



**Oduor v Real People Kenya Limited & 2 others (Civil Case E273 of 2019)
[2022] KEHC 15991 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E273 OF 2019
A MSHILA, J
NOVEMBER 25, 2022**

BETWEEN

CHRISTINE ADHIAMBO ODUOR PLAINTIFF

AND

REAL PEOPLE KENYA LIMITED 1ST DEFENDANT

JACKSON OCHIENG KANOT 2ND DEFENDANT

SUPERFEW AUCTIONEERS 3RD DEFENDANT

RULING

1. The applicant filed a Preliminary Objection dated July 26, 2021 on the following points of law and grounds;
 - a. The Application dated May 28, 2021 filed by the 1st defendant/applicant is *res-judicata*.
 - b. The statutory power of sale is no longer tenable to the 1st defendant -Real People Limited, in respect of the suit property following the decision of the court via the ruling of the court dated May 22, 2020.
 - c. The applicants have no decree and have not obtained a decree that they intend to enforce.
 - d. The Application is frivolous, vexatious and an abuse of the court process.
2. The court directed the parties to canvass the preliminary objection by filing and exchanging written submissions. The parties' respective submissions are as set out hereunder.



Applicant's Case

3. The applicant submitted that the respondent's application brought before the court the same issue that was decided by Lady Justice Muigai on May 22, 2022.
4. The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;
 - 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.
5. On whether the respondents have fulfilled the conditions set therein cannot be canvassed by way of the present application as that will amount to abuse of the court process and the rights and fruits of the Orders given on May 2, 2020 will not be enjoyed by the plaintiff as given therein.
6. Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in *Henderson v Henderson* (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
7. It was the applicant's position that there are no special circumstances to warrant opening the same case by way of an application which approaches the court by hiding facts that have already been canvassed and decided by the court. The applicants have all along misinterpreted and or misunderstood the ruling and hence their actions.
8. The execution could not apply to the suit property as the statutory power of sale was removed by the court in the ruling of May 22, 2020 hence execution can be of any other nature and not the suit property which is NOT available unless otherwise.
9. The present Application by way of a Notice of Motion for the court to calculate the accounts and declare that indeed the applicant is owed is not the work of the court but the parties through their respective advocate. The applicant prayed that the court finds that its res judicata and awards costs to the Plaintiff.

Respondents' Case

10. The respondents on the other hand argued that the preliminary objection raises no points of law. It was contended that the criteria for the two applications are different and the circumstances are now different and it was argued further that previous application is not a bar so long as issues and circumstances are different.



11. It was the respondents' submission that the Plaintiff argues that the 1st and 3rd defendants' Notice of Motion application dated May 28, 2021 is *res judicata*. The plaintiff has, however, never set down this suit for pre-trial directions since the delivery of the ruling on May 22, 2020. From the court record, it is evident that the instant suit is yet to be heard and determined. Hence, *res judicata* is inapplicable.
12. Further, the plaintiff argued that the applicants have no decree and or have not obtained a decree that they intend to enforce. From these arguments, it is clear that the plaintiff's notice of preliminary objection dated July 26, 2021 has largely relied on facts. The facts are disputed by the 1st and 3rd defendants and an investigation would be required to determine the truth thereof.
13. The respondents argued that the plaintiff's Notice of preliminary objection dated July 26, 2021 is not based on a clear point of law and the allegations raised therein that the statutory power of sale is no longer tenable to the 1st defendant ought to be proved before the matter can be determined by this Court and this can only be determined through a hearing. Therefore, the Plaintiff's Notice of preliminary objection dated July 26, 2021 is incompetent and the same should not be entertained by the court. On this the respondents relied on the case of *Nzele David Nzomo v Moses Namayi Anyangu & another* [2009] eKLR where the court observed that;

“A preliminary objection cannot be supported by evidentiary documents. It would be necessary to place the witness in the witness box to give sworn evidence and be cross-examined on the documents.”
14. In addition, the ruling delivered on May 22, 2020 only gave the plaintiff a reprieve during the Covid-19 pandemic lockdown. The ruling never indicated that the statutory power of sale is no longer tenable to the 1st defendant.

Respondent's Case

15. The plaintiff/respondent made submission in support of the application and stated that the elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit and that;
 - 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.
16. The plaintiff argued that there are no special circumstances to warrant opening the same case by way of an application which approaches the court by hiding facts that have already been canvassed and decided by the court. The applicants misinterpreted and misunderstood the ruling that the execution could not apply to the suit property as the statutory power of sale was removed by the court in the Ruling of May 22, 2020 hence execution can be of any other nature and not the suit property which is not available unless otherwise.



