



**Nganga v Nganga & another (Environment & Land Case  
10 of 2020) [2022] KEELC 15695 (KLR) (15 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 15695 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 10 OF 2020  
EC CHERONO, J  
JULY 15, 2022**

**BETWEEN**

**STEPHEN KIMANI NGANGA ..... PLAINTIFF**

**AND**

**MAINA NGANGA ..... 1<sup>ST</sup> DEFENDANT**

**ELIUD MWAURA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The defendants raised a Preliminary Objection at paragraph 6 of their defence dated May 18, 2021 as follows: -

' The Defendant aver that this matter is Res-judicata and shall raise Preliminary Objection during the hearing hereof'

2. When the matter came up for hearing on December 6, 2021, the Court directed the preliminary to be taken first and the parties through their advocates on record agreed that the said Preliminary Objection be disposed of by way of written submissions. The Defendants filed theirs on March 3, 2022 and the Plaintiff filed his on April 6, 2022.

**Defendants' Submissions**

3. The defendants referred to Wang'uru Succession Cause Number 29 of 1977 where the dispute involved Rice Holding 1501 Unit M5 which is also the same subject matter in this suit.
4. They submitted that this Court had been called upon to determine the ownership of the said rice holding yet the same had been determined and decided in the Wang'uru Court which involved the same parties as those in this matter.



5. They further submitted that the issue had also been resolved internally before the Manager of the National Irrigation Board through internal mechanisms provided under its statute.
6. They contend that the plaintiff herein was represented by counsel and at no time was the issue of jurisdiction or incompetence of the said court raised. Further that the matter was determined by a competent court and the plaintiff did not file an appeal against the said rulings and judgments.
7. They submitted that litigation has to come to an end and urged the Court to dismiss the suit with costs.

### **Plaintiff's Submissions**

8. The plaintiff who is acting in person did not submit on the Preliminary issue raised but instead dwelt on the merits of the case.
9. The Plaintiff submitted that he had proved his case beyond reasonable doubt and that the prayers sought be granted. He argued that the defendants obtained orders for review from Wanguru Court fraudulently and revoked his title to the suit land.

### **Analysis**

10. I have considered the Preliminary Objection raised by the defendants, the parties' rival submissions as well as the relevant law.
11. What constitutes a Preliminary Objection was discussed in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696*, where it was held that:

' 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... 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.'

12. The Defendants' Objection is hinged on the doctrine of Res Judicata. An objection based on Res-judicata is a pure point of law which, if argued successfully may determine the suit. Section 7 of the *Civil Procedure Act* CAP 21 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. The elements of res judicata were also discussed in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others [2017] e KLR* where the Court of Appeal held as follows: -

' Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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.'
14. In this case, the Plaintiff appears to be challenging the orders issued on November 26, 2004 and October 7, 2009 in Wang'uru Succession Cause No 29 of 1977 on grounds that the Court did not have jurisdiction to hear the succession cause.
  15. The Defendants have stated that the same is res judicata since the issues involves the same subject matter and parties as those in the Wang'uru case.
  16. I have perused the pleadings in both cases and going by the ruling delivered on October 9, 2018, I am satisfied that both the Wanguru Succession Cause No 29 of 1977 and the instant suit involves not only the same parties but also the same subject matter.
  17. The applicant now seeks to challenge the decision of the lower court by filing a fresh suit. The same is an abuse of the court process and contrary to the law as this Honourable Court can only exercise appellate jurisdiction in respect to a judgment or order of the lower court.
  18. The applicant has approached this Court in its original jurisdiction and not as an appellate Court. This Court cannot therefore adjudicate the issues raised as the same were dealt with in the lower court. If the Applicant was dissatisfied with the findings of the lower court, he should have appealed to the High Court but not filing a separate suit.
  19. Consequently, I find that this suit filed by the applicant is res- judicata.

**Conclusion**

20. In view of the foregoing, I find that the Preliminary Objection raised by the Defendants at paragraph 6 of their defence dated May 18, 2021 has merits and the same is upheld. The upshot of my finding is that this suit commenced by a plaint dated February 27, 2020 is hereby struck with costs.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 15TH JULY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of;-**

- 1. M/S Muturi holding brief for Ndana for the Defendant**
- 2. Plaintiff in person - present**
- 3. Kabuta Court Assistant – present.**

