



Omar (Suing on his behalf and as legal representative of the Estate of Sakinabal Ali Mohamed (Deceased) v Intergra Auctioneers (K) Company & 3 others (Environment & Land Case 231 of 2021) [2022] KEELC 2841 (KLR) (18 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 231 OF 2021**

**LL NAIKUNI, J
JULY 18, 2022**

BETWEEN

**SHOKAT EBRAHIM ALI OMAR PLAINTIFF
SUING ON HIS BEHALF AND AS LEGAL REPRESENTATIVE OF THE ESTATE
OF SAKINABAL ALI MOHAMED (DECEASED**

AND

**INTERGRA AUCTIONEERS (K) COMPANY 1ST DEFENDANT
KENYA FINANCE BANK LIMITED (IL) 2ND DEFENDANT
LAND REGISTRAR MOMBASA 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

I. Preliminaries

1. Before this Honorable Court for its determination is a Notice of Preliminary Objection filed by the 2nd Defendant dated 2nd February 2022, to be heard in limine to the suit on the following grounds: -
 - i. That no proper leave has been granted to the Plaintiff prior to the institution of this suit as provided for under Section 56(2) of the *Kenya Deposit Insurance Act*, 2012 and the suit herein is thus fatally defective.
 - ii. That the suit herein is Res Judicata and an abuse of the court process, with two different suits over the same subject matter having already been dispensed with namely: -



- a) Mombasa ELC No. 289 of 2018: Shokat Ebrahim Ali Mohamed – Versus - Intregra Auctioneers (K) Co., Kenya Finance Bank (IL), the Land Registrar Mombasa and the Hon Attorney General.
 - b) Mombasa HC Civil Suit No. 66 of 1994: Sakinabai Ali Mohamed – Versus - Kenya Finance Corporation Limited.
- iii. That the Plaintiff has ‘no locus standi’ to institute this suit on behalf of the Estate of Sakinabai Ali Mohamed as the Limited Grant of Letters of Administration Ad colligenda bona dated 7th December 2018 does not give the Plaintiff legal authority to institute a suit with regard to the said property.
 - iv. That the Plaintiff further has ‘no locus standi’ to institute herein under any circumstances as claimed in the Plaintiff.

II. Submissions

2. On 9th February 2022 while all parties were present in Court, the Honorable Court directed that the Notice of Preliminary Objection be canvassed by way of Written submissions. Pursuant to that the ruling dated was reserved to be 6th June, 2022. Unfortunately, due to unavoidable circumstances, the same had to be delivered on notice. The 2nd Defendant filed their written submissions on 7th March 2022 and the Plaintiff on 21st March 2022.

A. The 2nd Defendant’s Written Submissions

3. On 7th March, 2022 the Learned Counsel for the 2nd Defendant the Law firm of Messrs. Maitai Nyawira & Associates Advocates filed their written submissions. M/s. Maitai Advocate submitted that the 2nd Defendant herein was under liquidation, the said status having been gazetted on the 30th October 1996 vide Gazette Notice number 6269. A copy of the Gazette Notice was attached at page 33 of the list of documents filed by 2nd Defendant. The said Gazette Notice appointed the now defunct Deposit Protection Fund Board (Hereinafter referred to as “The DPF”) as the liquidator of the 2nd Defendant.
4. The Learned Counsel argued that pursuant to the provision of Section 76 (7) of the [Kenya Deposit Insurance Fund Act](#) No. 10 of 2012 all the powers, rights, liabilities, obligations and privileges conferred upon the DPF under any existing agreements or written law were now vested in the Kenya Deposit Insurance Corporation (hereinafter referred to as The KDIC”).
5. The Learned Counsel contended that the provision of Section 56(2) of the [Kenya Deposit Insurance Act](#) applied in this instance. The said section provides that: -
 - “(2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.”
6. The Learned Counsel submitted that in accordance to the above provision of the Law, first and foremost, the leave of Court ought to be sought before any party commenced a civil action against the 2nd Defendant. This was also the case, before one sought for an injunction with regard to the assets belonging to the 2nd Defendant.
7. The Learned Counsel opined that the Plaintiff was aware of the need for one to have obtained the leave court as in its notice of motion application for injunction dated 18th November 2021 sought



leave to institute proceedings against the 2nd Defendant. Upon filing of the suit under Certificate of Urgency and the application herein, on 18th November, 2021 the Plaintiff was granted leave to institute proceedings against the 2nd Defendant ex - parte. It is the submission by the Learned Counsel that the leave granted was irregular, un procedural and illegal as leave ought to be granted before the commencement of the suit and not after was done in this case. The Leave of Court ought to have been sought exclusively prior to the institution of this suit.

