



**Ongoto v Machuka & 2 others (Environment & Land Case  
68 of 2019) [2022] KEELC 2769 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2769 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 68 OF 2019  
MN GICHERU, J  
JUNE 28, 2022**

**BETWEEN**

**CHARLES ONGOTO ..... PLAINTIFF**

**AND**

**JOSEPHAT MAKWORO MACHUKA ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, NGONG ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is on the preliminary objection dated 30<sup>th</sup> September, 2020. The said objection is by the first Defendant and it is based on the following grounds;
  - i. That the suit is res judicata as the substance of the matter was heard and determined in Children Cause Number 187 of 2013 where the Plaintiff herein was an interested party.
  - ii. That the application is filed contrary to Section 7 of the *Civil Procedure Act*, 2010, and therefore this Court lacks jurisdiction to grant the orders prayed for.
  - iii. That in any case, the application is bad in law, vexatious and an abuse of the court process.
  - iv. That in case the Plaintiff herein is dissatisfied by the judgment, he ought to file an appeal against the said judgment before the appropriate forum as lodging this matter herein amounts to forum shopping and an evident abuse of the court process.
2. The preliminary objection is opposed by the Plaintiff who has filed a replying affidavit dated 19/10/2021 in which he disputes that the suit is res judicata because the suit property is within the geographical jurisdiction of this Court.



Secondly, the Plaintiff says that he only joined the suit in the Children Court as an interested party after the first Defendant refused to surrender vacant possession of the suit land after the plaintiff purchased it at an auction.

3. Only the Plaintiff's counsel filed written submissions on 15/3/2022. By the set timeline of 60 days from 15<sup>th</sup> March, 2022, the Defendants' counsel had not filed any submissions.
4. I have carefully considered the Preliminary Objection in its entirety and I find that it has no merit for the following reasons;

Firstly, a preliminary point of law should be on a pure point of law. It should not be supported by any affidavit or evidence except what has been pleaded.

This was the holding in the case of *Mukisa Biscuits Manufacturing Co. Ltd -versus- West End Distributors Limited* (1969) EA 696.

In the Preliminary Objection, there is mention of a judgment of the lower court. Such judgment has not been filed. Had it been filed, the Court would have perused it to see how it impacts on this case.

The Defendant should not be heard to refer to unfiled and unpleaded material and ask the Court to rely on it to dismiss this suit before hearing it.

Secondly, I find that the jurisdiction of the children court is not concurrent with that of the Environment and Land Court. It cannot therefore be true to say, that a matter heard and decided by the Children Court can be similar to a matter filed before this Court.

Finally, striking out of pleadings is a draconian measure that should be sparingly invoked in the clearest of cases. This is because under Article 50(1) of *the Constitution* of Kenya, a party who has filed a dispute before Court or a tribunal has a right to a fair hearing. It would be a derogation of this right to strike out the suit unless there are very sound grounds. No such grounds exist in this case.

Consequently, I dismiss the Preliminary Objection because I find that it has no merit.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 28<sup>TH</sup> DAY OF JUNE, 2022.**

**M.N. GICHERU**

**JUDGE**

