



Waita v National Land Commission & another (Miscellaneous Application E002 of 2023) [2023] KEELC 21018 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21018 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION E002 OF 2023
NA MATHEKA, J
OCTOBER 25, 2023**

BETWEEN

MARY WARUGURU WAITA APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

STEPHEN MBAKI WAITA 2ND RESPONDENT

RULING

1. The 2nd Respondent herein has raised an objection in limine to the Notice of Motion dated 23rd January 2023 and apply for dismissal of the same with costs on the following grounds;
 1. The Applicant Mary Waruguru Waita has no locus standi to file suit as a beneficiary without Letters of Administration Intestate or Ad litem of the Estate of George Francis Waita.
 2. The Notice of Motion is incompetent, null and void ab initio as the Applicant is not a party to the substantive suit Mombasa ELC No. 50 of 2021 Stephen Mbaki Waita versus National Lands Commission (2) Kenya National Highways Authority and leave was neither applied for nor granted to enjoin Applicant as a party before hearing and determination of the suit.
 3. An Order in a miscellaneous application cannot stay, set aside, vary or review judgment in a substantive suit.
 4. The Ex-parte Order issued on 9th February 2023 for more than 14 days is irregular and at variance with the judgment and Decree issued by the Court upon determination of the substantive suit Mombasa ELC No. 50 of 2021 Stephen Mbaki Waita versus National Lands Commission (2) Kenya National Highways Authority on 29th September 2022.
 5. The Notice of Motion dated 23rd January 2023 is defective for non-joinder of a material party in that it has left out a Defendant namely Kenya National Highways Authority the 2nd Defendant



in the substantive suit Mombasa ELC No. 50 of 2021 Stephen Mbaki Waita versus National Lands Commission (2) Kenya National Highways Authority.

6. Mombasa ELC No. 50 of 2021 Stephen Mbaki Waita versus National Lands Commission (2) Kenya National Highways Authority is res judicata and cannot be resurrected by a miscellaneous application which procedure is unknown to law.
 7. The Applicant is estopped from canvassing matters that have been fully adjudicated upon in the main suit by dint of the doctrine of issue estoppel.
 8. No objection to the Awards the subject matter of litigation in Mombasa ELC No. 50 of 2021 Stephen Mbaki Waita versus National Lands Commission (2) Kenya National Highways Authority were raised or lodged by the Applicant within the prescribed period or at all and consequently the Applicant is non-suited.
 9. The Ex-parte Order granted on 9th February 2023 has stayed the mandatory Order granted by Court on 29th September 2022, Decree issued on 21st December 2023 and taxation of bill of costs thereby denying the 2nd Respondent the fruits of his judgment delivered by the same Court.
 10. The Environment and Land Court lacks jurisdiction to hear and determine succession issues.
2. Before I delve into the Preliminary Objections raised by the 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, the court stated that;
- “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.”
3. 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.”
4. 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 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 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 Defendant’s Preliminary Objection.
5. 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.”

6. 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.
7. 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.”

8. 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.”

9. 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.”
10. 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”.

11. From the records this dispute in the substantive suit Mombasa ELC No. 50 of 2021 Stephen Mbaki Waita vs National Lands Commission & Kenya National Highways Authority the suit was concluded and the Applicant was not a party. On locus standi the Applicant states that she is a family member. As to where she has beneficial interest it cannot be determined at this preliminary stage. As to whether this is a succession matter or that the court cannot grant substantive orders in an application can only be determined once the court hears the said application. This court has to ascertain facts raised by both parties 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.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