8. The Learned Counsel submitted that leave could not be granted in the same suit and as such at the time of filing a suit, there was no leave in place. For this reason, therefore, the suit should be struck out for failing to comply with the mandatory provisions of the law. The Learned Counsel put more emphasis to the provision of Section 56 (2) supra which provided for two separate instances with regard to the grant of leave. The first being the commencement of fresh suits for which leave must be sought before the fresh suit is filed. The second being suits that were already in existence at the point when the institution was placed under liquidation and for which leave must be sought before continuing with the proceedings. To buttress on this point, they placed reliance on the case of "[*Rashik Kumar Punja Shah & Another – Versus - Chase Bank Limited \(In Liquidation\) & Another*](#) [2021] eKLR in which the court critically analyzed the provision of Section 56 (1) and (2) of the [*Kenya Deposit Insurance Fund Act*](#) as follows: -

“ A reading of sub - section (1) of the above provisions leaves no doubt that it in peremptory terms prohibits continuation of all proceedings against the directors, management or the institution which subsisted prior to liquidation. Sub - section (2) bars filing injunctions or commencing any other action or civil proceedings against the financial institution or in respect of its assets without the sanction of the court. The bar contemplated by sub-section (2) is wide and all-embracing against the institution or in respect of its assets. As was held in *Kwanza Estates – Versus - Dubai Bank of Kenya Ltd & Another* this provision bars any fresh suit from being commenced without court sanction and forbids continuing with any subsisting litigation without the same sanctions.”

9. The Counsel placed reliance on the cited case of "[*Kwanza Estates – Versus - Dubai Bank of Kenya Limited & Another*](#) [2016] eKLR” in which the court was of a similar opinion:

“ 21. Section 56(2) of the Act provides: No injunction may be brought or any other action or civil proceedings may be commenced or continued with against the institution or in respect of its assets without the sanction of the court.

This provision, as I understand it bars any fresh suit from being commenced without a court sanction and for that forbid continuance with any substituting litigation without the same sanctions.”

10. The Learned Counsel also submitted that the suit herein fell into the first category, the same being a fresh suit. In that instance, the leave of Court was required before commencing the suit and not after the suit was already commenced. The leave granted was thus irregular and the suit herein should be struck out for failure to comply with the mandatory provisions of Sections 56(2) of the Act.
11. Additionally, the Learned Counsel submitted that the herein was “Res Judicata” and an abuse of the Court process with two different suits over the same subject matter having already been dispensed with. The Learned Counsel stated that the 2nd Defendant had in its bundle of documents attached documentation with regard to the following suits; ELC (Mombasa) No. 289 of 2018; *Shokat Ebrahim Ali Mohamed Omar – Versus - Inegra Auctioneers (k) Co., Kenya Finance Bank (IL), the Land Registrar,*



Mombasa and the Attorney General and Mombasa HC civil suit no.66 of 1994: *Sakinabai Ali Mohamed – Versus - Kenya Finance Corporation Limited*. They argued that a look at the two suits would confirm that the suits were in relation to the same subject property in this suit and the cause of action was similar in both suits with the Plaintiff seeking to stop the 2nd Defendant from exercising its statutory power of sale. The 2nd Defendant has also attached a Ruling delivered in ELC No. 289 of 2018 dismissing the suit.

