



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC PETITION NO. 21 OF 2021

IN THE MATTER OF: ARTICLES 2,10,19,20,22 AND 23 OF THE CONSTITUTION OF KENYA

- AND -

**IN THE MATTER OF: VIOLATION AND THREATENED FURTHER VIOLATION OF ARTICLES 2, 3, 10,
19, 20, 21, 27, 28, 40, 47 & 50 (1) OF THE CONSTITUTION BY COUNTY GOVERNMENT OF MOMBASA**

- AND -

**IN THE MATTER OF: THE COUNTY GOVERNMENT OF MOMBASA ACT OF DEMOLISHING
THE PETITIONER'S BUILDING AND PERIMETER WALL STANDING ON THE PARCEL OF LAND
KNOWN AS PLOT NO. 1436 SECTION XVII, MOMBASA ISLAND AND THE THREATENED**

ILLEGAL COMPULSARY ACQUISITION OF THE PETITIONER'S PROPERTY

- BETWEEN -

HASAINIZ INVESTMENT LIMITED.....PETITIONERS

- VERSUS -

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENTS

RULING

I. Introduction

1. The Respondents filed a Notice of Preliminary Objection dated 29th November 2021 for determination by this Honorable Court. The Respondents claim that the objection is based purely on matters of law as the suit by the Petitioners offends the provision of Section 7 of the Civil Procedure Rules and the doctrine of **Res Judicata**.

II. The Respondent's objection

2. It is objecting the competence of the entire instant suit instituted by the Petitioners herein on the following grounds:-

a. That the Petition is bad in law and falls short on the doctrine of "Res Judicata" the provision of under Section 7 of the Civil Procedure Act Cap. 21 of the Laws of Kenya since the substantive matter in issue before this Court has directly been dealt with by the Court in:-

i. High Court (Mombasa) Petition No. 39 of 2016 – "Legal Advice Centre & 3 Others – Versus - the County Government of Mombasa & 4 others";

ii. Civil Appeal (Mombasa) No. 46 of 2017 – "Legal Advice Centre & 3 Others – Versus – the County Government of

Mombasa & 4 others”,

iii. High Court (Mombasa) Petition No. 6 of 2017 – “Peter Obhunga Wakoyo & 87 others – Versus – the County Government of Mombasa & 3 others”;

iv. Constitutional Petition No. 28 of 2020 – “Justus Chai Mbaru & 12 others – Versus – the County Government of Mombasa & 3 others”;

Wherein the issues were heard to conclusion and a determination rendered.

b. That therefore, the Petition should be struck out and dismissed as it amounts to playing lottery with the judiciary process and it an abuse of the court process.

III. The Submissions

3. On 18th October, 2021 when all the parties appeared before court, they were directed to file written submissions. Subsequently, upon full compliance this Court reserved a date for ruling thereof.

A. The Respondents’ Written Submissions

4. On 25th January 2022, the Learned Counsel for the Respondents, the Law firm of Messrs. Otieno B.N. & Associates Advocates filed their written submissions in support of the Preliminary Objection. Mr. Onduso Advocate submitted that the issues in the Petition had been extensively litigated by the parties’ up to the Court of Appeal. But in total disregard of the determinations made, the Petitioner had instituted this Petition raising the same issues raised in the previous suits. Though the said suits were by different parties, they litigated on the same subject matter, which was determined by the Court of Appeal. The Counsel submitted that the Petition was Res Judicata to the previous suits, for the reason that the issues were directly and substantially in contention. For instance, he cited the suit property Land Reference numbers Mombasa/Block XVII/1821. The Counsel submitted that the Petitioner was barred by the provision of Section 7 of the Civil Procedure Act, Cap 21 from the institution of this suit for being contrary to the provisions of Section 7 of the Civil Procedure Act, Cap. 21 and thus the doctrine of Res Judicata.

5. In addition, the Learned Counsel submitted that the Petition was an abuse of the court process, as this suit would lead to several judgements being rendered. The Petitioner ought to have applied to be enjoined in the previous suits and prosecute his claim. The Counsel urged court to dismiss the entire Petition and the Petitioners’ claim as they are playing a lottery with the judicial process with the hope of getting a favorable outcome.

