



REPUBLIC OF KENYA



**Manyenyo v Muhavi & 5 others (Environment & Land Case
184 of 2021) [2023] KEELC 18130 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 184 OF 2021**

NA MATHEKA, J

JUNE 19, 2023

BETWEEN

EVANS MANYENYO PLAINTIFF

AND

HUDSON MUHAVI 1ST DEFENDANT

JOSHUA LUMULA 2ND DEFENDANT

ROSE MAKUNGU 3RD DEFENDANT

ANNA KANYANGA ODEMO 4TH DEFENDANT

JUDITH KHASOHA 5TH DEFENDANT

EPHRAIM AMUGUNE 6TH DEFENDANT

RULING

1. The Defendant herein raised a Preliminary objection to the Plaintiffs' preliminary Notice of motion and plaint dated and filed into this Honourable Court on the September 2, 2021 on the following grounds;
 1. The Plaintiff's application dated September 2, 2021 is incurably defective seeing that there is no prayer for a permanent injunction sought in the main suit sufficient to sustain the grant of interim orders sought in the instant application.
 2. This suit in its entirety is mischievous, vexatious and a total abuse of the process of this Honourable Court for the reason that it seeks to overturn the regular ruling and/or order of the Court in CMCC 499 OF 2020 delivered on the August 27, 2021 absence in the neither an application for setting aside and/or varying the said order complained of as envisaged under Order 40 Rule 7 of the Civil Procedure Rules nor an appeal against the said order as envisaged



under Order 42 of the Civil Procedure Rules 2010 and therefore the pleadings filed by the Plaintiff herein ought to be struck out accordingly;

3. This suit as filed offends the subjudice principle since a similar cause being CMCC 499 of 2020 between the similar parties over the same cause of action is still live awaiting determination and/or directions before the Courts below;
4. That the said Plaintiffs Notice of motion and the subsequent pleadings thereto (supporting affidavit, plaint, verifying affidavit, list of witnesses and witness statements) all dated and filed on the September 2, 2021 ought to be struck out and/or dismissed with Costs against the Plaintiff herein.

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 proposition has been made in the case of *Mukisa Biscuits Manufacturing Co Ltd vs 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 vs Andrew Mwaura Gitthinji & another (2016) eKLR the court outlined the scope and nature of preliminarily 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 Defendant 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 vs Henderson* (1843-60) ALL ER 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 vs 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 July 16, 2021 the court in CMCC E056 OF 2020 Hudson Muhavi and 4 others vs Evans Manyenyo did issue injunctive orders against the Applicant herein, this position is not disputed. This matter was between same parties hereto, the matter in issue was the same as the present one (land), the jurisdiction of the court that passed the decree is undisputed. There has been no appeal against that order or any application seeking to set it aside. Similarly, on the August 27, 2021 in CMCC 499 OF 2020 *Board of Trustees Bahari Pentecostal Church vs Evans Manyenyo* the Court sat and determined a proper application before it and issued order directed at the applicant herein restraining him from continuing the collection and administration of church funds and from generally participating in the affairs of the church. The application was defended and was determined on its merits. Again, on the September 2, 2022, the court, still in this matter, upon considering a competent application before it and in the interest of peace and security within the church community at Tudor area, issued orders directing the closure of the church pending hearing and determination of the matter before it. The orders made on that day have never been appealed against or set aside. Both CMCC 499 OF 2020 and CMCC E056 of 2020 are presently ongoing matters awaiting final determination on their merits. In the instant case the Applicant seeks an injunction against the Respondents for peaceful possession. I find that this suit is an abuse of the court process. I find that the instant suit is *res judicata* and/ or sub judice CMCC 499 OF 2020 *Board of Trustees Bahari Pentecostal Church vs Evans Manyenyo* and CMCC E056 of 2020 *Hudson Muhavi and 4 others vs Evans Manyenyo*. I find that the preliminary objection has merit and I strike out the application and this suit with costs to the Respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH JUNE 2023.

N.A. MATHEKA

JUDGE