12. The Learned Counsel cited the case of “Bespoke Insurance Brokers Limited – Versus - County Secretary, County Government of Nairobi & another [2016] eKLR laid out the considerations for determination in a claim for “Res Judicata” as follows: -

- “ 33. For one to succeed in the plea of Res Judicata, he must show that:
- a) The matter in issue is identical in both suits
 - b) That the parties in the suit are substantially the same
 - c) That there is concurrent jurisdiction of the court
 - d) That the subject matter in the same and finally
 - e) That there is a final determination as far as the previous decision is concerned.”

13. The Learned Counsel asserted that the matter in issue was identical in this suit and the previous suits as the Plaintiff was seeking to stop the 2nd Defendant from exercising its statutory power of sale with regard to the same property namely Mombasa/block XLI/156. The parties were also the same in the case of ELC 289 of 2019, the Plaintiff is the same as this suit and the 2nd Defendant (the Bank) is also a Defendant in that suit, the only difference is the auctioneer used then and now. They held that the Parties were thus substantially the same. The subject matter in all three suits in the sale of Mombasa/ block XLI/156 and were thus similar.
14. The Learned Counsel submitted that they had attached the Ruling in ELC 289 of 2018 (page 26 of the 2nd Defendant’s bundle of documents) confirming that the suit was determined whereby it was dismissed with costs. To support their point, they reproduced the case of “*Henderson – Versus - Henderson* (1843 – 60) ALL E.R. 378” as was laid out in another case of “ANM – Versus - PMN [2016] eKLR”.
15. The Learned Counsel argued that the suit in ELC 289 of 2018 was dismissed due to a negligent omission by the Plaintiff in the failure to seek leave and as such the court should not be allowed the same party to keep re-litigating the same issue. They urged Court to find that the suit was “Res Judicata”.
16. Further, the Learned Counsel held that the Plaintiff had no locus standi to institute this suit on behalf of the Estate of Sakinabai Ali Mohamed as the Limited Grant of Letters of Administration Ad Colligenda bona dated 7th December, 2018 did not give the Plaintiff legal authority to institute a suit with regard to the said property. The Counsel submitted that the Plaintiff at Paragraph 1 of the Plaintiff indicated that he brought this suit on his own behalf as well as on behalf of the estate of Sakinabal Ali



Mohamed (deceased). The Plaintiff has annexed a Limited Grant of Letters of Admission Ad colligenda bona dated 7th December 2018. Specifically, the limited grant indicated as follows: -

“the purpose of collecting, getting in and receiving the state and doing such acts as may be necessary for the purpose of preservation of the same until further representation be granted by this court.”

17. The Counsel submitted that from the above, it was clear that the grant did not grant the power to institute or defend suits. Having confirmed that the grant itself did not grant the Plaintiff power to institute suit on behalf of the estate they did not have the legal capacity (“Locus Standi”) to have instituted it. Further, they submitted that under law, a limited Grant of Letters of Administration Ad colligenda bona did not under law grant the Plaintiff the legal right to institute suit on behalf of the estate. On this legal position, they cited the case of “Re the Matter of the Estate of Morarji Bhanji Dhanak (Deceased) [2000] eKLR, where the Court went into great lengths to define all the limited grants provided for under law as well as the procedure for filing each of the grants. The court found that limited grants ad colligenda bona could not be used to institute suit. They also relied on the case of Elijah Nderitu Gachaga – Versus - Francis Gakuu Gachaga & 2 others [2019] eKLR, in which the court similarly analyzed the issue of a limited grant ad colligenda bona with regard to the institution of a suit and dismissed the suit for that reason.
18. The Learned Counsel submitted that the Plaintiff had indicated that he brought this suit on his own behalf. At paragraph 6 of the Plaint, he confirmed that the property was registered in the names of Abdalla Haji Mohamed Sameeja and Sakinabai Ali Mohamed both of whom were deceased. In that circumstances, and given to the fact that both the registered owners were deceased, the Plaintiff could only institute armed with a grant for the two estates confirming that he was either the administrator of the estate or a beneficiary of the property. No such documents had been adduced before the court and in the absence of the same, the Plaintiff had no locus standi to institute the suit herein.
19. The Learned Counsel opined that the Plaintiff further had no locus standi to institute the suit herein under any circumstances as claimed in the Plaint. They held that the the Plaintiff at paragraph 8 of the Plaint claimed that the property was held in trust by the registered owners for his behalf and eight others. They submitted that the court could not determine or rely on this issue in this court and it is incumbent upon the alleged trustees to institute succession proceedings to reflect that position with regard to the property.
20. Finally, the Learned Counsel concluded by urging Court to find that the Plaintiff had no locus to institute the suit herein and the same should be dismissed with costs to the 2nd Defendant herein.

