Kitsao & another v TSS Investment Limited & 2 others (Environment & Land Case 51 of 2022) [2022] KEELC 3058 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3058 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 51 OF 2022

LL NAIKUNI, J

MAY 24, 2022

BETWEEN

CHANGAWA KAZUNGU KITSAO ..... 1ST PLAINTIFF

ALMADDY MDZOMBA MWAGANDA ..... 2ND PLAINTIFF

AND

TSS INVESTMENT LIMITED ..... 1ST DEFENDANT

BANK OF AFRICA KENYA ..... 2ND DEFENDANT

GARAM INVESTMENT AUCTIONEERS ..... 3RD DEFENDANT

RULING

I. Introduction

1. Primarily, what is before the honourable court for its determination is motion by way of a notice of preliminary objection filed in court on May 18, 2022. It was instituted by the 2nd and 3rd defendants/ respondents – the Bank of Africa and Garam Investment Auctioneers herein. Essentially, the objection was triggered by a Notice of Motion application dated 12th May, 2022 and the entire suit filed by the two 1st and 2nd plaintiffs/applicants namely Changawa Kazungu Kitsao and Almaddy Mdzomba Mwaganda herein seeking for to be granted certain interim orders. I shall be critically addressing the objection in more depth at a later stage.

2. On the May 12, 2022, under the Certificate of Urgency the 1st and 2nd plaintiffs/applicants instituted this suit by way of a plaint filed on May 13, 2022. It was seeking for an order of injunction to restrain the defendant by themselves, their servants and/or agents from selling, offering for sale, adverting, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale conducted by public auction or private treaty, taking possession, appointing receivers or exercising any power of sale conferred by section 90 (3) of the *Land Act*, 2012,

leasing, letting, charging or otherwise interfering with all that land parcels known Land reference NO. Mombasa/block XXI/526 and 527 originally scheduled for May 23, 2022 hence the urgency (hereinafter referred to as "The Suit land"). They also sought for costs and interest of the suit.

3. At the same time, the 1st and 2nd plaintiffs filed a Notice of Motion application seeking for the following orders:-

   a) Spend;

   b) That an interim injunction to restrain the defendant by themselves, their servants and/or agents from selling, offering for sale, adverting, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale conducted by public auction or private treaty, taking possession, appointing receivers or exercising any power of sale conferred by section 90 (3) of the *Land Act*, 2012, leasing, letting, charging or otherwise interfering with all that land parcels known Land reference No. Mombasa/block XXI/526 and 527 pending the hearing and determination of the application.

   c) That an interim injunction to restrain the Defendant by themselves, their servants and/or agents from selling, offering for sale, adverting, alienating, transferring by public auction or private treaty, disposing off or otherwise completing by conveyance, transfer of any sale conducted by public auction or private treaty, taking possession, appointing receivers or exercising any power of sale conferred by section 90 (3) of the *Land Act*, 2012, leasing, letting, charging or otherwise interfering with all that land parcels known Land reference No. Mombasa/block XXI/526 and 527 pending the hearing and determination of the suit.

   d) That the costs of this application be provided for.

   The honourable court certified the application as urgent but directed the same to be served upon all the Defendants/Respondents for an "inter partes" hearing on May 19, 2022. Upon service being effected, the while 1st Defendants/Respondent failure to neither enter appearance nor file any responses, the 2nd and 3rd Defendants/Respondents based on the provision of Order 51 Rules 14 of the Civil Procedure Rules, 2010 opted to only file the notice of preliminary objection and a bundle of authorities to act as their replies opposing the application.

4. Briefly, from the filed pleadings facts, the Plaintiffs/Applicants claim to be long time tenants to the suit and had continuously carried business of car bazaar on the suit land which belonged to the 1st Defendant/Respondent herein. They held having in the recent days been seeing entourages visiting the premises for inspection for purposes of an alleged pending public auction. They claim they were never informed by the 1st Defendant/Respondent that the property had been charged and neither were they aware of any scheduled public auction. Indeed, they stated that they had never been served with any statutory notice for that matter as required by law the provisions of section 96 of the *Land Act*.

5. They posited that they only came to be aware of the intended sale by public auction to take place on May 23, 2022 when they started receiving numerous phone calls from other business associates with the information that the same had been advertised in one of the local newspapers – "The people Dailies" the edition of May 9, 2022.

   According to them, definitely, as tenants on the premises, their businesses would be adversely affected by the said public auction. They opined that the sale was premature without consideration that them being long term tenants who would suffer a loss. They opined that it would be impossible to adequately compensate them in terms of damages.

They argued having established a "Prima facie" case with a high chance of succeeding while the Defendants/Respondents never stood to suffer any prejudice as the property was already charged in their favour and they were holding the Certificate of Title deed hence they would still get compensated in the long run.

