



Nyamai & 291 others v South Eastern University College (Environment & Land Case E001 of 2021) [2023] KEELC 17203 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17203 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E001 OF 2021**

LG KIMANI, J

APRIL 27, 2023

BETWEEN

WILLIAM NYAMAI & 291 OTHERS PLAINTIFF

AND

SOUTH EASTERN UNIVERSITY COLLEGE RESPONDENT

RULING

1. The Plaintiff filed the application dated December 20, 2022 seeking the following orders:
 1. Spent.
 2. That this Honourable Court do consider granting the ex-parte order herein either by themselves, agents, employees, proxies and/or servants from entering, evicting, subdividing, obtaining consent for transfer, selling, transferring, disposing, wasting, alienating and/or dealing in any way with land parcel LR No13529 situated at Kwa Vonza Location in Kitui County pending the hearing and determination of the suit pending inter-partes hearing on the 25th of January 2023.
2. The grounds relied on are that the Applicants are being threatened with eviction thus denying them enjoyment and use of their land while they have been in occupation of the parcel of land for more than 25 years.
3. The Respondent filed a Notice of Preliminary Objection dated January 24, 2023 stating that the application herein is not maintainable in law by dint of Section 7 of the *Civil Procedure Act* cap 21 Laws of Kenya. The Respondent claims that the application is incompetent and borne out of grave misapprehension of the law.



The Respondent's Submissions

4. Counsel submitted that Section 7 of the [Civil Procedure Act](#) on res judicata prohibits this kind of application as brought out by their preliminary objection. They relied on the case of [Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & Another \(Interested Parties\)](#) [2020] eKLR on the elements necessary in the doctrine of res judicata.
5. The Respondent submits that the previously filed amended Notice of Motion dated June 27, 2022 sought similar orders and the same was canvassed and a ruling delivered on December 6, 2022 dismissing the application. They submit that the application amounts to forum shopping and parties cannot open the same subject matter in bits. They on the case of [Mohammed Dado Hatu v Dhado Gaddae Godhana & 2 others](#) (2017) eKLR stating that the Applicants cannot raise the same issues as those in another application.

Analysis and Determination

6. The Applicants seek a temporary injunction in their application dated December 20, 2022 restraining the Respondents from entering, evicting, sub-dividing, obtaining consent for transfer, selling, transferring, disposing, wasting, alienating and/or dealing in any way with the suit property. The Respondent raised a preliminary objection that the application is res judicata and sought to have the issue addressed first.
7. The test of the true definition of a preliminary objection was well set out in the case of [Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd](#) (1969) EA 696.

“So far as I’m aware, 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.”

8. The law requires that a Preliminary Objection be brought only on a point of law as Lady Justice Mary Kasango noted in [Kenya Breweries Limited & another v Keroche Breweries Limited](#) [2020] eKLR while quoting Mativo J in the case of:

“[JN & 5 others v Board of Management St G School Nairobi & another](#) (2017) eKLR thus: Useful guidance can be obtained from the decision in [Omondi vs National Bank of Kenya Ltd & Others](#) where it was held that:- “The objection as to the legal competence of the Plaintiffs to sue.....and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points 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..... “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.....The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined 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, 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. Where a court needs to



investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.” (Emphasis added)

9. From the foregoing authorities the Court in determining the preliminary objection is perfectly at liberty to look at the pleadings and other relevant matters in its records and it is not necessary to file affidavit evidence on those matters. In that regard the court has looked at the Amended Notice of Motion dated October 19, 2021 and amended on June 27, 2022 and the prayers sought are set out in full as hereunder;
 - a. That a temporary injunction be issued restraining the Respondents herein either by themselves, agents, employees, proxies and/or servants from entering, evicting, subdividing, obtaining consent for transfer, selling, transferring, disposing, wasting, alienating and/or dealing with land parcel LR No 13529 situated Kwa Vonza Location in Kitui County pending hearing and determination of this suit.
10. The Court finds that the prayers set out above are the exact same prayers in the current application. The matters raised in the present application were directly and substantially in the previous application which was heard and determined by the ruling of December 6, 2022 and the court found inter alia that;

“On the face of the documents supplied by all the parties the Respondent has shown that the suit land is likely public land under Article 162 (1) (b) of the Constitution of Kenya 2010 for the reason that the Respondent is a public body or authority utilizing the suit land for a public purpose. I also find that on the face of it the land is subject to the provisions of section 42 of the Limitation of Actions Act. I therefore find that the Applicants have not established a *prima facie* case with a probability of success.”
11. The final order of the court was that “The Amended Notice of Motion dated October 19, 2021 and amended on June 27, 2022 lacks merit and the same is hereby dismissed with costs to the Respondent.”
12. Under the doctrine of *Res Judicata* set out at Section 7 of the Civil Procedure Act, this court is forbidden from hearing the current application. The section states 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.”
13. The Court finds that the application dated December 20, 2022 is *Res judicata* and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 27TH DAY OF APRIL 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT - JUDGE KITUI

Ruling read virtually and in open court in the presence of-

Musyoki C/A

Kalwa Advocate for the Plaintiff/Applicant



M/S Wambui Advocate for the Respondent

