



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndambuki & 10 others v Agricultural Finance Corporation & 6 others (Environment and Land Constitutional Petition 02 of 2020) [2022] KEELC 3770 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3770 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 02 OF 2020**  
**CA OCHIENG, J**  
**MAY 12, 2022**

**BETWEEN**

**MWANZIA NDAMBUKI ..... 1<sup>ST</sup> PETITIONER**  
**JONATHAN MUSEMBI ..... 2<sup>ND</sup> PETITIONER**  
**JOSEPH KIOKO KITUKU ..... 3<sup>RD</sup> PETITIONER**  
**STEPHEN MAWEU VATA ..... 4<sup>TH</sup> PETITIONER**  
**MUNYOKI MUTABUTA ..... 5<sup>TH</sup> PETITIONER**  
**NDOLO KALELI ..... 6<sup>TH</sup> PETITIONER**  
**SAMUEL MUSAU NZAU ..... 7<sup>TH</sup> PETITIONER**  
**AGNES MUNYIVA MUNGUTI ..... 8<sup>TH</sup> PETITIONER**  
**NGUTI MATHUKO ..... 9<sup>TH</sup> PETITIONER**  
**FRANCIS KIERUKA WANJIRU ..... 10<sup>TH</sup> PETITIONER**  
**JOHN MUTUA NGUMBI ..... 11<sup>TH</sup> PETITIONER**

**AND**

**AGRICULTURAL FINANCE CORPORATION ..... 1<sup>ST</sup> RESPONDENT**  
**PRAM COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**  
**WENDANO WA MURI COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**  
**THE HONOURABLE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**  
**CHIEF REGISTRAR OF TITLES ..... 5<sup>TH</sup> RESPONDENT**  
**THE CHIEF LAND REGISTRAR ..... 6<sup>TH</sup> RESPONDENT**  
**NATIONAL LANDS COMMISSION ..... 7<sup>TH</sup> RESPONDENT**



## RULING

### Introduction

1. This ruling is in relation to a notice of preliminary objection dated March 13, 2020 made in respect to the petitioners' petition dated October 7, 2019 on the grounds that; -
  - i. The petition filed by the petitioners is *res judicata* as the issues raised have been adjudicated upon in Machakos ELC Case No 66 of 2015; *Abdalla Kibue & 906 Others v Agricultural Finance Corporation & 2 others* where parties recorded a consent which was adopted as an order of the court on July 4, 2019.
  - ii. The subject matter of this suit does not exist and as such there is no cause of action since the said order of the court has been fully complied with and the parcels of land known as LR No 11610 and LR No 10314 also known as Muri Farm have already been subdivided and sold to 3<sup>rd</sup> parties.
  - iii. The petition is misconceived and an abuse of the court process.
2. The notice of preliminary objection was canvassed by way of written submissions and on record are both the 3<sup>rd</sup> respondent's and petitioners' submissions dated the January 19, 2021 and April 29, 2021 respectively.

### Analysis and Determination:

3. Upon consideration of the instant notice of preliminary objection including the rivalling submissions, the only issue for determination is whether the petition dated October 7, 2019 is *res judicata* and should be dismissed with costs.
4. In its submissions, the 3<sup>rd</sup> respondent contended that the instant petition is *res judicata*. It explained that despite the petitioners referring to the Machakos ELC Case No 66 of 2015 where a consent was entered into by the residents of the Muri Farm and the respondents herein; which consent was adopted as an order of the court and determined the proprietorship of the Muri farm, hence rendering this petition *res judicata*. Further, that the said LR Nos 5938, 11610 and 10314 situate at Masinga Sub-County Machakos County were duly subdivided and sold by the 1<sup>st</sup> respondent to third parties as per the consent order. It contends that the parcels have accordingly been subdivided, new portions created and the said titles were cancelled hence they do not exist. It insisted that the petitioners did not appeal and/or seek review of orders of this honourable court following its orders dated the July 4, 2019.
5. To buttress its averments, it relied on section 7 of the *Civil Procedure Act* as well as the following decisions: *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Ltd* (1969) EA 696; *Kenya Breweries Limited & another v Keroche Breweries Limited* [2020] eKLR and *Oraro v Mbaja* [2005] I KLR 141; and Supreme Court of India case of *Nagabhushana v State of Karnataka & Ors* [2011] INSC 88 as cited in *Mwangi Stephen Muriithi v Daniel T Arap Moi & anor* [2017] eKLR.
6. The petitioners submitted that the instant notice of preliminary objection is based on factual averments and the court will require evidence to demonstrate that Machakos ELC No 66 of 2015 is similar to the instant petition. They deny being parties to the aforementioned suit and insist the 3<sup>rd</sup> respondent should have provided the pleadings in the said matter which would require an affidavit. The petitioners averred that the court should compare the prayers sought in the petition with the aforementioned suit



before making any determination on whether the petition is *res judicata* or not. They reiterated that the 3<sup>rd</sup> respondent did not bother to show the court that the petition offends the ingredients of *res judicata* and hence there is no indication on whether or not the Petitioners are the same or part of the group in the aforementioned suit.

7. To buttress their averments, the Petitioners relied on the following decisions: *Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited* (1969) EA 696; [David Karobia Kiiru v Charles Nderitu & another](#) High Court Appeal No 27 of 2016; [George Oraro v Barak Eston Mbaja](#) Nairobi High Court Civil Case No 85 of 1992; and [Mwangi Stephen Muriithi v Hon Daniel Tarap Moi & another](#) [2017] eKLR.
8. The 3<sup>rd</sup> respondent has sought for the petition to be dismissed with costs for being *res judicata*, which notice of preliminary objection is opposed by the petitioners.
9. On perusal of the petition herein, I note the fulcrum of the dispute herein revolves around claim for occupation of suit land and various violations the petitioners claim they have been subjected to, by the respondents. The 3<sup>rd</sup> respondent filed the instant notice of preliminary objection to oppose the petition.
10. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at section 7 which stipulates 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 can 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.”
11. In the case of *Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited* (1969) EA 696; the court held 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 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.”
12. While the Supreme Court addressed its mind on this issue in the case of [Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others](#) [2015] eKLR and stated that:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts.” [Emphasis added]
13. Further in the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, 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.”
14. From the legal provisions cited above, it is pertinent that for a party to rely on the doctrine of *res judicata*, the decisions must emanate from the same court with competent jurisdiction; parties must



be the same and litigated under one title. In this instance, the 3<sup>rd</sup> respondent has not provided any pleadings, documents or court decision to confirm that the petitioners were indeed parties to the Machakos ELC No 66 of 2015 which dealt with the same issues or title and matter had already been determined. It seems the 3<sup>rd</sup> respondent seeks this court to ascertain its averments from elsewhere. To my mind I find that the 3<sup>rd</sup> respondent's averments also require evidentiary proof.

15. From the explanation in the petition including the supporting affidavit which remains uncontroverted, while associating myself with the decisions I have cited, it is my considered view that since the 3<sup>rd</sup> respondent did not deny the petitioners averments, its preliminary objection is premature as it does not stem from any pleadings. Further, the 3<sup>rd</sup> respondent has not pleaded any point of law or denied the averments in the petition whose implication can enable this court appreciate the nature of the said objection so as to dispose of the petition.
16. It is against the foregoing that I find the notice of preliminary objection dated the March 13, 2020 unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12<sup>TH</sup> DAY OF MAY, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