II. The 2nd & 3rd Defendants/Respondents Case

6. The 2nd & 3rd Defendants/Respondents, vide the said Notice of Preliminary Objection sought to terminate these proceedings in limine. They raised the following grounds, verbatim:

    a. That this Honourable court has no jurisdiction to entertain the application and the entire suit. The jurisdiction in this suit exclusively lies with the High Court of Kenya.

    b. That the Plaintiffs lack locus standi to seek the reliefs against the 2nd Defendant who is the Chargee as they are not recognized in law as one of the persons to seek relief under section 103 of the *Land Act*, 2012.

    c. That the interest in land is conferred by registration pursuant to section 24 of the *Land Registration Act* and therefore the Plaintiffs have no legal interest in the Charged Property.

    d. That the Plaintiffs' interest is subject to the Bank's interest pursuant to section 25(1)(a) of the *Land Registration Act* as the property is encumbered/charged to the bank.

    e. That the Bank's interest as Chargee ranks in priority to any other interest purportedly acquired by the Plaintiffs' pursuant to section 36 of the *Land Registration Act*.

    f. That the Plaintiffs' application aforesaid is res judicata.

    g. That the Plaintiffs' application is fatally defective because:

        i. Its purports to invite this Honourable Court to overturn the various decisions rendered by the Court of Appeal

        ii. It purports to invite this Honourable court to sit on appeal on various decisions pronounced by the High Court and Environment & Land Court which are of equal status as this Honourable court.

    h. That the Plaintiffs' application is an abuse of the court's process because:

        i. Numerous similar applications have been filed in the Court of Appeal, the High Court and the Environment Court seeking to stop the sale of the suit properties.

        ii. All the said applications have been dismissed with costs.

        i. That the purpose lease agreement between the Plaintiffs and 1st Defendant is unenforceable against the bank as the 1st Defendant did not obtain consent from the Bank to lease the said charged properties in contravention of section 59 of the *Land Registration Act* No. 3 of 2012 and the section 87 of the *Land Act* No. 6 of 2012.

II. The Submissions.

7. This has been an intensively marathon exercise. On the May 19, 2022 while in the presence of all the parties herein, the Honorable Court directed that the objection be disposed off orally on May 23, 2022 and ruling to be rendered immediately thereafter. In the meanwhile, the scheduled sale by public auction was postponed to May 24, 2022 at 11.00am. Indeed, on 23rd May, 2022 all the Advocates

appeared before court and ably articulated their submissions with regard to the submissions as stated herein below. Subsequently, the Honorable Court undertook to deliver its ruling the following day at 8.30am.

A. The 2nd & 3rd Defendant/Respondents Submissions.

8. Mr. Wawire Advocate of the Law firm of Messers. Wawire & Allen Advocates for the 2nd and 3rd Defendants/Respondents indicated that they would only be relying on the filed notice of the preliminary objection and the bundle of authorities as their replies. The Learned Counsel stated that he was very optimistic that once the objection was argued and heard it would dispose off the entire application and suit altogether. He segmented his submissions under the following five (5) broad issues. These were:-

    a) On the issue of Jurisdiction.

9. He argued that the ELC did not have jurisdiction to hear and determine the subject matter. His Contention was that the right Court to have filed this suit was High Court this being a matter of Charges and Mortgage. To buttress his point he relied on the Court of Appeal decision "Co - operative Bank of Kenya Limited – Versus - Patrick Kangethe Njuguna & 5 Others (2017) eKLR (hereinafter referred to as "Patrick Kangethe:) in particular the contents of paragraphs 36 to 41. His argument was that the matter in the instant case was not one on land. . It was a case of statutory power of sale. The Learned Counsel held that it was disputable by the Plaintiffs that there was a registered Charge against the suit property and by way of exercising its power of sale, as founded under the provision of section 96 of the *Land Act*, No. 3 of 2012, the bank now wanted to sale the suit land on May 24, 2022 at 11.00am as advertised and scheduled thereof.

    b) On the Issue of "the Locus Standi".

10. The Learned Counsel submitted that the 1st and 2nd Plaintiffs/Applicants herein did not have proper legal capacity ("Locus Standi") to institute this suit. He argued from the numerous court cases, the only person who could challenge the statutory power of sale was the Chargor – in this case the 1st Defendant but no one else. He referred Court to the provisions of section 103 (1) and (2) of the *Land Act* and the decisions of "*Nairobi Mamaba Village – Versus – National Bank of Kenya*, 2002, 1 EA" – pages 19 of the bundle (Refer).