B. The Petitioners Written Submissions

6. On 22nd December 2021, the Learned Counsel for the Petitioners, the Law firm of Messrs. Mutisia Mwanzia & Ondeng Advocates filed their written submissions in opposition of the Notice of Preliminary Objection. Mr. Mwanzia Advocate submitted that the Preliminary Objection raised by the Respondents failed to meet the threshold set out in the now famous case of “**Mukisa Biscuits Manufacturing Company Limited – Versus - West End Distributors (1969) E.A 696**”, since it had not been raised on pure points of law and as such it ought to be dismissed with costs.

7. The Learned Counsel submitted that for the Honorable court to determine whether the issues raised in the Petition were directly and substantially in issue with the other suits enumerated and cited in the Preliminary Objection, it would result to ascertaining facts and probe evidence on the same. In that way the Preliminary Objection would have failed to be a pure point of law but a matter of adducing evidence in a trial. Additionally, the Counsel argued that the court had been referred to several cases, which did not flow from the pleadings filed and they had not been supplied to court. To support itself on this point, the Counsel relied on the case of “**George Kamau Kimaru & 4 others – Versus - The County Government of Trans Nzoia & another (2014) eKLR**, where it was held that the doctrine of Res judicata could not be raised by way of preliminary objection rather than by Notice of Motion where pleadings were annexed. The Learned Counsel maintained and stressed that a preliminary objection was not a proper way of raising the issue of res judicata.

8. On the merits of the preliminary objection, the Counsel submitted that it did not meet the fundamental elements provided for under the dint of **Section 7 of the Civil Procedure Act, Cap. 21** as well established and stated in the case of “**IEBC – Versus - Maina Kiai & 5 others (2017)eKLR and Uhuru Highway Development Limited - Versus - Central Bank of Kenya (1999)eKLR**. The Counsel compared and distinguished the suit herein with the judgement made in Constitutional Petition No. 28 of 2020 of “**Justus Chai Mbaru & 12 others – Versus – the County Government of Mombasa & 3 others**, in support that its res judicata to the suit herein. The Counsel argued that the Petitioners were not party to the Petitions cited and thus the doctrine of Res judicata could only apply where the parties in the suits in question were similar.

9. On the subject matter, the Counsel argued that the Petitioner herein were litigating on all that parcel of land known as land Reference Numbers Plot No. 1436 Section XVII Mombasa Island, while in the cited Petition the suit land was the rented flats at Buxton Estate which were two different suits and subject matters altogether. The Counsel submitted that the issues raised herein were totally different from the Petitions cited in the preliminary objection, since the Petitioner was not a tenant as the Petitioners in the cited cases but the registered owner of the suit land. The Counsel argued that the preliminary objection was raised to delay the determination of the Petition contrary to what Sir Charles Newbold P. in Mukisa (supra) held that, “*The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.*”

IV. Analysis and Determination

10. I have considered the pleadings, the cited authorities and the rival written submissions by the Petitioners and the Respondents and the relevant provisions of the law.

11. In order to arrive at an informed, just and fair decision in this Objection, the Honorable Court has framed the following issues for determination. These are:-

a. Whether the Notice of Preliminary Objection dated 29th November, 2021 by the Respondents meets the fundamental threshold of a preliminary Objection as founded in law and precedents.

b. Whether the Petition filed by the Petitioners herein offends the provisions of Section 7 of the Civil Procedure Act, Cap. 21 and thus the doctrine of Res Judicata

c. Who will bear the costs of the Notice of the Preliminary Objection thereof.

ISSUE No. a).Whether the Notice of Preliminary Objection dated 29th November, 2021 by the Respondents meets the fundamental threshold of a preliminary Objection as founded in law and precedents.

12. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696*. Where Lord *Charles Newbold P.* held *that a proper preliminary objection constitutes a pure points of law*. The Learned Judge then held that:-

“The first matter relates 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 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 in 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 the issue. The improper practice should stop”

13. I have further relied on the decision of *Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR:-* as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia:-*

i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

14. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. As shall be deliberated on herein below, this Honorable Court finds the filed Preliminary objection by the Respondents not in tandem with the fundamental threshold founded on raising such objections as stated hereof.

