



Ethics and Anti-Corruption Commission v Ndubi & 3 others; National Land Commission (Interested Party) (Environment & Land Case 359 of 2015) [2022] KEELC 2902 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 359 OF 2015**

JM MUTUNGI, J

JUNE 30, 2022

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

ROBERT NDUBI 1ST DEFENDANT

JULIUS MATASYO 2ND DEFENDANT

FLORENCE AYITI MATASYO 3RD DEFENDANT

WILSON GACHANJA 4TH DEFENDANT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

1. This matter was scheduled for hearing of the suit on October 4, 2021 when the 1st defendant drew attention to the court that he had filed a Notice of preliminary objection dated October 1, 2021 on the ground that the suit was resjudicata and/or subjudice and hence was bad in law, incompetent and an abuse of the court process and deserved to be struck out. As the preliminary objection challenged the jurisdiction of the court to entertain the suit, the court gave directions that the preliminary objection be heard and disposed of first.

The preliminary objection is premised on the following grounds as per the Notice of preliminary objection.

1. This court has no jurisdiction to entertain or try the plaintiff's suit.



2. The plaintiff's suit is re-judicata in view of the judgment and subsequent ruling on objection proceedings in Nakuru CMCC No.181 of 2012- Robert H. Ndubi -vs- David Kipsang and Anti-Ethics & Anti- Corruption Commission.
 3. The plaintiff's suit is bad in law, sub judice and an abuse of court process, as the same issues for determination herein are pending before this court in another suit between the same parties, being Nakuru ELC Civil Appeal No. 15 of 2014- Ethics & Anti-Corruption Commission - vs- Robert H. Ndubi and David Kipsang.
 4. The plaintiff's suit is also bad in law, unsustainable and in abuse of court process, as the same subject matter herein is also pending before the court in a different suit between the same parties herein, being Nakuru High Court Miscellaneous Application No. 408 of 2013- Ethics & Anti- Corruption Commission -vs- Julius Matasyo, Flora Ayiti Matasio and Robert Hyder Ndubi.
 5. The plaintiff's entire suit is bad in law, unsustainable, incompetent, fatally flawed, a total abuse of court process, and is null and void ab initio.
2. The plaintiff filed grounds of opposition to the preliminary objection dated March 4, 2022. The plaintiff contended that the 1st defendant had taken the preliminary objection as an afterthought and asserted that the same constituted abuse of the court process. The plaintiff stated the doctrines of subjudice and resjudicata were inapplicable in the circumstances of the case and urged that the preliminary objection be dismissed.
 3. The 1st defendant and the plaintiff canvassed the preliminary objection by way of written submissions. The 1st defendant filed his submissions and supplementary submissions in support of the preliminary objection on February 9, 2022 and March 23, 2022 respectively. The plaintiff filed their submissions on 4th March 2022.
 4. In support of the preliminary objection the 1st defendant has submitted that there have been other cases involving the same subject matter that have either been determined and/or are pending before the court. He cites the following cases:-
 - i. Nakuru CMCC No.181 of 2012 – Robert H. Ndubi –vs- David Kipsang & Ethics & Anti-corruption commission.
 - ii. Nakuru ELC Appeal No.15 of 2014 – *Ethics & Anti- Anticorruption Commission -vs- Robert H Ndubi and David Kipsang.*
 - iii. Nakuru High Court (ELC) Misc App No. 408 of 2013- *Ethics & Anti-Corruption Commission -vs- Julius Matasyo, Flora Ayiti Matasio and Robert Hyder Ndubi.*
 5. The 1st defendant argues that in Nakuru CMCC No. 181 of 2012 where he was the plaintiff and David Kipsang the defendant he obtained judgment against the defendant and that the application by the Ethics & Anti-Corruption Commission objecting to the execution of the decree was dismissed by the court. The suit property which was originally a government house occupied by the defendant by virtue of being a Civil Servant was sold to the 1st defendant who had gotten registered as the owner. The judgment in the lower court decreed the property to the 1st defendant and hence the 1st defendant contends that the court determined the issue of the ownership of the property which rendered the instant suit resjudicata. The ELC Civil Appeal No. 15 of 2014 arose from the ruling on the objection proceedings, while Nakuru HC (ELC) Misc application No. 408 of 2013, was instituted by the plaintiff (EACC) under section 56 of the *Anti-corruption and Economic Crimes Act* to have the



suit property LR No.Nakuru Municipality Block 4/232 conserved and preserved. In the present suit the plaintiff avers the suit property constituted public property that was fraudulently and irregularly allocated and/or alienated and seeks to have the same recovered on behalf of the public.