11. He stated that the Plaintiffs were purporting to be tenants of the suit property but had not attached any proof such a tenancy agreement into their filed pleadings. He reiterated that they had no "Locus Standi" to be seeking an injunction orders against the Defendants/Respondents herein. He relied on the legal ratio in the case of "Venture Capital & Credit" (Supra) and "Cineland Limited" (Supra) as being examples of people who could come to challenge the bank or financial institutions on exercising its statutory power of sale.

    c) On the Issue of the Doctrine of "Res Judicata".

12. The Learned Counsel opined that the Plaintiffs/Applicants were in breach of the doctrine of "Res Judicata" as they offended the provision of section 7 of the *Civil Procedure Act*. Cap 21 of the laws of Kenya. He informed Court from the bar that there has existed over ten (10) court cases instituted before different Courts of law over the same subject matter. He indicated that all the other properties and been sold and there were only two (2) properties which were still remaining. As a matter of adducing empirical evidence, the Learned Counsel informed Court that these cases were the one founded as cases Item No. 5 to 13 (with an exception of case no. 9) of the bundle of authorities by the Defendant/ Respondents. Nonetheless, the Advocate admitted that the only difference was that the Plaintiffs in

the instant case were different to the cited cases. This fact notwithstanding, he still argued that the Doctrine of res judicata would still be applicable in the given circumstances as the Courts at the Court of Appeal (being cases Numbers 5 & 6 of the bundle of cases), High Court and the ELC has already made such pronouncements. He stressed that although the parties were different in those cases but the subject matter was the same as the one in the instant case.

13. It was his contention for this Court to grant the injunction order sought, the Court would be sitting as appellate court of the decisions made by the Court of Appeal which was superior one than this Court in terms of hierarchal order. He stated that the Court of appeal had wondered the reason the Applicants perennially kept on approaching Courts on interlocutory applications rather than such biting the bullet by fixing the matters for a full trial and final determination on merit by Courts.

d) On the issue of the abuse of the Court process and law.

14. The Learned Counsel held that there existed intense abuse of the Court process and law by the Applicants in instituting these numerous cases. There had been frequent interruption of the process of exercising the statutory power of sale as required by law. In all this cases, it is the banks that constantly continued being prejudices. To support his argument he referred court to the decision by Justice J. Mativo of "*Juja Coffee exporters Limited & 3 Others – Versus – Bank of Africa Limited & 4 Others*, HCC No. 57 2016 (Unreported).

He further held from the bar and stated it was not disputed that the Plaintiffs herein had sought for the said injunction orders from High Court, Mombasa before Justice Njoki and it was awaiting a ruling in the month of July, 2022.

e) On the issue of the Consent.

15. Under this sub – heading, the Learned Counsel submitted that under the provision of section 59 of Registered *land Act*, Cap. 300 (now Repealed) and Section 87 of the *Land Act*, which provided that if the Charge contained a condition, express or implied that Chargee prohibits the Chargor fom transferring, assigning, leasing, or in any case of a lease, sub leasing the land without the consent of the Chargee, no transfer, assignment, lease or sub – lease shall be registered until the written consent of the Chargee has been produced to the Registrar. This never happened in the instant case.

In conclusion, he urged Court in the interest of justice that the Plaintiffs' Application dated 12th May 2022 and the entire suit be dismissed with costs.

B. The 1st & 2nd Plaintiffs/Applicants Submissions.

16. On May 23, 2022, the Learned Counsels for the Plaintiffs/Applicants, the Law firm of Onyari, Nyameno & Company Advocates filed their written submissions and a List of authorities dated May 20, 2022 in opposing the said preliminary objection. Mr. Gikandi Advocate leading the firm of Messrs. Onyori & Company Advocates tendered his submissions as follows.

17. Objection Ground - Jurisdiction is with the ELC

The Learned Counsel contended and relying on the case of "Patrick Kangethe" (Supra), that the jurisdiction to entertain this suit lies with the High Court and not the ELC. On this point, he submitted that there a misreading of the case of Patrick Kangethe (Supra). Firstly, he argued that that was a case of a chargor questioning the exercise of the statutory power of sale. He held that that case was different from a tenant in occupation questioning the same power.

Secondly, in that case the Learned Counsel stated that the Court of Appeal held that:-

> " However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed.

He opined that his understanding was that the learned judges implied that if the creation of the charge was itself in issue, then it is a matter for the ELC to determine. He referred Court to the contents of paragraphs 5 & 9 of the Plaint to the effect that they had been in occupation since the years of 1992 & 1997, and had never been told that any charge was created over the land where their businesses operate from.

To him what appeared to be in direct contest was on the legality of a charge created without notice and participation of long-term tenants. Whether that claim would succeed or fail was a different issue; but it was the ELC that must decide it.

