



**Jepkemboi & another v Ngisirei (Environment & Land Case
E004 of 2023) [2023] KEELC 20230 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E004 OF 2023
MN MWANYALE, J
SEPTEMBER 25, 2023**

BETWEEN

JANE JEPKEMBOI 1ST PLAINTIFF

BETHWEL KIBICHI LIMO 2ND PLAINTIFF

AND

KIBET ARAP NGISIREI DEFENDANT

RULING

1. Before Court for determination is the Notice of Preliminary Objection dated March 16, 2023, seeking the striking out of the suit on grounds *inter alia*;
 - i) The Honourable Court herein lacks jurisdiction to hear and determine this suit, since
 - ii) the suit offends the provisions of Section 7 of the [Civil Procedure Act](#)
 - iii) The suit is misconceived in law and amount to abuse of Court process.
2. The foundation of the preliminary Objection is paragraphs 7, 8 and 9 of the statement of defence filed by the Defendants and dated March 16, 2023. In the said statement of defence, the Defendant alludes to a previous suit, to wit, Eldoret High Court Civil Suit No 36 of 2005, and pleads that this suit is resjudicata, hence the Notice of Preliminary Objection.
3. Parties were directed to file written submissions on the Notice of Preliminary Objection.
4. The Defendant submits that there existed a previous suit to wit Eldoret High Court Civil Case No 36/2005 wherein a consent order was recorded and that the Plaintiff herein are suing on behalf of the late Esther Lelei who was a party to the previous suit.
5. In support to the submissions, the Defendant has cited the decision in the case of *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others* 2017 (eKLR).



6. In response the Plaintiff submits that the issue raised in the Preliminary Objections are issues of fact which the Court has to ascertain the correctness and truthfulness; including issue of fraud on the consent entered in Eldoret High Court suit Number 36/2005.
7. The Plaintiff submits that in view of the issues of facts which need to be ascertained there is thus no proper issues capable of being raised in a preliminary objection.
8. In this regard the Plaintiff places reliance in the decision in the case of *Henry Wanyama Khaemba -vs- Standard Chartered Bank Limited and Another* (2014) eKLR.
9. On the strength of the above decision as well as the Mukhisa Biscuit decision the plaintiff prays for a dismissal of the Notice of Preliminary Objection.
10. I have analyzed the application before Court, submissions of the parties, as well as the authorities in support of each of the parties' position, and I frame two issues for determination.
 - i) Whether or not there is a proper preliminary objection before Court
 - ii) whether this suit is resjudicata
11. A preliminary objection was defined in *Mukhisa Biscuit Manufacture Limited vs West end Butchery Limited* as follows; ... "so far as I am aware of preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings and if argued as a preliminary objection is in the nature of what used to a deliverer. It raises a pure point of law, which is argued on the assumptions that all acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....."
12. Similarly in *Omondi vs National Bank of Kenya Limited and 2 others*, as quoted in the decision of *J. N. and 5 others vs Board of Management St. G. School Nairobi and another* where it was held; "a preliminary objection consists of a point may dispose off the suit.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....."
13. The objection raised herein is that this suit is resjudicata. Whereas resjudicata is a pure point of law, it needs to be ascertained by fact of existence of the previous suit.
14. In this case the Court has to ascertain factual information of the existence of a consent filed in Eldoret High Court Civil Case No. 36/2005.
15. That ascertain of information thus removes the preliminary objection from being a pure point of law as envisaged in the decisions cited above.
16. it follows therefrom that there is no proper preliminary objection before Court capable of determining the suit in limine. The issue of resjudicata, shall thus be dealt with in the normal hearing of the matter to ascertain whether indeed this suit is resjudicata.
17. The upshot is that there is no preliminary objection properly before Court and the Preliminary Objection dated March 16, 2023, is dismissed with costs in the cause.

DATED AND DELIVERED AT KAPSABET THIS 25TH DAY OF SEPTEMBER, 2023.

HON. M. N. MWANYALE

JUDGE

