



**Registered Trustees of Child Welfare Society of Kenya v Diocese of Embu Trustees, Registered (Environment & Land Case 10 of 2022) [2023] KEELC 22584 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22584 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 10 OF 2022  
A KANIARU, J  
NOVEMBER 21, 2023**

**BETWEEN**

**REGISTERED TRUSTEES OF CHILD WELFARE SOCIETY OF KENYA ..... PLAINTIFF**

**AND**

**DIOCESE OF EMBU TRUSTEES, REGISTERED ..... DEFENDANT**

**RULING**

1. The ruling is on a Preliminary objection dated 14.03.2023 and filed on 16.03.2023. The objection has been brought by the Defendant – The Diocese of Embu Trustees, Registered -and the prayers sought are herein reproduced ipsissima verba:

a) Res Judicata

The issues relating to prayers 5(a), (b), (c), (d), (e) and (f) of the plaintiff's plaint dated 25.02.2022 at the plaintiff's trial bundle dated 24.02.2023 at pages 10 and 11 thereof were issues directly and substantially in issue in a former suit namely ELC Pet 1 of 2018 between the same plaintiff and the same defendant herein and the subject therein which is the subject herein namely the ownership of plot no. Embu/Municipality/112/375 was heard and determined and a decree issued on 28.11.2019.

b) Sub-judice

When the plaintiff filed this suit by the plaint dated 25.02.2022, there was in existence a petition to the senate dated 08.11.2021 by the defendant herein against the plaintiff and which had been responded to by the defendant by its response dated 27.01.2022.



The senate standing Committee on land, environment and national resources was seized of the matter now before this Honourable court as the subject was;

“Petition concerning illegal alienation of parcel of land Embu/ Municipality/112/375 (Leasehold) by the Child Welfare Society of Kenya.”

As at the institution of this suit by the plaintiff the court lacked jurisdiction ab initio.

2. The Preliminary objection was canvassed by way of written submissions. The Defendants submissions were filed on 25.09.2023 whereas the Plaintiff's submissions were filed on 22.09.2023.
3. I have considered the preliminary objection as well as the rival submissions. The issue for determination is whether the preliminary objection meets the fundamental threshold deemed necessary for a proper objection and whether the same is merited.
4. The court in the case of *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties)* [2021] eKLR held the following;

“The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. 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.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a point of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

5. From the foregoing provisions, it is apparent that in order for a preliminary objection to hold, it must be demonstrated by the party bringing it that there is no contest as to the facts; and that it has been raised on a pure point of law.
6. The law on Res Judicata is found under Section 7 of the *Civil Procedure Act* (Cap 21) which provides that:

“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.”

7. In the case of *Christopher Kenyariri vs Salama Beach* (2017) eKLR, as cited in *Alfred Sagero Omweri vs Kennedy Omweri Sagero* (2021) Eklr the court clearly stated the ingredients to be satisfied when determining Res Judicata as follows;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.



- b) Former suit between same parties or parties under whom they or any of them claim.
  - c) Those parties are litigating under the same title.
  - d) The issue was heard and finally determined.
  - e) The court was competent to try the subsequent suit in which the suit is raised.”
8. The defendants are claiming that the prayers sought in the plaint were issues directly and substantially in issue in a former suit, namely ELC Petition 1 of 2018, involving the same parties herein and the same subject matter, that is ownership of plot No. Embu/Municipality/1112/375, which was heard and determined. I have looked at the said plaint and the said Petition. My understanding is that in the petition, the Petitioners who are now the defendants in this case, had filed a constitutional petition, seeking for orders of Judicial Review to quash the decision of the National Land Commission’s that revoked their certificate of title to plot No. Embu/Municipality/1112/375 and granted the same to the Plaintiffs. The plaintiffs were the Respondents in the Petition. The Plaintiff’s herein filed a cross-petition to the said Petition seeking to have the National Lands Commission’s decision declared as lawful and for orders that the Defendants vacate the suit land therein or be evicted. The court heard the Petition and the Cross-petition and dismissed the same on the grounds that they did not raise any constitutional issues which could be ventilated in a constitutional petition and that the orders sought could be acquired in a civil action.
9. Comparatively, in the plaint, the Plaintiffs are seeking; orders of injunction restraining the defendants from continuing occupation of the suit land; preservative orders preventing the defendants from interfering with the shelter and accommodation of the children in the children’s home located in the suit land; orders of eviction against the defendants from the suit land; damages for trespass for the period in which Notice to vacate was issued against the defendants until its expiration; costs.
10. From the foregoing, it is clear that in as much as the two suits are between the two parties, the causes of action in each is very different. The subject raised in the plaint is not ownership of plot No. Embu/Municipality/1112/375 as alleged by the Defendants in their Preliminary Objection but rather the plaintiffs are seeking injunctive reliefs as against the Defendant. Also I agree with the plaintiffs in their submissions that, the orders for the Defendants to vacate the suit land or be evicted were issues that were raised in the cross-petition. However the court did not make a final determination on the same as it was of the view that they were orders that could be sought in an ordinary civil suit. So in my view, they were not issues that were finally heard and determined. I find therefore that the doctrine of Res-judicata is not applicable in this case as presented for the given reasons.
11. On the second issue the doctrine of Sub-judice is founded on Section 6 of the [Civil Procedure Act](#) which states that:-
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
12. One aspect of the objection on the basis is that when the plaintiff filed this suit vide the plaint dated 25.02.2022, there was a petition in the Senate against the plaintiff and therefore as at the time of instituting the suit, the court lacked jurisdiction ab initio. I am inclined to agree with the Plaintiff that



the senate is not a court of law. It is not a court of competent jurisdiction. The law is very clear that in order for a suit to be said to be sub-judice there must be two similar and concurrent suits pending in the same court or in any other court having jurisdiction in Kenya to grant the relief claimed. The Senate has no power to grant the reliefs sought by the Plaintiff in the plaint as the same can only be granted by a court of law of competent jurisdiction. On this ground the Defendants cannot successfully invoke the doctrine of sub-judice.

13. Furthermore, a preliminary objection ought to be on a pure point of law, argued on the presumption that all facts pleaded by either side are correct. A preliminary objection cannot be raised and sustained if any fact has to be ascertained. Whenever court retires to ascertain facts, as it has done in this case, no objection can be sustained. In this matter, the material facts are all controverted.
14. The upshot of the above is that the Preliminary Objection dated 14.03.2023 lacks merit and the same is dismissed with costs to the Plaintiffs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2023.**

In the presence of Mr. Mbaabu for the plaintiff and in the absence of Mr. Morris Njagi for the defendant

**A.K. KANIARU**

**JUDGE –ELC, EMBU**

**21.11.2023**