Thirdly, this suit was a dispute on the use and occupation of the land. The Plaintiffs had indicated that they had been in occupation and extensively invested in their premises. They sought for protection to that occupation and investment. That is not dissimilar with "*Catherine Kanini Kioko & another v Ruweya Ali Mwinyi & another* [2017] eKLR" where the ELC, in allowing the application, held that:-

> " In this case, the Applicants' interest on the suit properties though not registered but their physical possession has not been disputed...
>
> From the dates in the contract, they are the first in time and their being in possession, the law accords them some recognition...

Fourthly, the Learned Counsel referred Court to two (2) recent decisions by the ELC (Munyao and Yano JJ.). In "*Margaret Muthoni Njoroge – Versus - Housing Finance Company Limited & another* [2020] eKLR and the case of "*Samuel Gikuru & 2 others v HFC Limited* [2020] eKLR.

He concluded that the ELC was clothed with abundance of jurisdiction to hear the matter.

18. Ground 2: Plaintiffs have locus standi.

The Learned Counsel vehemently argued that the 1st and 2nd Plaintiffs had all the legal capacity to have instituted this case on their own behalf as tenants to the suit property. He contended and relying on well known cases of "Venture Capital; Nairobi Mamba Village" and "Caneland Limited", that the only person capable of challenging the exercise of the statutory power of sale was the chargor. Those cases were rightly decided when they were, but much of the force in their holding has waned with the *Land Act* 2012.

He stated that that any practitioner who blanketly relied on those three cases must be oblivious of the expanded locus standi under the provision of section 96 (3) of the *Land Act* 2012. For sure, it could not be logical to say a spouse of the chargor who consented to the charge would have no locus to question the exercise of that power.

He opined that the Plaintiffs' locus standi was not an object of mystery. To buttress his point he strongly relied on the plain text of Section 96(3)(e) of the *Land Act* 2012. Tuiyott J. (now JA) thought so in "*Ashite Chandrakant Patel & another – Versus - Diamond Trust Bank Kenya Limited* [2019] eKLR holding that:-

> " Tenants or subtenants of premises on the charged property ought to be given Notice of an intended sale...The Notice affords a tenant/subtenant opportunity to reorganize his or her

affairs. But it has to be emphasized that the right of notice belongs to the tenant or subtenant and so for a statutory notice to be faulted for noncompliance with the provisions of section 96(3)(e), the complainant must necessarily be the tenant or subtenant".

And the case of "*Emrre Global Investors Ltd – Versus - Housing Finance Company of Kenya Ltd & 2 others* [2014] eKLR. And in Catherine Kanini (supra). He thought the objection is equally misguided.

19. Grounds 3, 4, 5 & 7: Registered versus unregistered interests

The learned Counsel cited Sir Charles Newbold P. and case of "*Francis Munyao Mulinge & 2 others – Versus - Gladys Mponda & 5 others* [2022] eKLR as lamenting thus;

> " 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...It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Francis Munyao Mulinge (supra) also cites Black's Law Dictionary saying;

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

Lucy Kurgat – Versus - Franline Yaola Manyonge [2020] eKLR is equally apt. He wonder whether this was a proper point of law to be taken as a preliminary objection and answered in the negative.

Firstly, whether the 2nd & 3rd Defendants were accepting the facts as pleaded by the Plaintiff. If they were then the Plaintiff were questioning the legality of the charge and says it should not be the basis for disposing the suit property. But he averred that it was clear that the 2nd Defendant was contending that the charge was validly registered and bestowed on it power to sell the suit property. That was a dispute on the facts.

Secondly, he wondered whether the registered interests superseded unregistered interests as contended by the 2nd & 3rd Defendants could not be a point of law. It is a point which the 2nd & 3rd Defendants may take to persuade the court to exercise discretion in their favor in the long run. They may succeed on that point at trial; although Catherine Kanini (supra) puts considerable doubt on it; but it was not a preliminary objection to be decided in limine.

20. Grounds 6, 7 & 8: Res judicata; stare decisis and abuse of court process

He stated that they had taken these points together. Starting with stare decisis, he stated that they did not see anything in the two (2) Court of Appeal decisions, or the ELC and High Court decisions listed as No. 5, 6, 7, 8, 10, 11, 12 & 13 in the 2nd & 3rd Defendants' List of Authorities, that binds this court.

Stare decisis, the English of which is "to stand by things decided", simply means that decisions of a court higher up the hierarchy are binding on the courts below it. He argued that but as in the case of "*Mwai - Versus - Moi* [2008] 2 KLR (EP) 351, which the 2nd & 3rd Defendants rely on, says, those decisions are binding "unless they can be distinguished from the case under review on some other principle...".

