



**Beach Villas Limited v Mogeni & 4 others (Environment & Land
Case 6 of 2020) [2022] KEELC 2547 (KLR) (18 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 6 OF 2020**

**MAO ODENY, J
JULY 18, 2022**

BETWEEN

BEACH VILLAS LIMITED PLAINTIFF

AND

KEVIN TOM MOGENI 1ST DEFENDANT

KEVIN KINUSU SIFUNA 2ND DEFENDANT

COUNTY GOVERNMENT OF KILIFI 3RD DEFENDANT

LAND REGISTRAR, MOMBASA 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of a Preliminary Objection dated 25th June 2021 by the 2nd Defendant on the ground that this court lacks jurisdiction to entertain, handle and determine the suit herein as between the parties by virtue of a consent entered into and recorded in Mombasa ELC No. 111 of 2012 between the parties.
2. The Plaintiff filed their Grounds of Opposition dated 8th November 2021 stating that the 2nd Defendant's Preliminary Objection is not a proper Preliminary Objection within the meaning of the Mukisa Bisciut case because it raises factual issues which require the court to have a look at the pleadings as well as the referenced consent order. That further this court had the jurisdiction to entertain, hear and determine this suit between the parties herein as the issues raised against the 2nd Defendant pertaining to this matter have never been heard and/or determined in Mombasa ELC No. 111 of 2012 or any other court.
3. Counsel agreed to canvas the Preliminary Objection vide written submissions which were duly filed.



2nd Defendant's Submissions

4. Counsel submitted that the 2nd Defendant had under paragraph 4 of its defence brought to the court attention of the existence of a consent judgment recorded in Mombasa ELC 111 of 2012 between the parties herein which had comprehensively settled disputes as between the parties herein in the following terms: -

“That upon recording the consent the parties and or their advocates now or in the future shall not pursue any civil or criminal case or complaint on matters arising out of the issues herein or concerning the Plaintiff or its property.”

5. It was counsel's submission that arising from the consent, this court lacks jurisdiction to further handle this matter thus ought to be dismissed with costs. That in Mombasa ELC No. 111 of 2012, the parties were similar to the parties in this case and the issue in contention was land and that parties are bound by their consent unless the same is set aside by an application.
6. Counsel relied on the cases of *Kericho Guest House enterprises Limited v Kenya Breweries Limited* [2018] eKLR and *Kasmit Wesonga Ongoma & Another v Wanga* [1987] eKLR and urge the court to dismiss the plaintiff's case with costs.

Plaintiff's Submissions

7. Counsel submitted that the Plaintiff filed a Plaint dated 25th February 2020 and the Defendant entered appearance on 18th December 2021 and filed a defence on 21st January 2021 whereby he pleaded a point of law of res judicata against the Plaintiff's suit. The Plaintiff filed its reply to the 2nd Defendant's Defence dated 17th July 2021 which responded to the 2nd Defendant's defence including the issue of re judicata.

Counsel identified the following issues for determination: -

- a. Whether the issues in this suit are similar to the issues in dispute in ELC Case No. 111 of 2012 referred to on paragraph (a) of the P.O;
 - b. Whether the Consent orders issued on 16th July 2018 by Lady Justice A. Omollo in ELC Case no. 111 OF 2012 conclusively determined the orders sought by the Plaintiff in this suit as stated on paragraph (a) of the P.O;
 - c. Whether this court has jurisdiction to hear and determine this suit in view of the consent orders in ELC Case No. 111 of 2012.
8. It was counsel's submission that the Preliminary Objection herein is not purely on point of law as the same requires this court to have a look at pleadings as well as the consent referred to by the 2nd Defendant so as to determine whether the said consent was in reference to all the Plaintiff's property or only the suit property in ELC No. 111 of 2012. That the 2nd Defendant neither attached the pleadings nor the consent in ELC No. 111 of 2012 to guide this court in its determination.
 9. Mr. Karega submitted that the issues in Mombasa ELC NO. 111 of 2012 were whether the Certificate of title and/or Provisional Certificate in respect to Land Reference No. MN/III/414 (original No. 328/3) Section III mainland North; CR13545/1(hereinafter referred to as "plot No. 414") held by David Kinisu Sifuna (the 2nd Defendant herein) was null and void and whether the entries Nos. 3, 4 and 5 in relation to the transfer to Kelvin Tom Mogeni (the 1st Defendant herein), Provisional Certificate issued and Transfer to David Kinisu Sifuna as appearing in the Certificate of Title and/or Provisional



Certificate dated 20th June 2001 in respect to “plot No. 414” held by the 2nd Defendant was null and void.

