HCCC. No. 104 of 2016 is based on an Affidavit sworn on 9<sup>th</sup> February 2016. It was his submission that if Section 7 were to be enforced it is HCCC No. 104 of 2016 that ought to be stayed since it was filed subsequent to the instant suit.
27. As for *Petition No. 485 of 2019*, the Plaintiff submitted that it was dismissed on jurisdictional grounds that the Advocate ought to have invoked the appeal process against the judgment of the Advocates Tribunal rather than lodge a Constitutional Petition.
28. The Plaintiff then urged this Court to dismiss the objection with costs.



### **Analysis:**

29. From the foregoing comprehensive appreciation of the parties' respective cases and submissions, the issues that arise for determination are;
  - i. Whether the objection is properly raised in law.
  - ii. Depending on (i) above, whether the objection is merited.
30. This Court will, going forward, sequentially analyse the above issues.

### **The propriety of the objection:**

31. A valid preliminary objection is one that raises pure points of law capable of disposing of the matter at once. Before a Court considers the merits or otherwise of a preliminary objection, it must be satisfied that the objection is not caught up with factual issues that would necessitate the calling of evidence.
32. The locus classicus decision on Preliminary Objections is that of *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) E.A. At page 700, former Court of Appeal discussed the nature and propriety of a preliminary objection as under: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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 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 preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

33. In *Nairobi High Court Civil Suit No. 85 of 1992, Oraro vs. Mbaja* [2005] 1 KLR 141, Prof. Ojwang J, (as he then was), cited with approval the position in *Mukisa Biscuit -vs- West End Distributors* case (supra) and stated as follows on the operation of preliminary objections: -

...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 processes 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.

34. In *Omondi -vs- National Bank of Kenya Ltd & Others* {2001} KLR 579; [2001] 1 EA 177, it was observed that, a Court, while determining a preliminary objection can look at the pleadings and other relevant documents but must abide by the principle that it must raise pure points of law. It was thus held: -

...In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to



purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion.

35. The Supreme Court has also spoken on the issue of preliminary objections. In *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others* (2015) eKLR, the Apex Court remarked as follows: -

...Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

36. Finally, in *John Musakali -vs- Speaker of County of Bungoma & 4 Others* (2015) eKLR, the validity of a preliminary Objections was considered as hereunder: -

The position in law is that a preliminary Objection should arise from pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential of disposing of the suit at that point without the need to go for trial. If, however, the facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

37. From the foregoing, it is abundantly clear that a preliminary objection should only raise pure points of law and is argued on the assumption that all the facts pleaded by the other side are admitted.
38. Therefore, a preliminary objection will fail the foregoing test if facts have to be ascertained, the arguments do not arise from the pleadings or when what is sought is the exercise of judicial discretion.
39. This Court has carefully appreciated each of the eight points of the Defendant's objection. It is apparent that the issues would necessitate the calling of evidence to ascertain their veracity.
40. Be that as it may, whereas res-judicata and sub-judice are jurisdictional contests, the Supreme Court gave directions on how such pleas may be raised in suits. In *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR, the Apex Court comprehensively dealt with the different facets making up the doctrine of res judicata including its exceptions. The Court emphasized that since the plea is anchored on evidential facts, then such facts ought to be properly raised by way of an Affidavit.
41. In this case, the Defendant relied on the Lists of Documents it filed. Whereas that is in order, still the said documents were neither the originals nor certified true copies of the originals. More so, the documents are yet to be produced in evidence. They are yet to be part of the evidential record of the Court. (See the Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (2015) eKLR). Such documents cannot, therefore, be alleged to be admitted in evidence.
42. The position, however, would have been different had the Defendant filed an Affidavit and introduced the documents therein. In doing so, the Plaintiff would have been accorded an opportunity to rebut or admit the said documents. As things stand, the pleas of res-judicata and sub-judice, which can amount to complete bar to a Court's jurisdiction, were not properly raised by way of a preliminary objection in this case.
43. The upshot is that the Notice of Preliminary Objection dated 9<sup>th</sup> March 2023 is improperly raised and as such invalid in law.



44. It is hereby dismissed with costs to the Plaintiff.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 27<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. C. MRIMA**

**JUDGE**

Ruling virtually delivered in the presence of:

Mr. Muturi, the Plaintiff in person.

No appearance for Mr. Sifuna, the Defendant in person.

Chemosop/Duke – Court Assistants.