6. The plaintiff in its submission was categorical that the preliminary objection raised by the 1st defendant did not satisfy the threshold of what qualifies as a preliminary objection as established in the case of *Mukisa Biscuit Manufacturing Co Ltd - vs- West End Distributors Ltd* (1969) EA 696. 7. In the case Sir Charles Newbold, P. stated:-

“ 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 of 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 issue. The improper practice should stop”

8. The plaintiff has asserted that the previous suits referred to by the 1st defendant would not in any event render the present suit resjudicata and/or subjudice. The suit in the lower court Nakuru CMCC No.181 of 2012 which gave rise to ELC Appeal No. 15 of 2014 as between the 1st defendant and one David Kipsang and that the plaintiff herein only joined the suit as an objector to the execution of the decree and consequently the plaintiff's interest in the suit property was not adjudicated before the decree was passed. In the lower court suit, the 1st defendant sought to be declared as owner of the suit property and for the eviction of the defendant (David Kipsang). As observed earlier (EACC) the plaintiff was not a party in the suit and only joined in the suit when it sought to object to the execution. The Nakuru ELC Appeal No. 15 of 2014 was not against the judgment of the lower court but against the ruling of the Honourable Magistrate dismissing the objection proceedings against the execution of the judgment.
9. The plaintiff is a Corporate body established under section 3 of the [Ethics & Anti- Corruption Commission Act](#) and is by virtue of Section 7 of the said Act given mandate to recover Public property belonging to the government that may have been fraudulently and/or unlawfully alienated. In the present suit the plaintiff instituted the suit seeking to recover the suit property which it alleged had been fraudulently allocated by the 4th defendant to the 2nd and 3rd defendants in abuse of office and that the 1st defendant was aware that the suit property was alienated government land and could not have been available for allocation to any other person. The plaintiff has consequently prayed for the rectification of the land register and cancellation of all entries relating to the issue of lease and title to the suit property.
10. I have reviewed and considered the pleadings in the earlier lower court suit Nakuru CMCC No.181 of 2012 and the instant suit and I am satisfied the issues in the earlier suit are different from the issues raised in the instant suit. In the earlier suit the 1st defendant who was the plaintiff sought to be declared as owner and therefore entitled to exclusive possession of the suit property having purchased the same from the original owners (now 2nd and 3rd defendants in the present suit). He also sought eviction and damages from the defendant who was a government employee and the occupant. In the instant suit the plaintiff (a government agency) seeks recovery of the suit property on the basis that the same was irregularly and fraudulently allocated to the 2nd and 3rd defendants by the 4th defendant, a fact which was within the 1st defendant's knowledge and/or he ought by exercise of due diligence to have known or have been aware of. Quite clearly the issue in the two different suits are different and distinct. The plaintiff herein was also not a party in the earlier suit and could therefore not be bound by the decision of the lower court.



11. The plaintiff has mandate to pursue recovery of any government land that may have been unlawfully and/or fraudulently allocated and/or irregularly alienated. Although the 1st defendant has submitted that the issue of ownership was determined by the subordinate court, the issue whether or not title to the land had been fraudulently acquired and/or procured was not tried. That is the main issue in the instant suit. Under section 26 (1) of the [Land Registration Act, 2012](#) the title of a registered proprietor may be challenged on grounds of fraud and/or misrepresentation and/or if it is proved the title was obtained through a corrupt scheme. The plaintiff is thus entitled to challenge the title held by the 1st defendant on the grounds of fraud and/or illegality.
12. The 1st defendant has argued that the present matter is subjudice by reason that Nakuru ELC Appeal No. 15 of 2014 was pending determination by the court. I had observed earlier in this ruling that the appeal was not against the judgment but against the ruling by the learned trial magistrate dismissing the objection to attachment. The appeal cannot properly deal with the issue of ownership of the property. Indeed, until the issue of ownership as relates to the 1st defendant and the government is finally determined, the determination of the appeal would be of no consequence. The court in fact on October 23, 2019 made an order staying the appeal to await the hearing and determination of the present suit. The appeal therefore cannot be subjudice as it will be dependant on the outcome of the present suit.
14. In the premises and having considered and evaluated the parties submission, I find no merit in the preliminary objection and I order the same dismissed with costs to the plaintiff as against the 1st defendant.
15. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF JUNE 2022.

**J M MUTUNGI
JUDGE**

