



Ole Sordo & another v County Government of Narok & 2 others (Environment & Land Case 2 of 2018) [2023] KEELC 18761 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 2 OF 2018
CG MBOGO, J
JULY 13, 2023**

BETWEEN

RIMOINE OLE SORDO 1ST PLAINTIFF

RASH ENERGY 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF NAROK 1ST DEFENDANT

**THE GOVERNOR OF THE COUNTY GOVERNMENT OF
NAROK 2ND DEFENDANT**

**THE COUNTY EXECUTIVE MEMBER OF LANDS - COUNTY GOVERNMENT
OF NAROK 3RD DEFENDANT**

RULING

1. Before this court for determination is the Notice of Motion application dated 24th April, 2023 filed by the defendants/applicants and is expressed to be brought under Order 2 Rule 15 (1) (a) of the [Civil Procedure Rules](#) and Sections 1A,1B and 3B of the [Civil Procedure Act](#) seeking the following orders: -
 1. Spent.
 2. That the honourable court be pleased to strike out the plaint herein as it discloses no reasonable cause of action in law and the suit thereof be dismissed forthwith.
 3. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and *inter alia* that the suit is not ripe for adjudication and this court should avoid entangling itself and or decline to entertain abstract disagreements overs speculative future events.



3. The application was supported by the affidavit of Godfrey Ndubi Kwena-the Town Administrator sworn on even date. In his affidavit, Kwena deposed that the suit is premature as it is based on futuristic events and the claim is predicated or rests on mere and illegitimate apprehension of threats on planned demolitions which have not been actualised to date. Further that the applicants do not intend to demolish the structures erected on the respondent's property known as Land Reference Plot 193 Block 5 without just cause and due process.
4. The applicants further deposed that no administrative decision has been formalised and its effects felt in a concrete way to invite judicial interference with such administrative decision. Further, that it is just and fair to strike out the suit for failure to disclose a reasonable cause of action if at all as there is no factual matrix upon which the respondent's claim is founded upon. Further, that there is no live dispute and unless the application is heard, they stand to suffer irreparably as the respondents shall be granted permanent and or perpetual order where they are not deserved.
5. The 2nd plaintiff/respondent filed grounds of opposition dated 9th May, 2023 challenging the application on the following grounds:-
 1. The substantive prayer in the application is at prayer 2 thereof, to wit, "the Hon. Court be pleased to strike out the plaint herein as it discloses no reasonable cause of action in law and the suit thereof be dismissed forthwith.
 2. This prayer is *res judicata* the decision of this Hon. Court (differently constituted) dated 24th July, 2019 {the ruling} where the honourable court introduces the subject of its determination to wit, "what is before the court for determination is a notice of preliminary objection dated 15th March, 2018 in which the respondent contends that the suit herein does not disclose any cause of action and consequently they sought that the plaintiff's notice of motion together with the plaint that was filed be struck out with costs."
 3. There has been no appeal of this ruling nor any review of it since 24th July 2019. A court of law cannot entertain a plea or issue that has been determined in its primary jurisdiction under the doctrinal principle of *res judicata*.
 4. Order 2 Rule 15 (2) of the *Civil Procedure Rules*, upon which the defendants raise the application, states that "no evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made."
 5. The import as has been held in judicial decisions interpreting this rule of procedure, is that pleadings can only be struck out if hopelessly defective and that hopelessness should be clear on the face of the pleadings without a need to examine the contingent evidence by way of witness statements and documents filed.
 6. Whether the suit is ripe for adjudication or not;whether it rests on contingent future events or not;whether the dispute is sufficiently developed or not;whether the defendants have threatened the impugned harm or not are all matters that can be judiciously determined by examining the evidence adduced by the litigants in totality and not merely perusing the pleadings thereof.
 7. These claims, therefore disavail themselves from determination by an application under Order 2 Rule 15 (1)(a) of the *Civil Procedure Rules, 2010* and can be adjudicatorily finalised through a trial and final judgment thereof.