He held that taking of this as a preliminary point of law had denied this court the opportunity to see what the issue was and what was actually decided in the cases which it is now contended tie the hands of this court. He contended that making reference to the judgment alone was sufficient ground to decide the point.

He further stated that even if we are to stick with the judgments and rulings provided by the 2nd & 3rd Defendants, he did not see anywhere where the points now being raised by the Plaintiffs were ever

considered. He stated that they had painstakingly perused those decisions and could not see any court address the rights of a tenant under section 96(3)(e) of the *Land Act* 2012. Those cases were therefore easily "distinguished from the case under review" and could not bind this court.

On this point, he relied on the decision of the Supreme Court in *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* [2021] eKLR held that for the court to decide a plea of Res Judicata;

> " Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case.

He summarized that this issue would not be achieved through a preliminary Objection without looking at "the entire pleadings and record". He stated that no wonder some judges had held, with some justification, that the plea of res judicata should be taken by a formal application.

He averred that even assuming the plea of res judicata was properly taken as a preliminary point it could not succeed on two accounts. First, the Plaintiffs here had not been shown to be parties in any of the other cases. They were agitating their own interest as tenants who have occupied the suit property since years 1992 and 1997. There is therefore no commonality of parties.

Secondly, he stated that there was no commonality of issues. As we said earlier, the 2nd Defendant's exercise of the statutory power of sale had never been challenged on the ground that notices had not been served under the provision of Section 96(3)(e) of the *Land Act* 2012. This was the first time the court was requested to interrogate that issue. The invitation was coming from a party who had never participated in any of the past litigation to which the court had been referred.

It is in those circumstances that the Supreme Court in "*John Florence Maritime Services* (supra) reversed the Court of Appeal while holding that:-

> " From the face of it, it would appear that the issues in the present suit and JR 130 of 2011 are directly and substantially the same. However, the Appellants herein predicated their petition on inter alia grounds that the bilateral agreement should have been approved by Parliament in order to form party of Kenyan law and in failing to do so, the Respondents contravened Article 2...We therefore find that the principle of res judicata was wrongly invoked on this ground.

In a nutshell, he argued that the Supreme Court was saying that it was permissible to challenge the same agreement on different grounds. Applying this principle to the instant case, he reiterated with great emphasis that it was permissible to challenge the exercise of the statutory power of sale on account of Section 96(3) of the *Land Act* 2012, without falling afoul of the plea of res judicata.

In conclusion, the Learned Counsel submitted that they had demonstrated that the points taken as preliminary points of law were actually points of fact. Those that are proper points of law are without merit.

He urged Court to find the preliminary objection dated 18th May 2022 to be devoid of merit and to reject it with costs.

VI. The Issues for Determination

21. I have carefully considered the application by the Defendants for the preliminary objection, the grounds thereof and also the submissions filed by the Defendant/Applicant. Further, I have considered the law applicable in this case. There are three issues for determination in both the applications before me. They are;

    a) Whether the Notice of Preliminary objection dated May 18, 2022 filed by the 2nd & 3rd Defendants meets the established threshold founded on law and Precedents.

    b) Whether or not this Honorable Court has jurisdiction to hear and determine the matter before it?

    c) Whether or not the 1st and 2nd Plaintiffs/Applicants have "the Locus Standi" in this matter?

    d) Whether the 1st and 2nd Plaintiffs/Applicants Notice of Motion application and the Plaint here was in breach of the Doctrine of Res judicata offending the provisions of section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya?

    e) Who will bear the costs of the Notice of the Preliminary Objection by the 2nd & 3rd Defendants/ Respondents.

V. Analysis and Determination

ISSUE No. 1 Whether the Notice of Preliminary objection dated May 18, 2022 filed by the 2nd & 3rd Defendants meets the established threshold founded on law and Precedents.

22. 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, and which all the parties here cited of "*Mukisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors Limited.* [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"

23. Further, I wish to cite the case 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.

However, it cannot be raised if any facts have to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

In the case of "*Quick Enterprises Limited - Versus - Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the Court held that: -

> "When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

In determining a Preliminary Objection, the Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law. See the case of "*Avtar Singh Bhamra & Another – Versus - 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."

Before the Court embarks on determining the merit of the Notices of Preliminary Objections, it will first determine whether what have been raised by the parties herein satisfy the ingredients of a Preliminary Objection. In this determination, the Court will be persuaded by the findings in the case of *Oraro – Versus - Mbaja*(2005) 1KLR 141, where it was held that:-

> " Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".

24. 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. Certainly, the issues raised by the 2nd and 3rd Defendants/Respondents herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the 2nd and 3rd Defendants/Respondents was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

ISSUE No. 2 Whether or not this Honorable Court has jurisdiction to hear and determine the matter before it?

