



REPUBLIC OF KENYA



**Attorney General & 2 others v Ben & 4 others (Environment & Land  
Case E003 of 2021) [2023] KEELC 19351 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 19351 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E003 OF 2021**

**A KANIARU, J  
MAY 30, 2023**

**BETWEEN**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> PLAINTIFF  
PRINCIPAL SECRETARY MINISTRY OF EDUCATION ..... 2<sup>ND</sup> PLAINTIFF  
BOARD OF MANAGEMENT GITARE PRIMARY SCHOOL ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ESBON KIURA BEN ..... 1<sup>ST</sup> DEFENDANT  
NJERU KAVINDI ..... 2<sup>ND</sup> DEFENDANT  
NJERU W. WACIMBA ..... 3<sup>RD</sup> DEFENDANT  
MUSA JOSEPH ..... 4<sup>TH</sup> DEFENDANT  
TIRUS NJIRU KIRIMUI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this court is a preliminary objection dated 1.11.2022. The objection is filed by the defendants and it is premised on the following grounds:
  - i. The plaint is incompetent and misplaced.
  - ii. The plaint squarely offends the principle of resjudicata.
  - iii. The plaint is an attempt to challenge the decision of the Embu Chief Magistrate's court in CM MISC Application No. 35 of 2017 dated 5<sup>th</sup> February, 2021 through back door.
  - iv. The plaint is frivolous and an abuse of the court process and the plaintiffs shall be praying that the same be struck out with costs.



2. The parties in the suit are The Hon. Attorney General, Principal Secretary Ministry of Education, Board of Management Gitare Primary School who are the plaintiffs while Esbon Kiura Ben, Njeru Kavindi, Njeru W. Wacimba, Musa Joseph and Tirus Njiru Kirimui are the defendants.
3. The plaintiffs made a case that they were the registered owners of Land Parcel No. Kagaari/Gitare/505 which they said was allotted to them by the colonial government in the 1950s. They claimed that the defendants fraudulently and illegally hived off portions of the land in 1978 and created land parcels number Kagaari/Gitare/T.199, T.200, T.201, T.202, T.203 and T.204. It was said that the parties had moved the court via Runyenjes District Land Disputes Tribunal No. 3 of 2010 and the award by the tribunal was adopted in Runyenjes Case No. 36 of 2011.
4. The plaintiffs argued that they had been in occupation of the suit land for over 50 years with the full knowledge of the defendants. According to them, the tribunal had no jurisdiction to entertain the matter and award the defendants the parcel of land Kagaari/Gitare/T.199, T.200, T.201, T.202, T.202 & T.204 as the land had title which had been issued before 1978. It was further stated that the land was public land in possession and use of Gitare Primary school which was outside the mandate of the Land Dispute Tribunal. It was argued that the determination of the dispute as a boundary matter was unlawful and resulted in illegal excision of public land. The claim by the plaintiffs is for cancellation of the title and for the land to revert back to the original owner.
5. The defendants filed a defence in opposition to the case as well as a preliminary objection. According to the defendants, the dispute over the land was not only determined before the land dispute tribunal, but was also before the Chief Magistrate's court in Embu where the court was said to have determined that the plaintiff were on the wrong and in essence granted orders to the 3<sup>rd</sup> plaintiff to move from the defendants properties. They went ahead to state that the matter had been exhaustively dealt with in several courts including Kerugoya High Court and Embu Chief Magistrate Court. According to them also, the 1<sup>st</sup> plaintiff had filed an appeal on the same issue. The suit was said to be res judicata and incompetent. The suit was faulted for not disclosing any cause of action and the court was urged to dismiss it with costs. Ultimately it was said that the court lacks jurisdiction to hear the matter.
6. The preliminary objection was canvassed by way of written submissions. The defendants filed their submissions on 4/10/2022. The defendants' submissions were to the effect that the suit was res judicata for reason that the matter had been heard and determined in Award Case No. 36 of 2011, Embu CMCC Miscellaneous Suit No. 35 of 2017 and Embu ELC Miscellaneous Application Number 6 of 2018. They relied on the provisions of section 7 of the *Civil Procedure Act* which outlines the requirements for a suit to be considered res judicata.
7. It was their case that the doctrine of res judicata allows a litigant only one bite at the cherry. That the doctrine prevents a litigant, or person claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. The doctrine was said to prevent multiplicity of suits, which would ordinarily clog the courts. It was argued that the plaintiffs were making an attempt to have the court sit on an appeal of its own decision. According to the defendants, the Court having rendered a decision, then the reasons enumerated by the Plaintiffs were not sufficient to warrant this Court's attention to go back on its decision.
8. The court was said to be functus officio and it was argued that any party that was dissatisfied with the decision made ought to address the same in a higher court. The defendants were of the view that a court can only go back on its judgement on review and it was aid that the requirements for review had not been met in this instance. It was reiterated that the doctrine of res judicata ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. To buttress this, they