8. There is in existence in this matter an order of this Hon. Court restraining the defendants from interfering with the suit premises pending the hearing and determination of the suit. Their compliance with this court order is evidence that the court order sought in the plaint is of the most usefulness rather than proof that the defendants do not intend to interfere with the premises.
 9. The application herein is for the foregoing reasons, unmerited, misconceived, misplaced and therefore an abuse of the court process.
 10. The application herein should be dismissed with costs to the 2nd plaintiff.
6. The application was further opposed by the replying affidavit of the 1st respondent/plaintiff which was sworn on 11th May, 2023. The 1st respondent/plaintiff deposed that the application lacks merit as it seeks to invite this court to sit on a matter that it has already deliberated on yet the applicants have not provided sufficient evidence to demonstrate that the respondents claim is bound to fail or constitutes an abuse of the court process.
 7. On 15th May, 2023, this court directed that the application be canvassed by way of written submissions. On the 5th June, 2023 the applicants filed their written submissions dated 2nd June, 2023.
 8. On the issue of *res judicata*, the applicants submitted that this court cannot be said to be sitting on appeal over its own decision as there was no substantive determination on the merits of the question of whether the respondents suit discloses a reasonable cause of action and in the absence of such determination, this court will be exercising first instance jurisdiction on a matter for which it has competence to determine.
 9. Further, that the ruling delivered on 24th July 2019 is distinct from the instant application as it did not determine whether the plaint discloses a reasonable cause of action and that unlike the preliminary objection, there is an avenue for adducing evidence and its only contention is that the evidence is insufficient. The applicants submitted that *res judicata* is a matter of fact and not law and would require evidence to prove. The applicants relied on the case of [Okiya Omtatah Okoiti v Attorney General & another](#) [2022] eKLR.
 10. The applicants further submitted that grounds of opposition only relate to points of law and therefore the grounds of opposition filed by the 2nd respondent are not proper and would need to call for evidence to substantiate the veracity of the said averments. Reliance was placed in the cases of [Daniel Kibet Mutai & 9 Others v Attorney General](#) [2019] eKLR, [Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited](#) [2010] eKLR and [Faustina Njeru Njoka v Kimunye Tea Factory Limited](#) [2022] eKLR.
 11. The applicants further submitted that for the bar of *res judicata* to be raised, evidence of previous proceedings as between the same parties on the same subject matter and for which there is a substantive determination by a court of competent jurisdiction must be brought to the court's attention. The applicants relied on the cases of [George Kamau Kimani & 4 Others v County Government of Trans Nzoia & another](#) [2014] eKLR and [Henry Wanyama Khaemba v Standard Chartered Bank Limited & another](#) [2014] eKLR and submitted that the bar of *res judicata* as raised cannot be sustained and cannot suffice to defeat the instant application.
 12. The applicants further submitted that there is no substantive determination on merits of the question of whether the plaint discloses a reasonable cause of action and in the absence of such determination, this court will be exercising first instance jurisdiction on a matter for which it has competence to determine. The applicants relied on the cases of *Greenhalgh v Mallard* (1) (1947) 2 ALL ER 257,