B. The Plaintiff’s Submissions

21. On 21st March, 2022, the Learned Counsel for the Plaintiff, the Law firm of Messrs. J.O Magolo & Company Advocates filed their written Submissions. Mr. Magolo Paul Advocate submitted that leave was granted to the Plaintiff by virtue of Section 56 (2) of the KDIC Act. He held that under the provision of Section 56 of the Kenya Deposit Insurance Act provided that:
 - (1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the Liquidator.
 - (2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court.



22. The contention by the Learned Counsel was that the Plaintiff filed this suit on 18th November 2021. That accompanying the Plaintiff was a notice of motion application dated 18th November 2021 where the 1st prayer was that leave be granted to the Plaintiff to commence proceedings and obtain orders against the 2nd Defendant who was in liquidation pursuant to the provision of Section 56 (2) of the [Kenya Deposit Insurance Act](#). He stated that Orders were granted by this court on the same day, 18th November 2021, and the 1st order therein was that leave was granted to the Plaintiff to commence proceedings and obtain orders against the 2nd Defendant. It was therefore not true that no proper leave had been granted to the Plaintiff as provided for under the provision of Section 56 (2) of the [Kenya Deposit Insurance Act](#).
23. The Learned Counsel submitted that the 2nd Defendant in its submission suggested that leave could not be granted in the same suit, a position which was not supported by the law. Furthermore, the authority attached to the Defendant's submissions being the case of "[Kwanza Estate – Versus - Dubai Bank of Kenya Limited & another](#) [2016] eKLR was an application seeking leave to sue, injunction orders among other orders in the same application, application which was allowed as prayed. Even assuming that the 2nd Defendant's position were to be the case, it is trite law that the essence of that position is that a court of law should not be allowed the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties.
24. The Learned Counsel sought guidance of the Court from the provisions of Article 159 (2) of the [Constitution](#) of Kenya which provides as follows:-
- “in the exercising of judicial authority, the courts and tribunals shall be guided by the following principle –
- (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and
 - (e) the purpose and principles of this constitution shall be protected and promoted

It was the Counsel's submission that the 1st ground of the Preliminary Objection failed because of the Article from the [Constitution](#).

25. On the law regarding the doctrine of “Res Judicata” the Learned Counsel referred Court to the decision of Justice Joel Ngugi in the case of “[MWK – Versus - AMW](#) [2016] eKLR”, where he stated that: -

“Section 7 of the Civil Procedure Act, Cap. 21 which 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. The section, of course, codifies the doctrine of res judicata in Kenya. Our case law has now distilled the essential ingredients of the doctrine



– see for example, Nancy Mwangi T/A Worthlin Marketers – Versus - Airtel Networks (K) Limited (Celtel Kenya Ltd) & 2 others [2014] eKLR; Kamunye & others – Versus - Pioneer General Assurance Society Limited [1971] E.A. 263 and John Florence Maritime Services Limited & another – Versus - Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR.

There are, restated, four ingredients:

- a. Was there previous litigation in which identical claims were raised or in which identical claims could have been raised?
- b. Are the parties in the present suit the same as those who litigated the original claim?
- c. Did the court which determined the original claim have jurisdiction to determine the claim?
- d. Did the original action receive a final judgment on the merits?"