10. Further that the court in Mombasa then adopted the Consent recorded by parties filed on 25th June 2018 and declared inter alia that the Certificate of title and/or Provisional Certificate issued on 20th June 2001 in respect to “plot no. 414” held by the 2nd Defendant was null and void and that entries Nos. 3, 4 and 5 in relation to the transfer to Kelvin Tom Mogeni (the 1st Defendant herein), Provisional Certificate issued on 20th June 2001 in respect to “plot no. 414” held by the 2nd Defendant was null and void.
11. Counsel submitted that the court neither heard nor conclusively determined any of the issues dealing with the validity, legality of the transfer and registration of Land Subdivision Number 411/III/MN Title number CR 13543 to Kelvin Tom Mogeni (the 1st Defendant herein) and its subsequent transfer to David Kinisu Sifuna (the 2nd Defendant herein) by Tom Kelvin Mogeni (the 1st Defendant herein) and urged the court to dismiss the Preliminary Objection with costs.

Analysis and Determination.

12. The issue for determination is whether the Preliminary Objection has merit.
13. A Preliminary Objection should be purely on a point of law which is argued on the assumption that all facts pleaded by the other side are correct as was held in the case of *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969) EA 696. It cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

In the case of *Oraro Vs Mbaja* (2005) 1KLR 141, the Court 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.”

14. The 2nd Defendant raised the Preliminary Objection on the ground that this matter is res judicata due to a consent which was filed in Mombasa ELC No 111 of 2012. Section 7 of the [Civil Procedure Act](#) provides for the doctrine of res judicata which bars the court from trying any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Res judicata applies if the following are proved; -
 - a. The suit or issue raised was directly and substantially in issue in the former suit
 - b. The former suit was between the same party or parties under whom they or any of them claim
 - c. That those parties were litigating under the same title
 - d. That the issue in question was heard and finally determined in the former suit
 - e. That the court which heard and determined the issue was competent to try both the suit in the issue was raised and subsequent suit.
15. The 2nd Defendant did not attach the consent or the pleadings in respect of the case that he claims to be res judicata. The consent also is not clear whether the Plaintiff is estopped by the said consent from pursuing any civil or criminal case or complaint against the Defendants or any other person over the suit property or any other property belonging to the Plaintiff.



16. Res judicata is one of the issues that can be raised as a Preliminary Objection but the Applicant must place the documents in respect of the previous suits and show clearly that the suit falls on all fours on the doctrine of res judicata. Where there is scanty information which forces the court to look outside the pleadings before it can make a determination, then it would be proper to deal with the issue at the hearing.
17. In the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR in upholding a Preliminary Objection on grounds of res judicata, this court held that: -

“The proceedings, Judgment and decree in Eldoret ELC Petition No 2 of 2015 were availed to court. The defendant’s contention that this matter has already been determined by a competent court of the same jurisdiction vide Eldoret ELC Petition no. 2 of 2015 is sound as the subject matter and parties in the current suit are directly and substantially in issue in ELC Petition No. 2 of 2015 which was determined by a competent court. This court cannot sit on its own judgment unless it is a review. If the plaintiff was dissatisfied with the outcome of ELC Petition No 2 of 2015 whereby the court found that it had been unlawfully registered as the proprietor of the suit property as the same was public property reserved for a public secondary school, then it should have preferred an appeal and not file another suit.”

18. This was not the position in this case where the information was scanty. I therefore find that the Preliminary Objection has no merit and is dismissed with costs.

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

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