15. In saying so, the Learned Counsel to the Petitioners has argued that the Notice of Preliminary Objection is not on a pure point of law since court has to result to considering facts and evidence in the previous pleadings in order to make a finding of Res judicata. His contention was that the doctrine of Res judicata could not be raised by way of preliminary objection rather than by Notice of Motion where pleadings were annexed. The Counsel maintained and stressed that a preliminary objection was not a proper way of raising the issue of res judicata. To buttress his case, he relied on the case of *“George Kamau Kimani & 4 others – Versus - the County Government of Trans-Nzoia & another (2014)eKLR*, where court held that *“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 raising the issue of Res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection. In this regard I adopt the words of Sir Charles Newbold P. in Mukisa Biscuit case (Supra) which are applicable in the present circumstances.*

“The first matter relates 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 a demurrer. It raises a pure point of law which is argued on 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 improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issues. This improper practice should stop.”

16. This Honorable Court is inclined to fully agree with my Brother Obaga J, that indeed a Notice of preliminary objection cannot sustain the doctrine of res judicata as provided by Section 7 of the Civil Procedure Act, Cap. 21 on the ground that reference has to be made to pleadings in the previous suits. Once a court steps out of the premise of law and looks at facts and evidence, that stops to be a pure point of law, matters of adducing evidence which can only be conducted adequately and appropriately during a full trial thereof. The objection must fail on that front.

ISSUE No. b). Whether the Petition filed by the Petitioners herein offends the provisions of Section 7 of the Civil Procedure Act, Cap. 21 and thus the doctrine of Res Judicata

17. Ideally, this Principle has been provided for by the Provisions of Under Section 7 of the Civil Procedure Act Cap. 21. *Inter alia*:-

“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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

From the above legal provisions, the following are the ingredients that constitutes and the bar of the Doctrine of *Res Judicata* to be effectively raised and upheld an account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:-

- 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 this suit in which the issue is raised.

18. It is trite law that “Res judicata” is a point of law and a true preliminary objection, if proven to exist a court ought to allow its procession and dismiss the entire suit. The Court of Appeal in *IEBC – Versus - Maina Kiai & 5 others (2017)eKLR* observed that:-

‘Res Judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. ...Thus for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- 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 this suit in which the issue is raised.

The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and afford parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by competent court. It is designed as a pragmatic and common sensual protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, y a multiplicity of suits and for a, to obtain at last outcomes favorable 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 and calumny. The foundations of Res Judicata this rest in the public interest for swift, sure and certain justice.'

19. The Respondents have made reference to several other suits they claim to be offending the provisions of Section 7 of the Civil Procedure Act, Cap. 21 and the doctrine of the Res judicata to wit the Petition 39 of 2016, CACA 46 of 2017, Petition 6 of 2017 and Petition 58 of 2020, but has failed to annex any of the pleadings therein. To be able to adequately deal with the issue whether the current suit is res judicata or not these previous suits, the Court would need to examine their proceedings in order to determine; whether the parties present herein are the same as those in the other suits, whether they are litigating on the same title and if the issues in the previous suits are directly and substantially in issue with the present suit. If court is called to ascertain facts in order to support a preliminary objection it stops being an objection on pure matters of law but facts. It has to be rejected.

VI. Conclusion and disposition

20. For the reasons given above and analysis made, this Honorable Court finds that the Notice of Preliminary Objection by the Respondent unmeritorious and hence disallowed with costs to the Petitioner. Subsequently, for clarity sake and expedient disposal of this Petition, the Honorable Court makes the following directions:

a. THAT the Notice of Preliminary Objection dated 29th November, 2021 by the Respondents herein be and is hereby dismissed with Costs.

b. THAT the Petition by the Petitioners dated 24th May, 2021 and filed in court on 26th May, 2021 be heard and determined within the next ninety (90) days from the date of this ruling. The matter to be heard on 8th June, 2022 by both adducing of Viva Voce evidence and affidavits.

c. THAT the Respondents to bear the costs of the Notice of Preliminary Objections to be made to the Petitioners herein.

21. IT ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF MARCH, 2022

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

M/s Yumna Hassan, Court Assistant.

Mr. Mark Mwanzia Advocate for the Petitioners.

Mr. Onduso Advocates for the Respondents