26. The Learned Counsel submitted that on the ground that the 2nd Defendant had in her list of documents filed documents including the final ruling for ELC (Mombasa) No. 289 of 2018; Shokat Ebrahim Ali Mohamed Omar – Versus - Integra Auctioneers (K) Limited and others together with a Plaint for HC (Mombasa) Civil Suit No. 66 of 1994; Sakinabai Ali Mohamed – Versus - Kenya Finance Corporation Limited. In ELC (Mombasa) No. 289 of 2018; Shokat Ebrahim Ali Mohamed Omar – Versus - Integra Auctioneers (K) Limited and others the ruling by the court was very clear that the matter was struck out and not dismissed as put by the Defendant in her submissions. It was the Counsel’s submission that the ingredients for Res Judicata as set out in the above mentioned authority, “MWK – Versus - AMW [2016] eKLR had not been met as the matter did not receive a final judgment on merit as the case was not even heard.
27. The Learned Counsel submitted that “in HC (Mombasa) Civil Suit No. 66 of 1994 Sakinabai Ali Mohamed – Versus - Kenya Finance Corporation Limited the parties to the set were different from the parties to this suit. Further, the 2nd Defendant had only provided the Plaint and no other pleading to the case. Mombasa Therefore, it was impossible for this court to discern whether at all the matter received a final judgment on merit.
28. With regard to the Locus Standi, the Learned Counsel submitted that the Plaintiff had attached Limited Grant of Letters of Administration ad colligenda bona of all the estate of the Late Sakinabai Ali Mohamed for purposes of collecting, getting in and receiving the estate and doing such acts as may be necessary for purposes of preservation of the same. The Plaintiff filed this suit after receiving a letter from Integra Auctioneering (K) Company claiming to have been instructed to recover a loan that is unknown of and no documents have been supplied to that effect. Integra Auctioneering (K) Company further expressed their intention to sell that suit premises registered in the name of the deceased. The Plaintiff in the supporting affidavit deponed that this was being done by crooks and fraudsters who wanted to defraud the estate of the deceased. It was for this reason that, therefore, he was forced to institute this suit in order to preserve the estate of the deceased as required of him by the Grant of Letters of Administration Ad Colligenda bona. Furthermore, Sakinabai Ali Mohamed (deceased) was the Plaintiff’s aunt and was not survived by any issues.
29. The Learned Counsel submitted that it had been deponed by the Plaintiff that Sakinabai Ali Mohamed (deceased) and Absalla Haji Samea (who died on 20th January 1998) were absolute proprietors of land title No. Mombasa/block XLI/156 Old Town on which was developed a three - storey building



comprising of shops and residential premises. They h Mombasa held that the title in trust for the Plaintiff herein and eight others who were his siblings, that is;

- i. Zeitum Ibrahim Ali Mohamed
- ii. Yasmin Ibrahim Ali Mohamed
- iii. Sherali Ibrahim Ali
- iv. Rehmat Ibrahim Ali
- v. Roshan Ibrahim Ali
- vi. Hamadi Ibrahim Ali
- vii. Fatima Ibrahim Ali
- viii. Shebanu Ibrahim Ali

30. The Learned Counsel submitted that the beneficiaries of the trust included the Plaintiff with their families of about 28 people lived on the said premises and had no other home. The said land parcel was the only known asset of the deceased persons. His contention was that the two having held the title in trust as above stated, the property on the land parcel was at all times during the lifetime of the deceased and even after their death the property of the beneficiaries of the trust and vested in the said beneficiaries. Thus, the Plaintiff had locus standi to bring this suit in his own capacity.
31. The Learned Counsel concluded by quoting the case of “*Nicholas Kiptoo Arap Korir Salat – Versus - Independent Electoral and Boundaries Commission & 6 others* (2014) eKLR, in a majority judgment the judge held that:-

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even only in the clearest of cases...

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite part ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical.

Instead in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect.

Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

32. In the long run, the Learned Counsel urged this Honorable Court to dismiss the 2nd Defendant’s Preliminary Objection dated 2nd February 2022 and award the Plaintiff costs on the same.

III. Analysis and Determination

33. I have read and considered the contents of the notice of the Preliminary objection dated 2nd February, 2022 by the 2nd Defendant herein, the elaborate submissions and the cited authorities by all the parties, the relevant provisions of both the Constitution and statutory law.



