



REPUBLIC OF KENYA



KENYA LAW
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**Ali v Ali (Environment & Land Case 58 of 2021)
[2022] KEELC 3384 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 58 OF 2021**

NA MATHEKA, J

JULY 27, 2022

BETWEEN

ASLAM MOHAMED HAJI ALI APPLICANT

AND

AMINA AKBAR MOHAMED HAJI ALI RESPONDENT

RULING

1. The Respondent raised a Preliminary Objection on a point of law that the Applicant's Notice of Motion Application dated 5th April, 2022 and filed on the same day be struck out with costs to be paid forthwith to the Respondent on the basis that;
 1. That the Notice of Motion filed herein is fatally defective, incompetent, and bad in law as Section 6 of the *Civil Procedure Act* bars any Court from engaging in matters subjudice before them.
 2. That a ruling was made in Kadhi's Court Succession No.107 of 2020 in regards to some issues being raised in the Notice of Motion Application dated 5th April, 2022.
 3. That the said Notice of Motion Application is wholly incompetent, misconceived, unprocedurally, lacks merit and is an abuse of the Court process as it is both bad in law and incurably defective.
2. The Applicant submitted that he has the locus standi to appear before this court and that this court has jurisdiction. The Applicant states that he is not a party to the succession case and has not filed a similar application there.



3. This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd* (1969) E.A 696,

..... 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”

4. In the same case, Sir Charles Newbold said:

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”.

J.B. Ojwang, J (as he then was) in the case of *Oraro vs Mbajja* (2005) e KLR had the following to state regarding a ‘Preliminary Objection’.

I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

5. The issue as to whether or not this suit is subjudice is therefore properly raised as a Preliminary Objection and the court will consider the same first. Section 6 and 7 of the *Civil Procedure Act* Cap 21 provides as follows:

Section

6.

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section

7.

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.”

6. The Respondent submitted that there is a pending matter on the same property before the Kadhis court and hence this application is subjudice. I have perused the ruling in Kadhi’s Court Succession No.107 of 2020 and find that indeed the Applicant is not a party therein. This is a ruling revoking the



earlier grant of the Estate of Akbar Mohamed Haji Ali. I find the present application is not subjudice.
I find the preliminary objection is not merited and I overrule the same. Costs to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

