



Republic v County Government of Mombasa; Abdalla (Exparte Applicant) (Environment and Land Judicial Review Case E002 of 2023) [2023] KEELC 18141 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023
NA MATHEKA, J
JUNE 20, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA RESPONDENT

AND

SANIYA ABDALLA EXPARTE APPLICANT

RULING

1. The Respondent raised a preliminary objection on the hearing of the notice of motion application that;
 1. The suit is *Res Judicata* based on the Applicant's copy of the Judgement dated April 24, 2018 delivered by Justice Yano marked as SA-3.
 2. That the Judicial Review Application is an abuse of the court process and should be dismissed with costs in favor of the Respondent.
2. This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being:

In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
3. The above legal preposition has been made in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 where the court held that;

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

4. In the case of *Attorney General & Another v Andrew Mwaura Gitthinji & another* (2016) eKLR the court outlined the scope and nature of preliminary objection as;

- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

5. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the Respondent herein was properly brought before the court.

6. Section 6 and 7 of the *Civil Procedure Act* Cap 21 provides as follows:

Section 6.

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

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.”

7. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”



8. Therefore, for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. In the case of *Henderson v Henderson* (1843-60) ALL E.R.378, the court held that;

"...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

9. It follows then that a Court will apply the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.

10. In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, (2017) eKLR, 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."

11. The Court went on to state on the role of the doctrine:

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

12. On perusal of the court record I find that on the Exparte Applicant Saniya Abdalla is the daughter and administrator of the deceased Abdallah Mohammed Abdallah. That the late Abdallah Mohammed



Abdallah had instituted a suit against the Respondents in Mombasa ELC No 285 of 2015. That upon the hearing and determination of the suit a judgement was delivered dated May 24, 2018 and a decree dated November 4, 2022 where the suit was dismissed. The Exparte Applicant has now come to court under judicial review proceedings seeking similar orders as those in the previous suit against the same party and over the same subject matter. The Exparte Applicant seeks for orders of prohibition barring the Respondent from accessing the passage. Orders of mandamus compelling the Respondent to comply with the said decree and judgement in Mombasa ELC No 285 of 2015 and an order of mandamus compelling the Respondents to remove any and all cabro blocks on the suit properties. The suit was dismissed and if there was anything to enforce it would certainly not be by way of judicial review. There has been no appeal against that judgement or any application seeking to set is aside. I find that this suit is an abuse of the court process. I find that the instant suit is Res judicata ELC No 285 of 2015 *Abdalla Mohamed Abdalla v The County Government of Mombasa*. I find that the preliminary objection has merit and I strike out the judicial review application with costs to the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JUNE 2023.

N.A. MATHEKA

JUDGE