34. In order to arrive at an informed, fair, just and reasonable decision, this Honorable court has framed the following five (5) salient issues for its determination. These are:-
- a. Whether the Notice of Preliminary Objection dated 2nd February, 2022 by the 2nd Defendant meets the laid down legal threshold of a preliminary objection as founded in law and precedents.
 - b. Whether the suit instituted by the Plaintiff against the 1st, 2nd, 3rd and 4th Defendants herein should be struck out for failure to comply with the provision of Section 56 (2) of the [Kenya Deposit Insurance Act?](#)
 - c. Whether the suit instituted by the Plaintiff against the 1st, 2nd, 3rd and 4th Defendants herein offends the doctrine of Res Judicata?
 - d. Whether the Plaintiff has Locus standi to file and prosecute this suit?
 - e. Who will meet the Costs of the Preliminary Objection.

ISSUE No. a). Whether the Notice of Preliminary Objection dated 2nd February, 2022 by the 2nd Defendant meets the laid down legal threshold of a preliminary objection as founded in law and precedents.

35. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd – Versus- West End Distributors Limited*. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in 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”

36. I wish to cite the case of [Attorney General & Another –Versus- Andrew Mwaura Githinji & another](#) [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.



37. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 2nd Respondent herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. Further Ojwang J (as he then was) in the case of “Oraro - Versus - Mbaja (2005) eKLR held that:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a 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 a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence

ISSUE No. b). Whether the suit instituted by the Plaintiff against the 1st, 2nd, 3rd and 4th Defendants herein should be struck out for failure to comply with the provision of Section 56 (2) of the Kenya Deposit Insurance Act?

38. Section 56(2) of the Kenya Deposit Insurance Act(No. 10 of 2012) provides as follows:-

“No injunction may be brought or any other action or civil proceedings may be commenced or continued against an institution or in respect of its assets without the sanction of the Court.”

Explaining the import of the said provision in “Andrew G. Muchai – Versus - Chase Bank Limited (2016) eKLR, Nzioka J observed and I concur as follows:-

“In my opinion to answer this question, one needs to appreciate what receivership is all about. In my opinion, receivership in legal terms entails an order/directive where all the property and affairs of an institution are placed in the dominion and control of an independent person known as a receiver. Thus receivership is a preservation process put in place to protect the assets, liabilities and business affairs of a bank with the aim of protecting the interests of its depositors, creditors and members of the public. In this case to preserve the bank’s liquidity, assets, and to find the best way to return it into normal business.”

The essence of seeking leave to commence a suit, is to verify that the applicant has a valid claim, which they need to pursue against the institution and by extension the corporation. The main aim is thus to create orderliness, decency and avoid a floodgate of actions, which may involve some of the matters placed under supervision. This is informed by the fact that when Chase Bank Kenya (in receivership) was placed under receivership, the Kenya Deposit Insurance Corporation declared a moratorium to the Bank’s business to be undertaken by all stakeholders of the bank; including limiting the Bank’s services. A moratorium is a temporary delay or suspension of an activity. The same prohibits a Bank from inter alia, receiving deposits and making payments, unless it is partially or fully lifted by the Kenya Deposit Insurance Corporation. Thus suits cannot be commenced suo moto without the



Court's leave and/or sanction. That will create anarchy. I hold that, for a company under receivership, a party suing it must seek the Court's leave before commencing a suit against it. Therefore, institution of any proceedings will require the sanction of the Court.....

39. It is not in dispute in the matter before me that no leave was sought prior to the commencement of this suit. The suit therefore touches on property under liquidation.

ISSUE No. c). Whether the suit instituted by the Plaintiff against the 1st, 2nd, 3rd and 4th Defendants herein offends the doctrine of Res Judicata?

40. This is also a preliminary objection that is raised on a point of law on the grounds that this matter is res judicata. The issue for determination is whether this suit falls on all fours of Section 7 of the Civil Procedure Act. Cap. 21 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 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.”

41. The Courts have rendered many rulings on the doctrine of Res Judicata which essentially frowns upon the use of the courts to abuse processes. The moment the court comes to the conclusion that the suit is Res Judicata, then the court should not shy away from pronouncing itself so. On the first issue raised I am obliged to revisit the all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Limited – Versus - West End Distributors Limited (1969) EA. 696 A preliminary objection per Law J.A. was stated to be thus:-

“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.”