25. The first issue relates to the jurisdiction of this Court. It is trite law that the moment a party in a suit challenges the jurisdiction of a Court, anything else the court does from then onwards becomes a nullity whatsoever. Once that happens, it is significant that that huddle is finally tackled first and foremost. This is because without jurisdiction the court has no mandate to make one more step. It

must down its tools. This legal preposition was well established in the now famous case in the now famous case of "*Owners of Motor Vessel "Lilian S" – Versus - Caltex Oil (Kenya) Limited* (1989) eKLR dealt with a court, jurisdiction thus:-

> "Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given".

In the instant case, this court's jurisdiction was challenged through the Preliminary objections raised by the 2nd and 3rd Defendant/Respondents herein.

26. The broad jurisdiction of the Environment and Land Court is donated by article 162 of *the Constitution* which establishes the three tiers of Kenya's Superior Courts. It provides thus:

1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)

2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

   a) employment and labour relations; and

   b) The environment and the use and occupation of, and title to, land.

3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

27. In the discharge of the mandatory obligation placed on it by *the Constitution*, Parliament enacted the *Environment and Land Court Act* and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

> 13 Jurisdiction of the Court
>
> 1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) b of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> 2) In exercise of its jurisdiction under article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-
>
>   a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
>
>   b) Relating to compulsory acquisition of land;
>
>   c) Relating to land administration and management;

d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and

e) Any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under articles 42, 69 and 70 of *the Constitution*.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court

5) Deleted by Act No. 12 of 2012

6) Deleted by Act No. 12 of 2012

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

a) Interim or permanent preservation orders including injunctions;

b) Prerogative orders;

c) Award of damages;

d) Compensation;

e) Specific performance;

f) Restitution; or

g) Declaration; or

h) Costs

28. It is to be noted that under Article 165(5), *the Constitution* expressly bars the High Court against exercising jurisdiction in respect of matters reserved for the Supreme Court or falling within the jurisdiction of the third tier superior courts established under article 162(2) of *the Constitution*. Article 165(5) of *the Constitution* provides thus:

" The High Court shall not have jurisdiction in respect of matters:

a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution, or

b) falling within the jurisdiction of the courts contemplated in article 162(2)"

A plain reading of the above constitutional and statutory framework on the jurisdiction of the Environment and Land Court reveals that the Environment and Land Court which is the court contemplated under article 162(2)(b) of *the Constitution*, has a broad constitutional jurisdiction to hear and determine disputes relating to the environment and the use, occupation, and title to land.

29. *The Constitution* donated powers to Parliament to legislate a legal framework elaborating on that broad constitutional framework. In so doing, Parliament at section 13 of the *Environment and Land Court*

Act empowered the Court to make any order or grant any relief as the Court deems fit and just. I am therefore satisfied beyond doubt that under Section 13 of the *Environment and Land Court Act*, this court has jurisdiction to entertain any matter that involves land disputes; that jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.

30. From the above cited provision of the law, it brings out a very weighty issue on jurisdiction of this court on matters of an individual and the County governments. Based on the provisions of Article 162 (2) (b) of *the Constitution* of Kenya, sections 3 and 13 of the ELC Act, No. 19 of 2011, Sections 150 of the *Land Registration Act*, No. 3 of 2012 and Section 101 of the *Land Act*, No. 6 of 2012 confers this court with unlimited and original jurisdiction to hear and determine on all matter pertaining to land and environment matters. As indicated herein, this Court would find it difficult to be conflicting with the decision of this Court which are of equal status. I fully concur with the Advocate for the Plaintiffs on this issue while citing the two (2) recent decisions by the ELC (Munyao and Yano JJ.). In "Margaret Muthoni Njoroge (Supra), Munyao J., making direct reference to Patrick Kangethe, commented that:-

> " ...the Court of Appeal was of opinion that the case was one that was principally related to accounts. I do not believe that the Court of Appeal held that when this court sees the word "charge" in any pleadings, then it should drop its pen.

Then concluded by saying;

> " I do not see how one can then argue that this court would not have jurisdiction over a dispute related to the legality of the instrument of the charge. An auction sale by Chargee is similarly a sale related to land, and in the same way that this court will have jurisdiction to handle a dispute relating to a sale of land, so too, it is this court with jurisdiction to determine disputes relating to the manner in which a Chargee is disposing or has disposed of the charged land.

I wish to add that in this case, which has been greatly misinterpreted by numerous legal practioneers and jurists alike, meant the ELC would strictly down its tools when the disputed issues were overly pertaining to accounts then the right Court would be to refer it to High Court for its determination. Certainly, the Court of appeal never removed the basic purpose whereby the Environment & Land Court was created being land use, title and occupation from this court.

