



**Nderitu & 3 others (Suing on their behalf and on behalf of Panorama Gardens Residents Association) v Urithi Housing Co-Operative Society Limited & another (Environment & Land Case 5 of 2020) [2022] KEELC 3338 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 5 OF 2020**

**LN GACHERU, J**

**MAY 26, 2022**

**BETWEEN**

**JOSEPH KAHUNGA NDERITU ..... 1<sup>ST</sup> PLAINTIFF  
MICHAEL MUIRURI MWAURA ..... 2<sup>ND</sup> PLAINTIFF  
JACKLINE WANJIRU MWANGI ..... 3<sup>RD</sup> PLAINTIFF  
JAMES WANJOHI GATERU ..... 4<sup>TH</sup> PLAINTIFF  
SUING ON THEIR BEHALF AND ON BEHALF OF PANORAMA GARDENS  
RESIDENTS ASSOCIATION**

**AND**

**URITHI HOUSING CO-OPERATIVE SOCIETY LIMITED ..... 1<sup>ST</sup> DEFENDANT  
FAMILY BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide a Notice of Preliminary Objection dated February 1, 2022, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Objectors objected against the entire suit on grounds that;
  1. The Plaintiffs entire suit filed herein is incompetent, fatally and incurably defective and is an abuse of the Honourable Court for reasons that;
    - a. The Plaintiffs entire suit falls short of the doctrine of Res judicata under Section 7 of the *Civil Procedure Act* in light of the determination in Murang'a ELC Case No 25 of 2019 – *Anthony Mbugua Njibia & 36 others vs Urithi Housing Co-operative Society Limited & Another*.



2. That the Plaintiffs entire suit is based on an incurable illegality and ought to be struck out forthwith with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Objectors.
2. The Notice of Preliminary Objection was canvassed by way of written submissions and the 2<sup>nd</sup> Defendant/Objector through the Law Firm of Maina & Onsare Partners Advocates LLP, filed their submissions dated April 13, 2022, and submitted that the law on Preliminary objections was well settled and that a Preliminary Objection should be on a pure point of law.
3. On whether the suit was Res judicata, it was their submission in the affirmative based on the Judgment delivered on October 12, 2021, in Muranga ELC Case No 25 of 2019 – *Anthony Mbugua Njibia and 36 Others vs Urithi Housing Co-operative Society Limited and Another*. Reliance was placed on the case of *Samuel Kiiru Gitau vs John Kamau Gitau* Nbi HCC No 1249 of 1998, where Justice Visram (as he then was) stated;

for a matter to be res judicata, it must be one on which the court has previously exercised judicial mind and has after argument and consideration, come to the conclusion on the contested matter and for this reason a matter is said to have been heard and determined notwithstanding that the former suit was disposed of by a decree or an award. For a matter to be directly or substantially in issue in a former suit, is to be determined by reference to the plaint, the written statement, the issues and the judgment and the test of res judicata is the identity of the issue and not the identity of the property involved in the former suit”

4. Reliance was also placed on the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No 105 of 2017 ([2017] eKLR), where the Court of Appeal held that:

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive 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 the suit in which the issue is raised.”
5. The 2<sup>nd</sup> Defendant/Objector submits further that while it is true the prayers in ELC Case 25 of 2019, and the prayers in the instant suit are different, the common denominator is the Subject matter which is LR. No 11486/18 (Panorama Estate). That the issues raised by the Plaintiffs in the instant suit would have been heard in ELC 25 of 2019, yet the Plaintiffs being aware of the said suit did not seek to be enjoined. To buttress this position, the 2<sup>nd</sup> Defendant/Objector relies on the case of *Thomas Owen Ondiek & Another vs National Bank of Kenya LTD & Another* 2015 eKLR, where it was stated that;

it is trite law that an issue or claim that should have been raised in an earlier case cannot be raised in a subsequent suit between the same parties”



6. That the array of prayers sought by the Plaintiffs in the instant suit, point to an order of specific performance which was directly and substantially in issue in ELC 25 of 2019. That this Court cannot sit on its own judgment on the same issue, unless there is an application for review filed. That the parties herein and the parties in ELC 25 OF 2019, are the same and therefore the Court cannot entertain the instant suit.
7. In Conclusion, the 2<sup>nd</sup> Objectors submits that this Court has already pronounced itself on the issues raised herein in a competent suit and more specifically being ELC 25 of 2019, and therefore the instant suit is Res Judicata.
8. The Preliminary Objection was not opposed by the Plaintiffs herein and the 1<sup>st</sup> Defendant/Objector did not file any submissions in support of their Preliminary Objection.
9. The Court has now carefully read and considered the Notice of Preliminary Objection, the written submissions and the Pleadings in general and finds that the issues for determination are;
  1. whether the Notice of Preliminary Objection is merited
  2. Whether the Instant suit is *res judicata*
10. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 to mean:-
 

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.”
11. Further Sir Charles Nebbold, JA stated that:-
 

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 had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
12. The Supreme Court in the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* [2015] e KLR expanded the above principle and further gave the rationale for raising a Preliminary Objection. The Court stated as follows; -
  1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose off the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.



2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. ...

3. ....

13. The Supreme Court in the aforementioned case went on to state that;

The true preliminary objection served two purposes of merit:

1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and
2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

14. The above being the description of Preliminary Objection, it is evident that a Preliminary Objection, raises a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or where the court is called upon to exercise judicial discretion.

15. In determining a Preliminary Objection, the Court will take into account that a Preliminary Objection must stem from the pleadings and that it raises pure point of law. See the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, where the court held that:-

A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

16. In the instant case, the Preliminary Objection herein is premised on the main ground that the instant suit is *res judicata*. Section 7 of the *Civil Procedure Act* sets out the threshold for holding that a suit is *res judicata*. This argument no doubt is a point of law and is advanced on the assumption that facts as pleaded by the Plaintiff are correct. Issues that touch on law need not be ascertained by evidence as the law speaks for itself. That applies to this case, more so on the ground that should the court find for the Defendants, the decision would have the effect of entirely disposing of the suit.

17. Based on the foregoing, this court finds and holds that the Preliminary Objection is valid and properly before the court. Having found that the Preliminary Objection is valid, this Court will now grapple with the question of whether the suit is *res judicata*.

### **Whether the suit herein is *res judicata***

18. The principle of *res judicata* is embedded under Section 7 of the *Civil Procedure Act*. The same provides as follows:

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.”



19. In the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] e KLR the Court of Appeal set out the ingredients of *res judicata* as follows:

From the above, the ingredients of *res judicata* are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83.”

20. Further in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No 105 of 2017 ([2017] eKLR) the Court of Appeal held that:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must 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 the suit in which the issue is raised.”

21. The Court went on to set out the rationale for *res judicata* as:

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.”

22. In a nutshell, *res judicata* is intended to bring litigation to a halt; it is intended to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating his case afresh. In essence, it saves precious judicial time and protects the sanctity of the court to do just what it should do. It prevents the abuse of the court process.
23. Having stated the above, this court will now consider whether the Defendants in the instant suit have met the threshold for the application of the doctrine of *res judicata*.
24. The first issue is whether the suit or issues in the instant suit was directly and substantially in issue in the former suit. It is important to note that the Defendants’ Preliminary Objection is unopposed, as



the Plaintiffs did not file any submissions in response there to. However, it is trite that uncontroverted evidence is not automatic and this Court has to investigate the same on a balance of probabilities.

25. It is not in doubt that the Defendants herein are the same Defendants in Muranga ELC No 25 of 2019; *Anthony Mbugua Njibia & 36 Others vs Urithi Housing Co-operative Society Ltd & Another* (the former suit.) It is also not in doubt that the former suit was substantively heard, and determined and judgment for the same was delivered on October 12, 2021. Further, a perusal of the instant suit indicates that the Plaintiffs herein are suing the Defendants on their own behalf and on behalf Panorama Residents Association.
26. A perusal of the judgment delivered in the former suit shows that there were 37 plaintiffs and this Court is unable to tell from the submissions who the exact plaintiffs were. It is however safe to assume; in the absence of any evidence to the contrary; that since suit land more specifically being LR No 11486/18 9(Panorama Estate) is the same in both suits, the Plaintiffs in the former suit are members of Panorama Residents Association, which is also a Plaintiff in the instant suit.
27. What remains to be determined is whether the issues for determination in the instant suit are substantially similar to the issues raised and determined in the former suit. In the instant suit, the subject is LR No 11486/18 9(Panorama Estate), while a perusal of the Judgement of the former suit (*Anthony Mbugua Njibia & 36 Others vs Urithi Housing Co-operative Society Ltd & Another* 2021 eKLR), indicates that the Plaintiffs therein sought orders against the Defendants therein for specific parcels of land to be hived off from LR No 11486/18 9(Panorama Estate). It appears that the subject matter is similar and this Court is unable to tell the plots owned by the fully paid up members as referred to in the instant suit.
28. With regards to the prayers sought, the prayers in the instant suit point to an order of specific performance among other orders against the 1<sup>st</sup> Defendant in favor of the plaintiffs and the fully paid up members of Panorama Gardens Residents Association. In the former suit, the Plaintiffs therein also sought for specific performance among other orders against the Defendants.
29. Based on the foregoing, this Court finds and hold that the issues for determination in the instant suit are substantially similar with the issues raised and determined in *Anthony Mbugua Njibia & 36 Others vs Urithi Housing Co-operative Society Ltd & Another* 2021 Eklr.
30. In the premises, this Court finds and holds that the Defendants/Objectors have substantively satisfied the conditions for the application of the doctrine of res judicata and therefore the Preliminary Objection dated February 1, 2022, is found merited and the same is allowed in its entirety with costs.
31. Having found that the instant suit is res judicata, the Court finds and holds that the same to be fatally incompetent and the same is struck out entirely with costs to the 2<sup>nd</sup> Defendant (Objector herein).

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26<sup>TH</sup> DAY OF MAY, 2022.

L. GACHERU

JUDGE

In the presence of; -

No Appearance for Plaintiffs

M/s Gitau for 1<sup>st</sup> Defendant/Objector

M/s Kimathi HB for M/s Ngai for 2<sup>nd</sup> Defendant/Objector



Alex Mugo - Court Assistant

L. GACHERU

JUDGE

26/5/2022

