



Njenga & another v Embu Gaturi Housing Co-op Society Ltd & another (Civil Appeal 22 of 2014) [2023] KEHC 21335 (KLR) (9 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21335 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 22 OF 2014
LM NJUGUNA, J
AUGUST 9, 2023**

BETWEEN

WAMAE NJENGA 1ST APPELLANT

SIMON NJOGU MUTURI (DECEASED) 2ND APPELLANT

AND

EMBU GATURI HOUSING CO-OP SOCIETY LTD 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Hon Justice F Muchemi on October 30, 2019)

RULING

1. Before this court for determination is a notice of preliminary objection dated February 21, 2023 filed by one Joseph Munyi who is the vice chairperson of the 1st respondent since October 2022. He seeks to object the notice to show cause dated November 7, 2022 on the grounds, inter alia, that the notice to show cause is incompetent and fatally defective as it is contrary to section 12 of the [Co-operative Societies Act](#) and his identity as a person is different from the identity of the 2nd respondent. In the same breath, that the circumstances of this case do not warrant piercing of the corporate veil.
2. In response, the appellants herein filed grounds of opposition to oppose the notice of preliminary objection citing the res judicata principle. It was their argument that the same issue had arisen in this court before and involving the former chairperson of the co-operative society. That this court went ahead to dismiss that preliminary objection through a ruling delivered by Hon Justice F Muchemi on October 30, 2019. They stated that this is a ploy by the respondents to defeat justice and waste the court's time and that the same need not be entertained by this court.
3. The parties agreed to canvass the application by way of submissions.



4. In their submissions, the appellants stated that the notice to show cause made out in the name of Joseph Munyi was for Kshs 4,810,959/=. They stated that in cases like this, the courts have often times not found merit in preliminary objections regarding committal to jail of the officials of the organizations. To make their case, they relied on the cases of *Charles Lutta Kasamani Vs Concord Insurance Co Ltd & 2 Others* [2018] eKLR, *Kinatwa Co-operative Savings Credit Society Ltd Vs Nakimu Classic Travellers Sacco Ltd* [2016] eKLR, Nairobi HC Civil Appeal No 413 of 2014 – *Samuel Njenga Vs Augustino Onanda & Orokise Sacco Ltd and John Richard Ouma Nyamai Vs The Co-operative Tribunal & 3 Others* [2013] eKLR where in all of these, the court found that it is not unconstitutional to commit the officials to civil jail.
5. The applicants relied on the case of *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors* [1969] EA 696 to argue their case that the preliminary objection was not based on points of law. They relied on section 28 of the *Co-operative Societies Act* to support their argument that the officials of the 1st respondent are to be held liable and that the issues in the case of *Salomon Vs Salomon UKHL 1, AC 22* and that no-one has moved the court to lift the corporate veil. They also relied on the decision in the case of *Wamae Njenga & another Vs Embu Gatari Housing Co-op Society Ltd & another* [2019] eKLR where the court held that the notice to show cause issued in the name of the chairperson of the co-operative society is an opportunity for the decree holder to enjoy the fruits of the judgment in his favour.
6. On the issue of res judicata, they relied on the definition of the term according to the Black's Law Dictionary and section 7 of the *Civil Procedure Act*. They noted that the present matter was recurring in the same court, with the same subject and parties, save for the person raising the preliminary objection, and the court had already decided. That the court in the previous matter exhaustively addressed the issues raised in the present preliminary objection. In conclusion, they stated that the preliminary objection is an abuse of the court process and that it must not be entertained.
7. The 1st respondent in its submissions pointed out that the issuance of a notice to show cause in the name of Joseph Munyi is a departure from the principles on lifting the corporate veil in the case of *Salomon v. Salomon* (supra). That section 12 of the Cooperative *Societies Act* accords corporate identity to the 1st respondent and therefore it is different from its own chairperson.
8. It was their case that the provisions of Order 22 Rules 31 and 34 of the civil procedure Rules 2010 exempt the 1st respondent's chairperson from execution as the judgment debtor. Reliance was placed on the bill of rights as enshrined in the *Constitution* of Kenya 2010 and Article 11 of the United Nations International Convention on Civil and Political Rights which both state that committal to civil jail for causes of action arising from contractual obligations is a violation of fundamental rights. On this they also cited the case of *Re Zipporah Wambui Mathaara, Milimani BC Cause 19 of 2010*. They also stated that committal to civil jail must be an option of last resort per section 38 of the *Civil Procedure Act* and Order 22 of the *Civil Procedure Rules 2010* and the case of *Sonia Kwamboka Rasugu Vs Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai* (2013) eKLR.
9. On the argument on lifting of the corporate veil, they relied on the cases of *Lucy Mukembura Kimani Vs Nzuri Feeds Suppliers Limited* (2021) eKLR and *Salomon Vs Salomon* (supra) arguing that the current circumstances do not warrant that the court lift the corporate veil. They relied on section 7 of the *Civil Procedure Act* and the case of *Gladys Nduku Nthuki Vs Letsbego Kenya Limited* (2022) eKLR to support their case that the matter is not res judicata.



10. Upon perusal of the notice of preliminary objection, the grounds of opposition, the competing submissions of both parties, in my view, the issue for determination as a priority is whether the suit herein is res judicata. Once this is determined, then the court will find its jurisdiction to determine the rest of issues raised. In the case of *Lal Chand Vs Radha Kishan, AIR 1977 SC 789* it was stated that;

' The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.'

11. Section 7 of the *Civil Procedure Act* provides for res judicata 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.'

Similarly, in the case of *The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, [2017] eKLR*, it was held that:

' For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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.'

12. It is true that the preliminary objection raised by the 1st respondent's present chairperson in this matter was also raised by the 1st respondent's chairperson earlier in this same matter, in the very same fashion and was conclusively determined by this very court but differently constituted. Hon F Muchemi delivered her ruling on October 30, 2019 in which she dealt exhaustively on the issues identical to the ones raised by Joseph Munyi herein. The court thus became functus officio and the decision of the court has since not been appealed against. The previous case has since been reported as precedence namely *Wamae Njenga & another Vs Embu Gaturi Housing Co-op Society Ltd & another [2019] eKLR*.

13. Needless to say, this is a clear case of res judicata and therefore this court will not take one more step in examining the issues raised in the preliminary objection.



14. In the upshot, and noting the provisions of the law and caselaw on res judicata, I find that the preliminary objection has merits and it is hereby allowed.

15. It is so ordered.

Delivered, dated and signed at Embu this 9th day of August, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondents

