



REPUBLIC OF KENYA



**Korir v Karebe Gold Mining Ltd (Environment & Land Petition
1 of 2023) [2023] KEELC 18415 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND PETITION 1 OF 2023**

MN MWANYALE, J

JUNE 22, 2023

BETWEEN

CHESERET A KORIR PLAINTIFF

AND

KAREBE GOLD MINING LTD DEFENDANT

RULING

1. Before Court for determination, is the Notice of Preliminary Objection dated March 8, 2023 filed in response to both the petition dated 6/2/2023 and the Petitioners Notice of Motion application of even dated;
2. The grounds of the Preliminary Objection are that;
 - i. The application dated 6/2/2023 and the petition are *res judicata* and are contrary to Section 7 of the [Civil Procedure Act](#) (2010).
 - ii. The issues and the reliefs sought by the Petitioner have been determined in finally by the judgment issued by Justice Kibunja in Eldoret Misc Application No 15 of 2019 Cheseret arap Korir v Equatorial Land Holdings Limited.
 - iii. The entire application and petition herewith dated 6/2/2023 is *sub judice* by virtue of the proceedings at Environment and Land Court at Kapsabet ELC No E009 of 2022.
 - iv. The entire application and petition dated February 6, 2023 is fatally defective incompetent, misconceived, misplaced and abuse of the process of the Court of this Honourable Court and ought to be dismissed with costs.
3. The basis of the preliminary objection is thus *res judicata* as provided in Section 7 of the [Civil Procedure Act](#) and *sub judice* as provided for in Section 6 of the [Civil Procedure Act](#).



4. The said Section if argued would form pure points of law; the Respondent in support of the said Section of the Law has introduced a factual aspect of the existence of a judgment issued by Hon. Mr. Justice Kibunja in Eldoret Misc Application No 15 of 2019, between Cheseret Arap Korir vs Equatorial Land Holdings Limited and another, factual aspect of the existence of proceedings at Environment and Land Court at Kapsabet ELC Case No E009 of 2022.
5. A Preliminary Objection was defined in the case of Mukisa Biscuit Manufacturer Limited vs West End Distributor “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 implications out of pleadings and which if argued as a preliminary objection is in the nature of what used to be a demurer.....it raises a pure point of law which is argued on the assumption that all the acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion.”
6. In *Omondi vs National Bank of Kenya Limited and 2 others*, quoted in the decision in *J. N. and 5 others vs Board of Management of ST. G. School Nairobi and another*.

The Court went on to observe the following with regard to a preliminary objection.

“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.....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.”

7. The above excerpts shall guide the Court in determining the preliminary objection.
8. As observed in paragraph 4 of this ruling, whereas the Respondent has pleaded Sections 6 and 7 as the basis of the Preliminary Objection, the Respondent has made reference to factual issues, which the Court to ascertain, and hence has removed the objections so raised from being purely points of law.
9. In the result, the Court will have to determine factual aspects of the existence of the judgment and the other proceedings which as was observed in the *Omondi vs National Bank of Kenya Limited* moves it from the ambits of a preliminary objection.
10. The notice of preliminary objection is as drafted is thus not a pure of law envisaged in the Mukisa Biscuit Case.
11. The preliminary objection thus fails and it is dismissed. The Courts notes that the Preliminary Objection had raised issues of *sub judice* and *res judicata* in reply to the petition and application, and the Courts needs to interrogate the said issues once properly presented before the Court determines the application dated February 6, 2023.

DATED AND DELIVERED AT KAPSABET THIS 22ND DAY OF JUNE 2023.

HON. M. N. MWANYALE,

JUDGE.

In the presence of;

Ms. Owino holding brief for Mr. Orende for Respondent

Ms. Muhanda for Petitioner