17. The present application by way of Notice of Motion asking the court to calculate the accounts and declare that indeed the applicant is owed is not the work of the court but the parties through their respective advocate.
18. The application herein is not for setting aside the Ruling dated May 22, 2020 and accordingly the ruling cannot be set aside through the backdoor in the disguise of an application that is res judicata.
19. It was the 1st and 2nd respondents' submission in opposition to the Application that the plaintiff argues that the 1st and 3rd defendants' notice of motion application dated 28th May 2021 is res judicata. The Plaintiff has, however, never set down this suit for pre-trial directions since the delivery of the ruling on May 22, 2020. From the court record, it is evident that the instant suit is yet to be heard and determined. Hence, res judicata is inapplicable.
20. In *Wensley Barasa v Immaculate Awino Abongo & another* [2020] eKLR the court stated that before a plea of resjudicata can properly be invoked to terminate a suit, it must be established that the former suit must have been heard and finally decided by the court in the former suit.
21. The respondents argued that, the plaintiff's notice of preliminary objection dated July 26, 2021 is not based on a clear point of law and the allegations raised therein that the statutory power of sale is no longer tenable to the 1st defendant ought to be proved before the matter can be determined by the court and this can only be determined through a hearing.
22. Further, the plaintiff has never set down this matter for hearing to enable this court determine the issues between the parties. Therefore, the plaintiff's Notice of preliminary objection dated July 26, 2021 is incompetent and the same should not be entertained by the court.
23. It was the respondents' position that the ruling delivered on May 22, 2020 only gave the plaintiff a reprieve during the Covid-19 pandemic lockdown. The ruling never indicated that the statutory power of sale is no longer tenable to the 1st defendant and it only indicated as follows:

“No execution shall take place during the Corona virus pandemic lockdown unless and until official announcement on return to normalcy and/or 90 day from today.”

Issues For Determination

24. The court has considered the application, the preliminary objection and the respective written submissions and has framed only one for determination which is as follows;
 - i. Whether to uphold the preliminary objection dated July 26, 2021.

Analysis

Whether to uphold the preliminary objection dated July 26, 2021?

25. The Plaintiff/Respondent herein has filed a preliminary objection citing that the application dated 28th May, 2021 is res judicata as the Objector had filed a similar application dated April 19, 2021 which was heard and determined by Hon. Lady Justice Muigai and ruling delivered on May 22, 2020.
26. The preliminary objection raised on a point of law on the grounds that the application dated May 28, 2021 is res judicata. The issue for determination is whether the application falls within the ambit of section 7 of the *Civil Procedure Act* which stipulates 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.”
27. In the impugned ruling the court halted the process of the exercise of the statutory power of sale of the suit property and granted an injunctive relief to the objector. The 2nd defendant/respondent was to pursue negotiations with the applicant Bank and or provide alternative security within Sixty (60) days;
 28. The applicant/Bank submitted and indicated that in its application dated May 28, 2022 it sought for leave to proceed with the exercise of its statutory power of sale over the property as the 2nd defendant had failed to pursue negotiations and or provide alternative security as directed by the court in its Ruling of May 22, 2020.
 29. The applicant argues that in its application it seeks to revive and exercise its statutory power of sale; from the reading of the Orders granted to the objector on May 22, 2022 and the Orders sought by the applicant in this instance, it is abundantly clear to this court that there are issues and orders sought that are different and distinguishable from each other; in any event, there are also factual details as to whether the 2nd respondent/defendant has complied with the orders by pursuing negotiations and or providing alternate security and these are facts that have to be proved through the process of evidence.
 30. A preliminary objection has been defined by the courts in a number of cases. In the case of *Mukisa Biscuits Manufacturing Co Ltd v West end Distribution Ltd* [1969] EA 696 a Preliminary Objection was defined as:-

“ 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 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”
 31. Also in the case of *Oraro .v. Mbaja* 2005 eKLR, Ojwang J (as he then was) described preliminary objection 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 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.”
 32. It is therefore not tenable for the court to proceed on the assumption that all the facts pleaded by the parties are correct and have been proved and also determined before authentication.
 33. The upshot, is therefore, that this court is satisfied that the preliminary objection doesn’t meet the threshold set out in the *Mukisa Biscuit’s case (supra)*.

Findings & Determination

34. For the forgoing reasons this court makes the following findings and determinations;



- i. This court finds that the preliminary objection raised does not meet the legal threshold and it is hereby overruled.
- ii. The costs of the preliminary objection shall be borne by the plaintiff
- iii. The court hereby directs that the suit do proceed for full hearing and determination;
- iv. Mention before the Deputy Registrar for Case Management on 7/12/2022.
- v. Hearing of the main suit on February 27, 2023.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 25th DAY OF NOVEMBER, 2022.

HON.A.MSHILA

JUDGE

In the presence of;

Ms. Abobo for the 1st and 3rd Defendants

Nandwa holding brief for Mokaya for the plaintiff

No appearance for the 2nd Defendant

