



**Njoroge v Kimondo & another (Environment and Land Appeal
22 of 2022) [2023] KEELC 22135 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 22 OF 2022
BM EBOSO, J
NOVEMBER 23, 2023**

BETWEEN

GEORGE NJOROGE APPELLANT

AND

JOHN KIMONDO 1ST RESPONDENT

KIAMBU LAND REGISTRAR 2ND RESPONDENT

*(Being an Appeal against the Ruling of Hon J. A Owiti, Senior
Principal Magistrate, delivered on 2/3/2022 in Kikuyu Senior Principal
Magistrate Court Environment and Land Case No. 47 of 2021)*

JUDGMENT

Background

1. This appeal challenges the ruling rendered on 2/3/2022 by Hon J. A Owiti, Senior Principal Magistrate, in Kikuyu Senior Principal Magistrate Court MCE & L Case No 47 of 2021. George Njoroge who is the appellant in this appeal was the plaintiff in the said suit. John Kimondo and the Kiambu Land Registrar who are the two respondents in this appeal, were the 1st and 2nd defendants in the suit, respectively.
2. Through a plaint dated 21/7/2021, the appellant alleged that on or about 6/11/2012, he entered into an agreement with the 1st respondent, through which they agreed that the 1st respondent would market and sell land parcel number Kabete/ Lower Kabete 1163 [referred to in this Judgment as “the suit property”] on his behalf. He contended that he gave the original title deed to his lawyer, one Mambiri Itieva, who is now deceased. He added that upon the demise of the lawyer, the 1st respondent “took advantage of the demise” and “fraudulently procured and secretly obtained the original title” and “started to fraudulently present himself as the duly registered owner of the property”. He sought the following reliefs:



- (i) an order of permanent injunction restraining the 1st respondent and his agents against taking possession, selling or dealing with the suit property;
 - (ii) an order directing the Land Registrar to cancel the entry registering the 1st respondent as proprietor of the suit property.
3. Together with the plaint dated 21/7/2021, the appellant filed a notice of motion of even date, seeking interlocutory injunctive orders restraining the 1st respondent, together with his agents, against entering, dealing with, selling, transferring ownership, invading, constructing on, taking possession of, or interfering with the suit property. On 3/8/2021, he secured an interim ex parte injunctive order in the above terms and the application was scheduled for interpartes hearing on 24/8/2021.
4. The substantive suit and the application attracted the following from the 1st respondent:
 - (i) a memorandum of appearance dated 23/8/2021 filed by M/s J. Nelima Associates & Company Advocates;
 - (ii) a notice of preliminary objection dated 23/8/2021 seeking an order striking out the suit on the ground of res judicata;
 - (iii) a replying affidavit sworn on 24/8/2021 by the 1st respondent; and
 - (iv) a notice of motion dated 9/9/2021 seeking an order lifting the ex parte injunctive order and inviting the court to issue a mandatory injunction compelling the appellant to remove the gate which the appellant had erected on the access road serving the suit property.
5. The case of the 1st respondent was that the suit was res judicata, contending that the question of ownership of the suit property had been adjudicated in Milimani Environment and Land Court Case No 397 of 2013 to which the appellant and the 1st respondent were parties. The 1st respondent further contended that the Nairobi Environment and Land Court had made a finding in its Judgment dated 12/10/2017 to the effect that the appellant validly sold the suit property to the 1st respondent through an agreement dated 6/11/2012 and conveyed the suit property to the 1st respondent in December 2012. The 1st respondent faulted the appellant for procuring ex parte orders through outright falsehoods and for concealing facts relating to the previous adjudication and determination in Nairobi Environment and Land Court Case No 397 of 2013.
6. On 28/1/2022, Hon J. Owiti gave disposal directions on:
 - (i) the appellant's application dated 21/7/2021;
 - (ii) the 1st respondent's application dated 9/9/2021; and
 - (iii) the 1st respondent's preliminary objection dated 23/8/2021. She directed parties to file written submissions and reserved 1/3/2022 as the date she would render a ruling relating to the three items.
7. Upon considering the three items, the learned magistrate rendered a ruling dated 2/3/2022. On the appellant's application dated 21/7/2021, the trial court made a finding to the effect that the 1st respondent's title could only be impeached on account of fraudulent acquisition but this was not the case because the appellant had stated on oath in Nairobi Environment and Land Court Case No 397 of 2013 that he sold the suit property to the 1st respondent and that full purchase price had been paid to him. Further, the learned magistrate found that the balance of convenience tilted in favour of the 1st respondent. Consequently, the appellant's application for injunction was found unmerited.