- [Kennedy Mokuwa Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende](#) [2022] eKLR, [The Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR and [Republic v Baua Ali & another Ex parte Mohamed Gituma & another](#) [2021] eKLR.
13. The applicants further submitted that the plaint does not disclose a reasonable cause of action in law if at all and the same is not ripe for determination. The applicants relied on the case *Abbott Laboratories v Gardener* 387 U.S 136 (1967). Further, that the plaint consists of allegations that are merely illusory, imaginary, abstract in nature and without factual matrix for determination. Reliance was placed in the cases of [Joseph Mboha v Speaker County Assembly of Siaya & another](#) [2020] eKLR, [Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others](#) [2016] eKLR and [Muchanga Investment Limited v Safari Unlimited \(Africa\) Limited & 2 Others](#) [2009] eKLR.
 14. In conclusion, the applicants submitted that the doctrine of ripeness is applicable to the circumstances of this case and it prohibits this court from entertaining the respondents' suit. To buttress this submission, the applicants relied on the cases of [Republic v Nairobi City County Assembly; Ex parte Applicant; Wamunyoro Investments Limited](#) [2020] eKLR and [National Assembly of Kenya & another v Institute for Social Accountability & 6 Others](#) [2017] eKLR.
 15. On the 23rd June, 2023 the 1st plaintiff/respondent filed written submissions dated 22nd June 2023 and raised two issues for determination as listed below:-
 - i. Whether the plaintiffs' case discloses a cause of action;
 - ii. Who should bear costs.
 16. On the first issue, the 1st plaintiff/respondent submitted that it is not in dispute that he is the absolute and registered owner of land reference plot number 193 block 5 and that he approached this court with great concern that the applicants/defendants will demolish the structures on the suit property and that the apprehension arises out of the defendants/applicants unlawful demolition of the 1st plaintiff/respondent buildings situated in plot number 55 block 4 which the defendants/applicants maintain that their actions were executed lawfully. As such, the 1st plaintiff/respondent submitted that the plaint discloses a reasonable cause of action. The 1st plaintiff/respondent relied on the cases of [Karl Webner Claasen v Commissioner of Lands & 4 Others](#) [2019] eKLR and [D.T Dobie & Company \(Kenya\) Limited v Joseph Mbaria Muchina & another](#) [1980] eKLR.
 17. The 1st plaintiff/ respondent further submitted that the looming threat of demolition hanging over his property coupled with the defendants/applicants' previous actions in demolishing plot number 55 block 4 without notices, necessitates the intervention of this honourable court and that dismissing the plaintiffs' claim without due consideration would be an injustice. Reliance was placed in the case of [Susan Rokib v Joyce Kandie & 6 Others](#) [2018] eKLR.
 18. The 1st plaintiff/respondent further submitted that the present suit raises triable issues which are worthy of this court's determination and the facts raised need interrogation during the hearing. Further, that the 1st plaintiff/respondent who has a private property under Article 40 (1) of [the Constitution](#) needs to be protected from any threat, violation and or infringement of fundamental rights. Further, that the defendants/applicants' statement of defence raises a *prima facie* defence and this court ought to allow it to trial for hearing and determination as was held in the Court of Appeal decision in [Ternic Enterprises Limited v Waterfront Outlets Limited](#) [2018] eKLR and [Lalji t/a Vakkepp Building Contractors v Casousel Limited](#) (1989) KLR.
 19. In conclusion, the 1st plaintiff/respondent submitted that the application be dismissed with costs.



20. On the 12th June, 2023 the 2nd plaintiff/respondent filed written submissions dated 7th June, 2023 and raised four issues for determination as found below: -
- i. Whether the plaint can be struck out under Order 2 Rule 15 (1)(a) of the Civil Procedure Rules for reasons disclosed in the application;
 - ii. Whether the application seeks orders that were determined by this court on 24th July 2019 and the effect thereof;
 - iii. Whether this is the proper stage to raise the doctrine of ripeness in opposition to the suit;and
 - iv. Costs.
21. On the first issue, the 2nd plaintiff/respondent submitted that with regards to Order 2 Rule 15 (1)(a) as read with Order 2 Rule 15 (2) of the Civil Procedure Rules, there is a further particular requirement that no evidence shall be admissible on such an application. Reference was made to the cases of D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR, Yaya Towers Limited v Trade Bank Limited (In liquidation) [2000] eKLR and Michael Kalani Muatha v Kyalo Mwikya & another [2022] eKLR.
22. The 2nd plaintiff/respondent urged this court to ignore and disregard the supporting affidavit as it a misnomer for the reason that it seeks to admit evidence that cannot happen to an application under Order 2 Rule 15 (1)(a) of the Civil Procedure Rules. Reference was made to paragraph 40 of the applicants/defendants written submissions. Also, that this court cannot look beyond the impugned pleading which is the plaint dated 9th January, 2018.
23. The 2nd plaintiff/respondent further submitted that the court has a limited window to examine the witness statements and documents filed alongside the impugned pleadings within the usual parameters when it is examining the application for being scandalous, prejudicial or abuse of court process. However, there is an absolute bar to the examination of witness statements, affidavits, documents and other exhibits and that the pleadings on the face of it must be hopeless and incurable through amendment without recourse to or sight of the attendant evidence.
24. The 2nd plaintiff/respondent further submitted that whether the suit is ripe for adjudication or not and whether it rests on contingent future events or not are all matters that can only be determined by examining the evidence adduced by the litigants in totality and not merely perusing the pleadings thereof.
25. On the second issue, the 2nd plaintiff/respondent submitted that the ruling delivered by Kullow, J dated 24th July, 2019 was not appealed and neither did the applicants/defendants move for a review thereof and instead they pushed for a hearing date of the main suit on their application and consensus, the same was marked ready for hearing.
26. The 2nd plaintiff/respondent questioned whether the defendants/applicants would have liked the ruling delivered on 24th July, 2019 to have used far more complex jargon than what was used as it does not change the fact that a dispute of law was put before a court of competent jurisdiction that rendered its decision on the matter which decision to date has not been appealed against. Further, that if this court allows parties to bring the same prayers multiple times, it would be inviting this court to embarrassment and drag the judicial system into disrepute.
27. On the third issue, the 2nd plaintiff/respondent submitted that the doctrine of ripeness originates in judicial review and constitutional petitions and is a defence to a suit or a petition to be pleaded in the statement of defence or response and thereafter be proved at the trial. Further, that this court



