



**Ngugi v County Government of Murang’a; National Land Commission
& 4 others (Interested Party) (Environment and Land Miscellaneous
Application E005 of 2021) [2022] KEELC 2540 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2540 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2021
LN GACHERU, J
JULY 21, 2022**

BETWEEN

DAVID NGUGI APPLICANT

AND

COUNTY GOVERNMENT OF MURANG’A RESPONDENT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

LAND REGISTRAR, MURANG’A INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

KAMAHUHA GIRLS HIGH SCHOOL INTERESTED PARTY

MINISTRY OF EDUCATION INTERESTED PARTY

RULING

1. The matter for determination is a Notice Preliminary of Objection dated 24th January 2022, filed by the 2nd – 5th Interested Parties/Objectors on grounds that;
 1. The Court lacks jurisdiction to hear and determine the suit as there is a prevailing judgement issued by a competent Court in Muranga ELCA No 12 of 2020; *David Ngugi Vs. The Board of Governors, Kamabuba High School*.
 2. That the suit is incompetent as it offends the mandatory provisions of Section 7 of the *Civil Procedure Act* and is *Res Judicata*.
 3. That the suit is bad in law, an abuse of the Court process and should be dismissed.



2. On 23rd February 2022, the Court directed that the Preliminary Objection be canvassed by way of written submissions. In compliance with the said directive, the Interested Parties/Objectors filed their written submissions dated 20th April 2022. It is the Objectors submissions that all the issues raised by the Applicant in the instant suit were conclusively dealt with in Murang’a ELCA No 12 of 2020: - [David Ngugi v The Board of Governors Kamabuba High School](#). That the Court in the above mentioned suit upheld the decision of the Lower Court with regards to the ownership of the parcel of land No.LOC.17/KAMAHUHA/916. That the Applicant in the instant suit is seeking to have a second bite of the cherry and resuscitate a matter that has already been determined by a Court of Competent Jurisdiction. The Objectors therefore urged this Court to allow the Preliminary Objection and dismiss the entire suit.
3. The Applicant filed his written submissions dated 7th June 2022, through the Law Firm of Charles Mbugua & Co. Advocates opposing the Preliminary Objection. It is his submissions that the Preliminary Objection as filed fails the test of a competent Preliminary Objection as laid out in *Mukisa Biscuit Manufacturing and Co. Ltd v West End Distributors and Oraro v Mbajja* (2005) Eklr for the reasons that the grounds relied upon are contested and need to be investigated.
4. On Res judicata, the Applicant submitted that the issues raised in the instant suit were not conclusively determined in Muranga ELCA No 12 of 2020 [David Ngugi Vs. The Board of Governors Kamabuba High School](#). He invited this Court to the determination of what constitutes res judicata as was laid out in [Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others](#) {2017}eKLR and [John Florence Maritime Services Limited & Another vs Cabinet Secretary, Transport and Infrastructure & 3 Others](#){2021}eKLR. In the end he urged this Court to find that the Preliminary Objection is incompetent and is ripe for dismissal.
5. The Court has carefully read and considered the Preliminary Objection together with the rival written submissions and finds that the issue for determination is whether the Notice of Preliminary Objection is merited
6. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd... Vs... West End Distributors Ltd* (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection 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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.
7. Further Sir Charles Nebbold, JA stated 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 had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.



8. The Supreme Court in the case of *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others* [2015] e KLR expanded the above principle and further gave the rationale for raising a preliminary objection. It delivered itself thus:

“1. Preliminary objection consists of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose off the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.

2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. ...

- 9 The Supreme Court in the aforementioned case went on to state that;

“The true preliminary objection served two purposes of merit:

1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and
2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

10. The above being the description of Preliminary Objection, it is evident that a Preliminary Objection, raises a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or where the court is called upon to exercise judicial discretion.

11. In determining a Preliminary Objection, the Court will take into account that a Preliminary Objection must stem from the pleadings and that it raises pure point of law. See the case of *Avtar Singh Bhamra & Another v 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.”

- 12 In the instant case, the Preliminary Objection is premised on the main ground that the instant suit is res judicata. The principle of res judicata is embedded under Section 7 of the *Civil Procedure Act*. The same provides 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 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.”



13. In the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015]eKLR, the Court of Appeal set out the ingredients of res judicata as follows:

"From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see *Karia & Another v the Attorney General and Others* [2005] 1 EA 83."

14. Further in the case of The *Independent Electoral and Boundaries Commission VS Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR), the Court of Appeal held that:

"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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 the suit in which the issue is raised."

15. The Court went on to set out the rationale for *res judicata* as:

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

16. In a nutshell, res judicata is intended to bring litigation to a halt; it is intended to bar a person who has had his day in a court of competent jurisdiction where his case was concluded from re-litigating his case afresh. The doctrine saves judicial precious time and protects the sanctity of the court to do just what it should do. Therefore, the said doctrine prevents the abuse of the court process by bringing litigation to an end.
17. Based on the foregoing, it is evident that Res Judicata as envisaged under Section 7 of the *Civil Procedure Act* is a point of law. However, the question that begs an answer is if the same can be determined without calling for evidence from elsewhere. It is trite that issues on law need not be ascertained by evidence as the law speaks for itself.



18. In answering the above question in the negative, the Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law, and should neither deal with disputed facts nor should it derive its foundation from factual information. See the case of *Oraro...Vs...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”.

19. The 2nd – 5th Interested Parties/Objectors herein have contended that the suit is Res Judicata to Muranga ELCA No 12 of 2020: - *David Ngugi Vs The Board of Governors Kamahuba High School*. The Court notes that both the Objectors and the Applicant herein have attached to their submissions the impugned judgment delivered in Muranga ELCA No 12 of 2020: - *David Ngugi Vs. The Board of Governors Kamahuba High School*, and or pleadings filed in that matter which they seek the Court to consider.

20. This Court is of the view that for it to be able to ascertain whether or not the matter is Res Judicata, it will have to ascertain the facts as pleaded by the Respondents/Objectors and those as raised by the Applicant/Respondent, by also probing the bundle of documents and calling for the impugned file. In doing so, the Court will be probing evidence. In the case of *Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another* (2014) EKLR, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

21. Further in the case of *George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another* (2014), eKLR, where the Court held that: -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

22. Since a Preliminary Objection cannot be raised on disputed facts and since for the court to decide whether or not the matter is Res Judicata, will require the probing of evidence, the Court finds and holds that what has been raised herein does not amount to a pure Preliminary Objection, as it calls for probing of evidence and ascertaining of facts.

23. Consequently, the Court finds and holds that the Preliminary Objection herein is not merited and the same is dismissed entirely with costs to the Applicant/Respondent.



24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21ST DAY OF JULY, 2022.

L. GACHERU

JUDGE

Delivered online in the presence of; -

Joel Njonjo – Court Assistant

Mr. Mbugua for Applicant/Respondent

Mr. Mugo HB for Chege for Respondent

1st Interested Party

2nd Interested Party

3rd Interested Party Absent

4th Interested Party

5th Interested Party

L. GACHERU

JUDGE

21/7/2022

