



Kenya Broadcasting Corporation v Kensko Agro Produce Limited & 2 others (Environment & Land Case 196 of 2021) [2023] KEELC 20105 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 196 OF 2021
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

KENYA BROADCASTING CORPORATION PLAINTIFF

AND

KENSKO AGRO PRODUCE LIMITED 1ST DEFENDANT

LAND REGISTRAR, MOMBASA 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The 1st Defendant has raised a Notice of Preliminary Objection on grounds that:
 - a. This suit is a gross abuse of the court process and the court lacks jurisdiction to hear and determine the Application dated June 7, 2023 and the main suit since there is prevailing judgment issued by courts of competent jurisdiction in respect of the same subject property i.e Mombasa ELC 282 of 2013 and Civil Appeal 82 of 2018', thus, the suit offends the mandatory provisions of Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
 - b. That this suit is filed in bad faith and it should be dismissed with costs.
2. The 1st Defendant stated that the suit herein is res judicata since the issues in dispute which are the subject matter of the suit herein were heard and determined in ELC NO 282 of 2013 - Mombasa, and Civil Appeal No 82 of 2018 Mombasa, thus the suit herein is a gross abuse of the court process and the court herein does not have jurisdiction to hear and determine the application and the main suit for being res judicata. The 1st Defendant herein was a third party and Housing Finance Corporation was the Plaintiff who had purchased LR Nos Mombasa / Block XXI/ 580, Mombasa Block xx1/581 and Mombasa / Block XXI/ 582 which were a subdivision of Mombasa/ block XX1/577 from the 1st defendant herein.



3. That based on the foregoing the dispute as to the procedure of issuing, granting and registration of all that property formally registered as MOMBASA/ MUNICIPALITY BLOCK XXI/577 and the resultant subdivisions i.e., Mombasa / Block XXI/ 580, Mombasa Block XXI/581 and Mombasa / Block XXI/ 582, Mombasa / Block XXI/ 583 and Mombasa / Block XXI/ 584 was heard and determined with finality and all the appellate remedies available to the aggrieved parties exhausted.
4. There is a similar suit filed by Ethics and Anti-Corruption Commission on behalf of the Plaintiff herein i.e. ELCC NO. E051 OF 2023, in which they are seeking consolidation of the two suits. The prayers in that suit are a duplication of the prayers in all the previous suits since the subject matter is substantially the same. They submit that the Applicant/ Plaintiff herein has not approached equity with clean hand and has intentionally failed to make disclosure of material facts that there were previous suits filed by Kenya Broadcasting Corporation that were heard and determined even on appeal in respect of the same subject matter. The institution of the current suit by the Applicant/ Plaintiff herein is therefore a gross abuse of the court process and this court does not have Jurisdiction to entertain the suit for being res judicata.
5. The Plaintiff submitted that the present suit does not fall within the purview of section 7 of the [Civil Procedure Act](#) in order to have it qualified under the doctrine of res judicata and furthermore, he objection does not the threshold of preliminary objection as was held in Mukisa Biscuit case.
6. That the doctrine of res judicata to apply, the matter must be directly and substantially in issue in the previous and in the former suit and the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit. The dispute in ELC 282 of 2013 was instituted by Housing Finance Company Ltd vs Kenya Broadcasting Corporation and Kesko Agro Products as third Party and the issue revolved around the sale and purchase of Mombasa Block XXI /580, 581 and 582. In the said proceedings the 1st defendant denied any correlation between the mentioned suit properties and the said Mombasa Block XXI/577. Further the dispute therein challenged the titles held by Housing Finance. The present suit touches on Mombasa Block XXI/583 and 584 and is between Kenya Broadcasting Corporation vs Kensko Agro Products and the Attorney General. The court is yet to pronounce itself with regard to the two referenced titles which are being held in the name of the 1st Defendant. The suit does not therefore offend the provisions of Section 7 of the Act.
7. That the 1st Defendant did not disclose the existence of the two subject properties in the present suit or that titles had been issued in its name or that they had any correlation with the dispute that was before the previous trial courts. It is therefore estopped from alleging that the dispute herein was already determined by the court and even if that was the case, we urge the court to then find that this is a special circumstance that the doctrine of res judicata will not apply.
8. Before I delve into the Preliminary Objections raised by the 1st Defendant, it is important that I establish if they meet the test laid down in the case of *Mukisa Biscuits Manufacturing Co. Ltd...vs... West End Distributors Ltd (1969) EA 696*, Sir Charles Newbold said;

' 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 is the exercise of judicial discretion.'



9. In *Oraro vs Mbaja 2005 eKLR*, Ojwang J (as he then was) described it as follows;

' I think the principle is abundantly clear. A 'Preliminary Objection' correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.'

10. It is clear therefore that a Preliminary Objection must only be based on pure points of law and if for any reason facts are involved, then they must not be contested. The Preliminary Objections raised by the 1st Defendant raise the legal issues that the Plaintiff's suit is resjudicata and that this Court lacks the jurisdiction to determine the suit. Those are pure points of law. The parties have made reference to previous cases involving the suit property. Those cases are not contested. The test laid down in the case of *Mukisa Buscuit Manufacturing Co Ltd (supra)* has been met. I shall now consider the merits or otherwise of the 1st Defendant's Preliminary Objection.

Section 7 of the [Civil Procedure Act](#) Provides

' 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.'

11. The provision is on the fundamental doctrine that there should be an end of litigation. The doctrine of res judicata may be pleaded by way of estoppel so that where a judgment has been given future and further proceedings are estoppel. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

12. Res judicata is normally pleaded as a defence to a suit or cause of action that the legal rights and obligations of the parties have been decided by an earlier judgment, which may have determined the questions of law as well as of fact between the parties. In other words, res judicata will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction. In that respect, the Court of Appeal held in *The [Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others, \(2017\) eKLR](#)*, that.

' 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.'



13. Expounding further on the essence of the doctrine this Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR* pronounced itself as follows;

' The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.'

14. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* (supra), 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.'

15. On the issue as to whether this suit is res judicata, the court wishes to rely on the case of *George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014), eKLR*, where the Court held that;

' I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.'

16. From the submissions the dispute in ELC 282 of 2013 was instituted by Housing Finance Company Ltd vs Kenya Broadcasting Corporation and Kesko Agro Products as third Party and the issue revolved around the sale and purchase of Mombasa Block XXI/580, 581 and 582 this one touches on Mombasa Block XXI/583 and 584. This court has to ascertain facts raised by both counsel as it is their word against each other. Where there are disputed facts to the existence of certain facts then the court must



call for evidence to prove the same. I find that this preliminary objection is not merited and it is dismissed with costs.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