submitted that the authorities cited by the defendants/applicants are all judgments meaning that the cases were tried fully. Therefore, the doctrine of ripeness cannot be determined preliminarily through an application before trial as by its nature, it deals with factual matters that are often in contestation and which must be subjected to the adversarial tools of trial for the courts to arrive at the truth.

28. The 2nd plaintiff/respondent further submitted that the doctrine of ripeness in opposition to the suit cannot be raised procedurally at this stage as it sets an unnecessary and unprocedural mini trial before the trial. As such, the 2nd plaintiff/respondent submitted that the application should be dismissed with costs.
29. I have carefully analysed and considered the application, grounds of opposition, replying affidavit and the written submissions and authorities cited and the sole issue for determination is whether the application has merit.
30. Order 2 rule 15 of the Civil Procedure Code which deals with striking out of pleadings, which provides as follows: -

“ 15 At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) It discloses no reasonable cause of action or defence in law; or
- (b) It is scandalous, frivolous or vexatious; or
- (c) It may prejudice, embarrass or delay the fair trial of the action; or
- (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

31. The principles guiding the striking out of pleadings and cases are now well settled. These principles, as set out in *D.T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1, are to the effect that that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.
32. The Court of Appeal in the case *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR restated these principles as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd v Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case *inter alia* as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”



We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of *Cail Zeiss Stiftung v Ranjuer & Keeler Ltd and others* (No.3) (1970) ChpD 506, where the Lord Justice said: -

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

33. As the court observed in *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR

“If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

34. The rationale behind this is the fact that striking out of a pleading and the exercise of the powers for summary procedure are draconian, coercive and drastic and therefore, striking out of a pleading must be done with tremendous caution because a litigant should never be driven from the seat of justice without being heard.

35. In the instant case, it is the defendants’/ applicants’ case that the plaint ought to be dismissed for the reasons that it is based on futuristic events and therefore not ripe for adjudication and that it discloses no reasonable cause of action. I have perused the record herein and I do note that the firm of Kemboy Law, advocates for the defendants/applicants at the time filed a notice of preliminary objection dated 15th March, 2018 on grounds that the plaint discloses no reasonable cause of action and sought that the same be struck out. A notice of change of advocates was filed then by the firm of advocates now on record for the defendants/applicants dated 27th February, 2023 who filed the instant application.

36. The plaintiffs/respondents contended that the application is *res judicata* as it was heard and dealt with by Kullow, J in his ruling delivered on 24th July, 2019.

37. Section 7 of the *Civil Procedure Act* provides for the ingredients of *res judicata* which states that: -

“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.”

38. The *Civil Procedure Act* has also provided explanations with respect to the application of the *res judicata* rule. Explanation 1-6 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.

Explanation (4) — Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) — Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) — Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

39. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- “(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.”