Yano J. weighed in on the issue in "*Samuel Gikuru & 2 others v HFC Limited* [2020] eKLR holding that;

> " The Plaintiff seeks an injunction to restrain the defendants from exercising its statutory power of sale and selling the said land...The current law on charges is in part C of the *Land Registration Act* and Part VII of the *Land Act* and section 101 of the *Land Registration Act* and Section 150 of the *Land Act* gives this court jurisdiction to hear and determine disputes, actions and proceedings concerning land under the two Acts.

Certainly, the ELC is clothed with original and unlimited jurisdiction to hear and determine such a dispute. From the above, it will be discerned that this Honorable Court finds that the suit is properly before it and the objection that this court has no jurisdiction is dismissed.

31. Having analysed and examined what falls in the ambit of the jurisdiction of the court, I find that this court is competent enough to hear this particular application, the Plaintiffs' Notice of Motion and the entire suit; having dealt with the issue of jurisdiction let us look at the Plaintiffs' locus standi.

> Issue No. 3 Whether or not the 1st and 2nd Plaintiffs/Applicants have "the Locus Standi" in this matter?

32. It is the 2nd and 3rd Defendants contention that the Plaintiffs have no locus standi to seek the reliefs against the 2nd Defendant who is the Chargee as they are not recognized in law as one of the persons to seek relief under Section 103 of the *Land Act*, 2012 which reads as follows:

> " An application for relief against the exercise by the chargee of any of the remedies referred to in section 85 (3) (a) and (b) may be made by
>
> (a) The chargor;
>
> (b) If two or more persons are joint chargors, by one or more of them on their own behalf;
>
> (c) A spouse of the chargor;
>
> (d) A lessee of the chargor; or
>
> (e) The trustee in bankruptcy of the chargor."

33. Section 96 (2) & (3) (e) Provides:

> "Chargee's Power of Sale:-
>
> (2) Before exercising the power to sell the Charged land, the Chargee shall serve on the Chargeor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have lapsed from the date of the service of that notice to sell"
>
> (3) (e) a copy of the notice to sell served in accordance with subsection (2) shall be served on:-
>
> (e) any lessee and sub – lessee of the Charged land or of any buildings on the charged land....."

This Honourable Court concurs with the Advocates for the Plaintiffs to the effect that the 1st and 2nd Plaintiffs had all the legal capacity to have instituted this case on their own behalf as tenants to the suit property. I could wish to distinguish the ratio founded in the well known cases of "Venture Capital; Nairobi Mamba Village" and "Caneland Limited", as advanced by the learned Counsel for the 2nd and 3rd Defendants herein to the effect that the only person capable of challenging the exercise of the statutory power of sale was the chargor. Those cases were rightly decided when they were, but much of the force in their holding has waned with the *Land Act* 2012.

Currently, and with the development of Jurisprudence, these three cases are oblivious of the expanded locus standi under the provision of Section 96 (3) of the *Land Act* 2012. The expanded locus standi covers spouses of the chargor who consented to the charge would have locus to question the exercise of that power. As the tenants, they ought to be served with the notices for the intention of the sale of the charged property.

I further associate myself to "*Ashite Chandrakant Patel & another – Versus - Diamond Trust Bank Kenya Limited* [2019] eKLR holding that:-

> " Tenants or sub - tenants of premises on the charged property ought to be given Notice of an intended sale...The Notice affords a tenant/subtenant opportunity to reorganize his or her affairs. But it has to be emphasized that the right of notice belongs to the tenant or subtenant and so for a statutory notice to be faulted for noncompliance with the provisions of section 96(3)(e), the complainant must necessarily be the tenant or subtenant".

However, the Defendants have not shown and explained in their application how the Plaintiffs are not a party to this suit. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. The issue for determination is whether the preliminary objection as presented satisfies the threshold for grant of such an order for striking out a suit.

Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where a court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. Unless parties enter into a consent compromising the case.

> Issue No. 4 Whether the 1st and 2nd Plaintiffs/Applicants Notice of Motion application and the Plaint here was in breach of the Doctrine of Res judicata offending the provisions of section 7 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya?

34. Ideally, the Doctrine of Res Judicata 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.

35. 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.

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 specter 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.'

36. While applying these principles to the instant case, this court has established that although indeed the 1st and 2nd Plaintiff/Applicant filed this suit,

The doctrine of res judicata is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

37. In order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. what issues were really determined in the previous case;

ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

The test in determining whether a matter is res judicata as stated was summarized in *Bernard Mugo Ndegwa – Versus - James Nderitu Githae and 2 Others* (2010) eKLR, as follows that:

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

38. The 2nd and 3rd Defendants in the Preliminary objection did not in any way show that was this matter had been determined in another court of competent jurisdiction. Courts have rendered many rulings on the doctrine of res judicata which essentially frowns upon the use of the courts to abuse processes. The moment the court comes to the conclusion that the suit is res judicata, then the court should not shy away from pronouncing itself so.