- relied on the cases of *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another*; *Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR.
9. The defendants further accused the plaintiffs of approaching the court with unclean hands by feigning ignorance of the Court procedures. According to them, the suit was an afterthought and devoid of merits. They submitted that they would suffer prejudice if the court would hear the matter afresh. The plaintiffs' intention was said to be to re litigate, re-agitate and re canvass the former suits afresh. Ultimately, the court was called upon to dismiss the suit with costs.
  10. The plaintiffs on their part filed their submission on 2/11/2022. They outlined the grounds of objection and stipulated two issues for determination by the court. The first was whether the objection has merit. They relied on the case of *Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited* (1969) EA.696 which gave a definition of what constitutes a preliminary objection. Further reliance was made on the case of *ORARO .V. MBAJA* (2005) eKLR, where the court stated that a preliminary objection is one which must not be blurred with factual details liable to be contested or to be proved through the process of evidence.
  11. It was argued that the objections raised were not pure points of law for reason that they would require an investigation of facts before the court and especially whether the suit attempts to challenge the decision in *Embu CMC Misc. Application No. 35 of 2017*. On this, they relied on the case of *Henry Wanyama Khaemba ...Vs... Standard Chartered Bank Ltd & Another* (2014) eKLR, where the court stated that the issues of res judicata, duplicity of suits and the suit having been spent will require probing of evidence. It was further said that they were incapable of being handled as Preliminary Objections due to the limited scope of the Jurisdiction on preliminary objection. The plaintiffs equally relied on the case of *George Kamau Kimani & 4 Others ...Vs... County Government of Trans Nzoia & Another* (2014) eKLR where it was stated that the best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata.
  12. The second issue they sought to have the court determine was whether the suit is res judicata. On this, the plaintiffs relied on the case of *Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 others* [2010] eKLR wherein the court set out the elements to be met for a suit to be said to be res judicata to wit: the matter in issue is identical in both suits, the parties in the suit are the same, sameness of the title or claim, concurrence of jurisdiction; and finality of the previous decision.
  13. The plaintiffs argued that on applying the above test, the same failed to meet the requirements for the case to be Res Judicata. According to them, the previous decision relied upon by the defendant involved a boundary dispute while the current suit related to the Defendants unlawful having hiving off of a portion of the suit land and having it registered in their names. The suits were said to be different in issues of law and fact.
  14. It was further pointed out that the proceedings before the Runyenjes District Land Disputes Tribunal were void ab initio, as the tribunal lacked Jurisdiction to handle the matter in this first instance, being that the suit property was public land for use of Gitare Primary School. Such a suit was said to be outside the tribunals' mandate. It was also further argued that the land had title which had been acquired before 1978. In essence, the suit was said not to offend the doctrine of res judicata, being that the issue therein were different. The defendants were accused of raising the preliminary objection with the aim of obstructing Justice and holding on to public land illegally.



## Analysis And Determination

15. I have considered the preliminary objection, the rival submissions by the parties, and the court record generally. The essence, nature and scope of a preliminary objection were well articulated in the Locus classicus case of Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited [1969] EA 696 where the presiding judicial luminaries expressed themselves thus:

Per Law JA

“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 point may dispose of the suit. Examples are an objection to the jurisdiction of the court, 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.”

Per: Sir Charles Newbold P

“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 can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

16. What is deducible from the foregoing is that a preliminary objection is based on pure points of law which are based on facts that are correct and/or not contestable. It can not be raised if the facts on which it is based require proof.
17. The defendants have raised four points. To me, the grounds alleging that the suit is incompetent and misplaced (ground 1); that the suit is frivolous and an abuse of court process (ground 4), and that the suit is challenging a past suit through backdoor (ground 3) are not points of law. The defendants are laboring under a serious misdirection to think that these grounds are pure points of law. It is plain to me also that those grounds require to be proved through evidence. I reject these grounds outright as they are not points of law.
18. The only ground that commends itself to me as a point of law is the one based on RES JUDICATA (ground 2). The legal provision on the doctrine of RES JUDICATA is to be found in section 7 of the [Civil Procedure Act](#) (Cap 21). It is 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”

19. In Geoffrey Mbaabu & Another Vs M'Maingi M'Laaru & Another: HCC No. 6 of 2008 (O.S.), MERU [2015] eKLR Ouko J (as he then was) stated five conditions necessary for resjudicata to apply. They are:
- i. The matter directly in issue and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.
  - ii. The former suit must have been between the same parties or parties claiming under them or having a common interest in the subject matter of the suit.



- iii. The parties must have litigated under the same title in the former suit.
  - iv. The court which decided the former suit must have been competent to try the subsequent suit.
  - v. The matter in issue must have been heard and finally decided in the former suit.
20. When the issue of RES JUDICATA is therefore raised, the court is always minded to establish whether the parties are the same, whether the subject matter is similar, whether the suit or issues were determined conclusively in the former suit; and whether the court that gave the determination was a competent one.
21. The defendant talked of past or former disputes relating to the same subject matter. Curiously though, the proceedings or decisions in the past or former disputes were not made available. The court was therefore not enabled to make an informed finding as to whether the threshold for RES JUDICATA has been met. It is not clear to this court therefore what the issues in the former disputes were. The nature of those disputes is also not clear. The omission to make available the proceeding and/or decisions in the former disputes was a serious one and this court can not make a favourable decision on the basis of insufficient material placed before it.
22. The preliminary objection raised is therefore not merited and I hereby dismiss it with costs to the plaintiffs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

**A. K. KANIARU**

**JUDGE**