40. A look at the ruling delivered by Kullow, J on 24th July, 2019 show that the parties in the application were the same, litigated under the same title and sought orders similar to the instant application and which was heard and determined. The only twist to it was that the subject for determination was a notice of preliminary objection. For purposes of clarity, I will reproduce the ruling delivered on 24th July 2019 as hereunder: -

“RULING

What is before the court for determination is a Notice of Preliminary Objection dated 15th March, 2018 in which the Respondent contends that the suit herein does not disclose any cause of action and consequently they sought that the Plaintiff’s Notice of Motion together with the Plaint that was filed in court be struck out with costs.

The Defendants contend that the Plaintiffs entire suit is based on unfounded apprehension that the Defendants want to interfere with the Plaintiffs rights of ownership to the suit property following the carrying out of demolitions within Narok Township and the suit land marked for demolition and further that they received verbal threats from the office of the Defendant.

The Defendants allege that the Plaintiff has not produced any documents in support of their contentions. By consent of the parties it was agreed that the Preliminary Objection be disposed off by way of written submissions. The Defendants contend that the suit herein is a mere precautionary measure grounded on the basis of apprehension arrived purely at the conclusion of the Plaintiff’s imagination.



The Plaintiff had filed two separate sets of submissions one that is jointly for the 1st and 2nd Plaintiffs and another for the 2nd Defendant alone.

It is the contention of the 1st Plaintiff that the 1st, 2nd and 3rd Defendants have continued to threaten them on the basis that the suit land sits on public property and it is because of the aforesaid threats that they sought the refuge of the court.

It is the 1st Plaintiff's contention that the Preliminary Objection raised by the Defendants does not raise any issues of law and what has been raised as purely matter of facts and thus the said Preliminary Objection has been brought in bad faith and that the Defendants are avoiding the hearing of the suit herein on merit. The Plaintiffs allege that the suit herein raises triable issues and that the issues raised by the Defendants can't be determined in a summary manner.

I have read the Preliminary Objection before me and the submissions filed by learned counsel on behalf of the Plaintiffs and Defendants. What constitutes a Preliminary Objection and the manner of hearing the same is now well settled. In the case of *MUKISA BISCUIT MANUFACTURING COMPANY LIMITED v WEST END DISTRIBUTORS LIMITED* (1969) EA 696 the court observed: -

“A Preliminary Objection consisting of point of law which has been pleaded or that arises by a clear implication out of the pleadings and which if argued as a preliminary point will dispose off the suit.”

I have looked at the Preliminary Objection before me and the submissions filed by counsel the test to be applied is whether the Preliminary Objection consists of issues of law which are pleaded, points of law that arise from pleadings and which if argued will dispose the suit. In the instant matter the point of law raised by the Defendant is couched as “The suit herein does not raise any cause of action”.

A cause of action in my mind relates to whether the facts pleaded disclose any claim. The facts that the Defendant issues are contested by the Plaintiffs and thus does not make their pleading a non-starter. Pleadings that do not disclose any cause of action must be so hopelessly pleaded that they raise no issues to be determined.(with emphasis)

In the case of *EL-BUSAIDY v COMMISSIONER OF LANDS & 2 OTHERS* (2002) eKLR the court stated:-

“The Preliminary Objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of Section 136(1) to it to make the Plaintiff's pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff's facts as pleaded. Clearly therefore, the Defendant's preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.”

From the foregoing it is my view that the Preliminary Objection dated 15th March, 2018 does not raise any points of law and I accordingly dismiss the same with costs.

41. A plain reading of the ruling shows that the issue of whether the plaint discloses a reasonable cause of action was dealt with substantively as the court applied its mind to whether the facts pleaded disclose any claim and I fail to understand how else the defendants/applicants would have wanted the same to be addressed.



42. I find the instant application a waste of court's precious time as this is an issue that has already been dealt with. As such, the Notice of Motion application dated 24th April 2023 is hereby dismissed with costs to the plaintiffs/respondents. Mention on 26th July 2023 for further directions. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 13TH DAY OF JULY, 2023.

HON. MBOGO C.G.

JUDGE

13/7/2023

In the presence of:

CA:T.Chuma