The doctrine of res judicata was discussed by the Supreme court in the case of J*ohn Florence Maritime Services Limited & Another – Versus - Cabinet Secretary Transport and Infrastructure & 3 others* [2021] eKLR

In paragraph 86, the court restated the elements that must be proved before a court may arrive at the conclusion that a matter is res judicata. The ration in this decision was that, for the Preliminary objection to succeed, the Courts needed have a look at the "the entire pleadings and record". Indeed some judges have held, with some justification, that the plea of Res Judicata should be taken by a formal application. It is for this reason that this Court was of the strong view that the 2nd and 3rd Defendants would have opted to fully invoke the provision of order 51 rule 14 of the *Civil Procedure Rules*, 2010 by at least filing both the Replying Affidavit along with the Preliminary object which would have enabled them to clearly bring out all these issues of facts which are a great impediment in an objection which is based purely on law. Further, the court stated:

> "For Res judicata to be invoked in a civil matter, the following elements must be demonstrated:
>
> a) There is a former judgement or order which was final.

b) The judgement or order was rendered by a court having jurisdiction over the subject matter and the parties, and

c) There must be between the first and second action identical parties, subject matter and cause of action."

ISSUE No. 5 Who will bear the costs of the Notice of the Preliminary Objection by the 2nd & 3rd Defendants/Respondents.

39. The provisions of section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of "*Reids Heweet & Company – Versus – Joseph* AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

> " The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is the 1st and 2nd Plaintiffs/Applicants have succeeded in the Notice of Motion application dated 12th May, 2022 while the notice of Preliminary Objection dated May 18, 2022 by the 2nd and 3rd Defendants/Respondents fails for being unmeritorious. For that very fundamental reason, therefore, the costs of this application will be made to the 1st and 2nd Plaintiffs/Applicants herein the 2nd and 3rd Defendants/Respondents herein.

IV. Conclusion & Disposition

40. Before I conclude this Ruling I must highly commend all the parties in this matter for their resilience, diligence, dignity, decorum and his enthusiasm on this matter. Within such a short duration they were able to put together such robust, well researched and articulate submissions and persuasive authorities. It is just unfortunate, I dare say, that being in adversarial system, not all parties can take home the golden trophy of victory. And so I wish all the parties herein the very best in all their future endeavours in the matter. Ultimately, having critically gone through the Notice of the Preliminary Objection and the framed issues herein, I wish to make the following findings:-

a. That an order be and is hereby made that the notice of the Preliminary Objection dated 18th May, 2022 by the 2nd and 3rd Defendants/Respondents herein lacks merit and therefore be dismissed.

b. That this Honorable Court has original and unlimited Jurisdiction under the provisions of article 162 (2) (b) of *the Constitution*, Sections 3 & 13 of the Environment & Land Court Act No. 19 of 2011, Sections 101 of the *Land Registration Act*, No. 3 of the 2012 and Section 150 of the *Land Act*, No. 6 of the 2012 to hear and determine the issues raised herein this suit.

c. That an order be and is hereby made that the Notice of Motion application dated May 12, 2022 by the 1st and 2nd Plaintiffs/Applicants being unopposed be and is hereby allowed in terms of Prayers numbers 3 and 4 of the said application hereof.

d. That for expediency sake this suit be fixed for hearing and determination within the next 90 days from the date of this ruling. Thus, the following should be effected:-

i. The 1st, 2nd and 3rd defendants/respondents herein are granted seven (7)days to file and serve their statements of defence and/or counter claim pursuant to the provision of order 6 & 7 and fully comply with the issue of case management under order 11 of the *Civil Procedure Rules,* 2010;

ii. The 1st & 2nd Plaintiffs/Applicants herein are granted Three (3) days leave to file their replies to the filed Statements of Defence and/or Counter Claim and file any further documents and/or witnesses statements.

iii. The matter to be mentioned on July 30, 2022 for purposes of ascertaining compliance, Pre trial Conference session and fixing a hearing date.

e. That the costs of this application will be in the cause.

It Is Ordered Accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY 2022

HON. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna, Court Assistant.

Mr. Gikandi Advocate leading Onyiri & Company Advocates for the 1st & 2nd Plaintiffs/Applicants.

No Appearance for the 1st Defendant/Respondent.

Mr. Wawire Advocate for the 2nd & 3rd Defendants/Respondents