8. On the 1st respondent's application for an order lifting the *ex parte* injunction and for a permanent injunction compelling the appellant to remove the gate, the learned magistrate did not make a clear finding. She stated the following:

“It is trite law that a mandatory injunction can only be granted in the clearest of the circumstances as submitted by the plaintiff/respondent. Further to the foregoing an order of injunction can be discharged on application of a party to the suit in terms of order 10 rule 7 of the *civil procedure rules*, 2010 upon satisfying the requisite conditions being : a party upon obtaining an *ex parte* injunction order sits on it and uses the order to prejudice the other party , the orders are used to intimidate the other party as held in the cited cases of *Kitale Services Station vs Monil Oil Kenya Ltd & another* 2004 eKLR , *Kenya Electricity Transmission Company Ltd vs Kibotu Ltd* [2019] eKLR, *Ochola Kamili Holdings Ltd vs Guardian Bank LTD* [2018] eKLR, *Solomon Mwiti Mugwika v M'mugwika Mamai* [2012] eKLR. The 1st defendant is the is the registered owner of the suit land to date and enjoys absolute rights and/or interest over the suit land unless the title is revoked on account of fraud, misrepresentation of facts. It is trite law that an injunction cannot issue against the registered owner of land. It is trite law that preliminary objection raises points of law that goes to the root of the matter to the extent of disposing of the matter at the preliminary stage refer to the case of *Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others* [2017] eKLR.”

9. On the 1st respondent's preliminary objection dated 23/8/2021, the learned magistrate found that the elements of *res judicata* had been established, hence the suit was *res judicata*. Consequently, the learned magistrate vacated the *ex parte* orders and struck out the appellant's suit for being *res judicata*.

Appeal

10. Aggrieved by the ruling of the lower court, the appellant brought this appeal, advancing the following six verbatim grounds of appeal:
1. The learned magistrate erred in law in holding that the suit was *res judicata*.
 2. The learned magistrate erred in law in upholding a preliminary objection which was purely founded in disputed issues of facts contrary to the decision in *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors* [1960] EA 696.
 3. The learned magistrate erred in failing to appreciate that ELC No. 197/2013 and the Kikuyu ELC No. ELC 4/2021 were not similar both in object and substance.
 4. The learned judge erred in law in holding that the parties in High Court ELC Case No. 197/2013 and Kikuyu Senior Principal Magistrate ELC Case No. 47 of 2021 were the same.
 5. The learned judge erred in law in holding that it is trite law that an injunction cannot issue against the registered owner of land.
 6. The learned magistrate erred in law in failing to appreciate that the issues for trial in High Court Case No. 397/2013 and Kikuyu Magistrate Court No. 47 were not the same. In other words, the cause of action in the High Court case was different from the one in the Magistrate's Court.
11. The appellant urged this court to grant him the following verbatim reliefs:
- a. The appeal be allowed.



- b. The lower court order striking out the suit be set aside and substituted with an order reinstating Kikuyu Magistrate's Court Case No 47 of 2021 for hearing and determination on merit and further order of injunction restraining the respondent from dealing with the property Kabete/Lower Kabete / 1163 in any way whatsoever pending hearing and determination of the reinstated case.
- c. That costs of the appeal be provided for.

Appellant's Submissions

12. The appeal was canvassed through written submissions dated 8/5/2023, filed by M/s Masaviru & Ketoo Advocates. The appellant's counsel identified the following as the three issues that fell for determination in the appeal:
 - (i) Whether the issues raised could be heard and disposed of adequately by a preliminary objection;
 - (ii) Whether the issues and the question of law raised in Kikuyu MCL & E No.47/2021 were res judicata and whether the issue had been raised, heard and determined in Milimani ELC 397/2013 between the same parties; and
 - (iii) Who bears the costs of the instant appeal. Counsel subsequently submitted on the first two issues but said nothing on the last issue.
13. On whether the issues raised in the suit could be heard and disposed through by a preliminary objection, counsel submitted that the preliminary objection was wholly incompetent and did not meet the threshold set out in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* [1996] EA 696. Counsel argued that in determining the preliminary objection, the trial court unprocedurally investigated facts which had been contested by the parties. Counsel added that the trial court erred when it started to examine the agreement of sale in great details, reviewed court proceedings, evidence, and oral testimony in order to determine the preliminary objection.
14. On whether the suit was res judicata, counsel submitted that the trial court ignored the fact that the parties were not litigating under the same title. Counsel argued that the sequence and appearance of the parties in the two suits were different and that the parties were litigating under different titles. Counsel added that the parties in the two suits were not the same, as contemplated under Section 7 of the *Civil Procedure Act*. Counsel argued that the legal issues and the remedies sought in the two suits were different. Counsel urged the court to allow the appeal.

1st Respondent's Submissions

15. The appeal was opposed through written submissions dated 1/7/2022, filed by M/s J Nelima & Company Advocates. Counsel for the 1st respondent identified the following as the three issues that fell for determination in the appeal:
 - (i) Whether the preliminary objection was valid as envisaged by law;
 - (ii) Whether the suit was res judicata; and
 - (iii) Whether the appellant was entitled to an order of injunction.
16. On whether the preliminary objection was valid as envisaged by law, counsel submitted that the preliminary objection dated 23/8/2021 was hinged on Section 7 of the *Civil Procedure Act* and was raised on points of law that emerged from the pleadings filed by the parties. Counsel added that the



learned magistrate rightly applied the law and facts by finding merit in the preliminary objection raised by the 1st respondent.