42. In this proceedings, it is the contention by the 2nd Defendant/Applicant ‘inter alia’ that this suit should be dismissed with costs as it offended the Doctrine of Res Judicata and an abuse of the court process. Having considered and reviewed the pleadings and submissions by counsel for the 2nd Defendant/Applicant, it is not in dispute, that there exists the final rulings in the case ‘ELC (Mombasa) No. 289 of 2018; Shokat Ebrahim Ali Mohamed Omar – Versus - Integra Auctioneers (K) Limited and others together with a Plaint for Mombasa HC Civil Suit No. 66 of 1994 Sakinabai Ali Mohamed – Versus - Kenya Finance Corporation Limited. In ELC (Mombasa) No. 289 of 2018; Shokat Ebrahim Ali Mohamed Omar – Versus - Integra Auctioneers (K) Limited and others the ruling by the court is very clear that the matter was dismissed and not struck out.

- a) It is now well settled that the doctrine of Res Judicata is important in adjudication of case and serves two important purposes;-

“it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and



- b) it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
43. In order therefore to decide as to whether the instant case offends the Doctrine of Res Judicata, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- a. what issues were really determined in the previous case;
 - b. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - c. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
44. Notwithstanding all the other plethora of cases and most cited by the Learned Counsels for both the Plaintiff and the 2nd Defendant, the test in determining whether a matter is Res Judicata is as summarized in the case of “Bernard Mugo Ndegwa – Versus - James Nderitu Githae and 2 Others (2010) eKLR, as follows that:
- i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same
 - iii. Sameness of the title/claim
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.

Being guided by the above authorities, I find that the issues in the previous suit which were substantially the same in the subsequent suit were not determined and covered by the ruling in the previous case. Thus, for this very reason, the ground on Res judicata in this case as raised by 2nd Defendant has failed. In saying so, the Court has taken cognizance that the matter was not heard to full hearing. The Court strongly believes that if the suit is given a hearing then all issues will be put to light without prejudice to any of the parties.

ISSUE No. d). Whether the Plaintiff has Locus standi to file and prosecute this suit?

45. The 2nd Defendant/Applicant has strongly and extensively submitted that the Plaintiff has no Locus Standi or legal capacity to institute this suit. To the Counsel, arising from the lack of the said capacity, the suit is incompetent and should be struck out. On this critical legal issue, the Court is compelled to refer to certain specific authorities in order to arrive at a founded position of law. In the case of Law Society of Kenya -Versus - Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, the Court held that ;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.



Further in the case of “Alfred Njau and Others – Versus - City Council of Nairobi (1982) KAR 229, the Court also held that:-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.

46. It is therefore evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. Additionally, it is evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit. In the case of *Quick Enterprises Limited – Versus - Kenya Railways Corporation*, Kisumu High Court Civil Case No.22 of 1999, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.

47. Having now considered the objections raised by the 2nd Defendant/Applicant, the Court finds that lack of locus standi can dispose of the matter preliminarily without having to resort to ascertaining of facts. The Preliminary Objection raised by the 2nd Defendant fits the description of Preliminary Objection as stated in the Mukisa Biscuit case (Supra).

48. While the Court has already held and found that the issue of locus standi is a Preliminary Objection rightly raised, in this instant suit, the 2nd Defendant/Applicant have averred that the Plaintiff having filed this suit have no interest whatsoever over the suit property as he has not produced any documentation that shows any interest it may have they have over the suit property and have shown why the owner of the suit property could not file the suit by themselves.

49. However, this Court notes that the Plaintiff is claiming beneficial interest over the suit. That means therefore that the issue as to whether or not the Applicant has any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into that conclusion. In arriving at this conclusion, I am compelled to refer to the case of “Presbyterian Foundation & Another – Versus - East Africa Partnership Limited & Another[2012]eKLR to wit:-

“The fourth issue is that the 2nd Plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, that determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2nd Plaintiff’s position vis-à-vis the 1st Plaintiff, I cannot say that the 1st Plaintiff’s suit is non-existent. It is further submitted that since the Church has registered officials and the 1st Defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non - starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1st Plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1st Plaintiff’s authorization, that would be something else. However, that is not an issue that, properly speaking, can be the subject of a preliminary objection.



Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the Defendants. In the result it is my view and I so hold that the issues raised in the notice of preliminary objection dated 28th June 2012 do not meet the threshold for Preliminary Objections. The same are accordingly dismissed with costs to the Plaintiffs..”

For these reasons, the Court strongly feels it imperative that the matter be allowed to proceed for full trial at which point all these matters may be re – evaluated once more but from a more informed position rather than at this preliminary stage.

ISSUE No. e). Who will meet the Costs of the Preliminary Objection.

50. The issue of Costs is at the discretion of the Court. Costs means the outcome of any legal action and/or proceedings in a litigation process. The proviso of the provision of Section 27 (1) of the Civil Procedure Act, cap. 21 holds that Costs follow the events. The events here means the result of the said legal action, act or proceedings in any litigation process. The result in the instant case is that the Preliminary objection through a notice dated 2nd February, 2022 raised by the 2nd Defendant fails to succeed. Nonetheless, the best cause of action in the given circumstances is to let the costs be in the cause of the matter.

IV. CONCLUSION & DISPOSITION

51. Taking into account the above findings of the court, this Court finds that since the Plaintiff’s suit is based on beneficial interest over the suit property, making a determination as to whether or not they hold such interest over the suit property at this stage will be draconian as the Plaintiff’s suit would have been determined via a Preliminary Objection and it would mean that the Court would not have had an opportunity to ventilate on the issues that would have been raised by the Plaintiff. Further it is the Court’s holding that the instant issue while it goes to the Jurisdiction of this Court, certain facts must be ascertained and therefore the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take evidence to determine the same. I am guided by jurisprudence to the case of “Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga - Versus - Eliud Timothy Mwamunga & Sagalla Ranchers Limited [2017] eKLR, where the Court held that: -

“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.

52. Consequently, the Court finds and holds that at this juncture, it would be imprudent to dismiss the Plaintiff suit as the suit ought to be heard and facts ascertained to arrive at a just determination. I am guided and persuaded by the case of Nicholas Kiptoo Arap Salat (supra) in reaching at my determination on this Preliminary objection application.
53. The upshot of the foregoing, and from the very onset, I must sincerely applaud and strongly commend all the Learned Counsels in this matter in the professional manner in which they conducted these



proceedings. They were full of resilience, decorum, diligence, dignity and respect for one another and to the Court. Their pleadings were well researched while their arguments articulate and orderly. This is a prime moment to be emulated by all Counsels appearing before any Court of law where adversarial system is the order of the day. Therefore, and for avoidance of any doubt, I do proceed to provide the following elaborate directions: -

- a. THAT the 2nd Defendant's Preliminary Objection dated 2nd February 2022 be and is hereby dismissed for lack of merit.
- b. THAT the Notice of Motion application dated 18th November, 2011 by the Plaintiff be canvassed by way of written Submissions as follows:-
 - i. The 1st, 2nd & 3rd Defendants herein be and are hereby granted 14 days leave to file and serve their Replying Affidavits.
 - ii. The Plaintiff granted 21 days leave to file and serve further affidavit and written submissions.
 - iii. The 1st, 2nd and 3rd Defendants herein granted 14 days upon service to file their written submissions.
- c. THAT for expediency sake, this matter to be mentioned on 6th October, 2022 for further direction on the ruling date.
- d. THAT the costs of this application to be in the cause.

54. It is so ordered accordingly.

RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY 2022.

HON. JUSTICE (MR.) L. L. NAIKUNI JUDGE

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of: -

- a. M/s. Yumna Hassan, Court Assistant.
- b. No appearance for the Plaintiff.
- c. No appearance for the 1st Defendant.
- d. M/s. Maitai Advocate for the 2nd Defendant.
- e. No appearance for the 3rd Defendant.
- f. No appearance for the 4th Defendant

