



REPUBLIC OF KENYA



**Ngala & 2 others v Randu & 2 others (Land Case 56 of 2020)  
[2023] KEELC 19334 (KLR) (29 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19334 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
LAND CASE 56 OF 2020  
MAO ODENY, J  
AUGUST 29, 2023**

**BETWEEN**

**VINCENT KAZUNGU NGALA ..... 1<sup>ST</sup> PLAINTIFF  
RODGERS KARISA NGALA ..... 2<sup>ND</sup> PLAINTIFF  
ROBERT KADSITU NGALA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**ZAWADI KAZUNGU RANDU ..... 1<sup>ST</sup> DEFENDANT  
EMMANUEL KAZUNGU RANDU ..... 2<sup>ND</sup> DEFENDANT  
KILIFI COUNTY LAND SURVEYOR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a notice of preliminary objection dated June 13, 2022 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the following grounds:
  - a. That the entire plaint dated July 20, 2020 does not disclose any reasonable cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - b. The suit is scandalous, frivolous and vexatious in so far as it discloses no basis for the initiation of the claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants to justify the expending of judicial time.
  - c. The suit is an abuse of the process of court.
  - d. The plaintiffs did not prefer an appeal from the decision Ujeri Alternative Dispute Resolution Board.
  - e. This matter is *res-judicata* for having been heard and determined by competent quasi-judicial institutions.



- f. The application offends the objectives of the Civil Procedure Act and rules of timely disposal of suits since it is repetitive.
2. Counsel submitted on the 1<sup>st</sup> issue that the plaint does not disclose any cause of action against the defendants and that the same is scandalous, frivolous and vexatious and relied on the case of Vivian Muia v Mzoori Limited [2017] eKLR where the meaning of the words scandalous, frivolous and vexatious were explained.
3. Ms Mwangi further submitted that this matter was heard and determined by the Ujeri Alternative Dispute Resolution Committee where the verdict was in favour of the defendants but the plaintiffs did not prefer an appeal. She therefore submitted that plaintiffs' case is marred with malice and they only want to use the court process to intimidate the 1<sup>st</sup> and 2<sup>nd</sup> defendants hence an abuse of process. Counsel relied on the case of Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others civil appeal No 25 of 2002 (2009) e KLR 229 on the issue of abuse of court process.
4. On the issue whether this suit is res judicata, it was counsel's submission that this matter was heard in 2016 before the Ujeri Alternative Dispute Resolution Committee a quasi-judicial institution where both the plaintiffs, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were present and relied on sections 3, 4 (2), section 8(1), 8(9) of the Land Disputes Tribunal (Repealed)
5. Ms Mwangi relied on the case of Jumaa Mukuma v Musembi Mutunga & another [2022] eKLR where the court upheld a preliminary objection on the ground that the suit was *res-judicata* having been heard and determined by competent quasi-judicial institution.
6. Counsel therefore urged the court to uphold the preliminary objection as prayed.
7. The plaintiffs did not file any submissions as had been agreed by counsel

### **Analysis And Determination**

8. The grounds of preliminary objection as filed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants are a mouthful. There is only one issue that I will deal with in respect of the preliminary objection namely that the suit is res judicata.
9. The Court of Appeal in the case of Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR stated:
 

“...A preliminary objection 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...”
10. The other grounds that the suit is scandalous, frivolous and vexatious and that the plaintiffs' suit is marred by malice cannot qualify as a point of law. The issues must be subjected to a full hearing to explain how scandalous or malicious the suit is. The court cannot dispose of such issues without evaluating them through evidence.
11. In the case of Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR the court observed as follows:
 

“A pleading is scandalous if it states (i) matters which are indecent or (ii) matters that are offensive, or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party, or (v) that charge the opposite party with bad faith.....”



A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the court.....

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for the purpose of annoyance...”

12. As earlier stated this does not fall under the ambit of preliminary objections, which are based on pure points of law.
13. 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.”
14. The test in determining whether a matter is res judicata was summarized in the *Bernard Mugo Ndegwa v James Nderitu Githae and 2 others* (2010) eKLR, as follows:
  - a. The matter in issue is identical in both suits;
  - b. The parties in the suit are the same;
  - c. Sameness of the title/claim;
  - d. Concurrence of jurisdiction; and
  - e. Finality of the previous decision.
15. The applicants claim that this matter is res judicata as it had been heard and determined by the Ujeri Alternative Dispute Resolution Committee. The committee rendered their verdict that was not signed by the parties who were present. The verdict was not conclusive from the language used giving the parties an option to negotiate further.
16. There is further no evidence that the award was ever adopted as an order of the court and therefore no decree was extracted to that effect. The committee did not have the mandate to hear land ownership disputes and therefore this matter has not been determined on merit as was held in the case of *Justus Atsieno Odhiambo v Peter Onyango Achieng* [2019] eKLR. Further the document filed as the award does not look like a proper award as per the *Land Disputes Tribunal Act*(repealed)
17. I therefore find that the preliminary objection lacks merit and is therefore dismissed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 29<sup>TH</sup> DAY OF AUGUST, 2023.**

**M.A. ODENY**

**JUDGE**