17. On whether the suit was res judicata, counsel submitted that the prayers sought and the parties in the two suits were similar. Counsel added that the previous suit was heard and determined and a judgment dated 12/10/2017 was rendered by a competent court that had jurisdiction.
18. On whether the appellant was entitled to an order of injunction, counsel relied on the principles set out in the case of *Giella v Cassman Brown*. Counsel added that it was clear from the pleadings filed by both parties that the appellant had failed to prove that he had a prima facie case with a probability of success. Counsel added that it was clear from the pleadings that the appellant had sold the suit property to the respondent. Counsel argued that the appellant had neither shown that he would suffer irreparable harm in the event the injunction was denied nor demonstrated that the balance of convenience tilted in his favour.
19. Lastly, counsel submitted that the suit in the trial court was res judicata and ought not be entertained by the court. Counsel urged the court to dismiss the appeal and to award costs of the appeal to the 1st respondent.

Analysis and Determination

20. I have read and considered the original record of the trial court; the record and the supplementary record of appeal dated 13/1/2023; the parties' respective submissions; and the legal frameworks and jurisprudence relevant to the issues that fall for determination in the appeal. The appellant itemized six grounds of appeal. His counsel subsequently identified only three issues that he invited this court to determine. Counsel, subsequently submitted on only the first and second identified issues. In the circumstances, I will dispose this appeal by sequentially analyzing the three issues that were identified by the appellant. Before I do that, I will outline the principle that guides this court when exercising appellate jurisdiction.
21. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Kesbar Shiani*](#) (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
22. The above principle was similarly outlined in [*Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
23. The first issue is whether the issues raised in the preliminary objection could be heard and effectually disposed on the platform of a preliminary objection. Having read the record, it is clear that only issue was raised and canvassed in the notice of preliminary objection. The issue was whether or not the suit before the lower court was res judicata.



24. The law on what issue can be disposed on the platform of a preliminary objection is well settled. Law J A outlined the relevant principle on this in *Mukisa Biscuit Manufacturers Company Ltd v West End Distributors Ltd* (1969) EA 696 in the following words:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

25. On his part, Newbold P outlined the principle as follows:

“The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice must stop.”

26. Ojwang J [as he then was] outlined the principle in *Oraro v Mbaja* [2005] eKLR 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 processes of evidence. Any 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.”

27. Was the issue of res judicata one to be disposed on the platform of a preliminary objection in the circumstances of the suit that was before the lower court? At the point the preliminary objection was raised, only the appellant’s plaint was on record. Indeed, there is no evidence that a defence had been filed at the time the preliminary objection was disposed. The appellant did not make any averments in the plaint which would be construed as disclosing elements of res judicata. This means that to establish res judicata, the 1st respondent needed to file a formal application supported with an affidavit containing the following necessary evidence relating to the previous suit:

- (i) all pleadings;
- (ii) all issues;
- (iii) evidence such as written statement affidavits; and
- (iv) finding or determinations.

28. Clearly, the above evidence could not be presented on the platform of a preliminary objection. The above evidence which was necessary for the purpose of establishing existence of the key elements of res judicata, as contemplated in Section 7 of *Civil Procedure Act*, required a formal application with a supporting affidavit exhibiting the above evidence.



29. For the above reason, it is clear that the lower court inappropriately admitted the preliminary objection and disposed the suit without a clear consideration of key evidence such as the parties' pleadings in the previous suit. To this extent, I agree with the appellant that the lower court made a grave error.
30. The second issue is whether the issues and questions of law raised in Kikuyu MCL & E No 47 of 2021 were res judicata and whether the issues had been raised, heard and determined in Milimani ELC Case No 397 of 2013 between the same parties. This court has reflected on the question as to whether or not it is appropriate to make a determination on the issue in this judgment. This court has made a finding that, in the circumstance of the suit before the trial court, the point of res judicata ought to have been ventilated on the platform of a formal application or through trial where evidence relating to the previous suit would be presented and the opposing would have the opportunity to controvert the evidence. The appellant was not presented with the opportunity to challenge the issue through production of evidence. This court will therefore refrain from making a pronouncement on the merits of the issue or res judicata in this. The court will allow the lower court the opportunity to consider and dispose the issue on the basis of necessary evidence.
31. Having come to the above findings, it is the view of this court that this appeal partially succeeds on the ground that a preliminary objection was not the appropriate platform on which to effectually dispose the issue of res judicata which required evidence. I will therefore set aside the order of the lower court striking out the suit.
32. However, because the issue of res judicata is a jurisdictional one, the respondents will be at liberty to properly move the trial court on the platform of a formal application, to enable the lower court consider the relevant evidence and dispose the issue of res judicata.
33. In his submissions, the appellant did not challenge the findings and pronouncements of the lower court on the applications dated 21/7/2021 and 9/9/2021. Consequently, the findings and/or pronouncement of the lower court on the two applications shall remain undisturbed.
34. On costs, the error giving rise to this appeal are attributable to the lower court which improperly admitted the preliminary objection. In the circumstances, parties will bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF NOVEMBER 2023

B M EBOSO

JUDGE

In the presence of: -

Mr Masauru for the Appellant

Ms Wanjala for the 1st Respondent

Court Assistant: Hinga

