



Republic v County Land Registrar, Siaya County & 2 others; Obonyo & another (Exparte Applicants) (Environment and Land Judicial Review Case 9 of 2021) [2022] KEELC 4892 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 9 OF 2021
AY KOROSS, J
SEPTEMBER 22, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY LAND REGISTRAR, SIAYA COUNTY.....1ST RESPONDENT 1ST RESPONDENT

THE COUNTY SURVEYOR, SIAYA COUNTY 2ND RESPONDENT

THE HON.ATTORNEY GENERAL 3RD RESPONDENT

AND

FREDRICK OTIENO OBONYO EXPARTE APPLICANT

MILDRED AKINYI OTIENO EXPARTE APPLICANT

RULING

1. Pursuant to leave and by the provisions of order 53 rules 3(1) and (3) of the Civil Procedure Rules, article 50(1) of the Constitution of Kenya, sections 19, 20, 76(2) and 77 of the Land Registration Act and sections 136(2) and 137(1) of the retired Registered Land Act, the *ex parte* applicants filed a substantive motion dated February 9, 2022 in which they sought orders of mandamus compelling the 1st and 2nd respondents to determine whether land parcel number West Alego/Sigoma Uranga/1251 (“suit property”) had been encroached upon.



Respondent's Case

2. In response, the respondents filed a notice of preliminary objection dated March 25, 2022 and filed on 1/03/2022. It is obvious the dating is erroneous. Nevertheless, this is not a substantive issue. It raised the following 5 grounds;
 - a) By virtue of section 7 of the [Civil Procedure Act](#), the motion was *res judicata*, the same having been dealt with in Kisumu ELC Case Number 348 of 2014;
 - b) The honourable court lacks jurisdiction in the matter;
 - c) By virtue of section 18 (2) of the [Land Registration Act](#), the motion was *res judicata* the same having been determined by the Land Registrar and land surveyor via the land registrar's land dispute report of September 25, 2018;
 - d) The motion is an abuse of court process as it seeks to revive a cause through the back door of an action already determined; and
 - e) The motion is bad in law since the *ex parte* applicants' only recourse is in lodging an appeal as opposed to filing a judicial review application; albeit they are guilty of laches.

The Respondents' Submissions

3. Mr Felix Kajo, litigation counsel for the Hon Attorney General who was representing the respondents, filed their written submissions dated 01/03/2022. He stated that it was not in dispute that the *ex parte* applicants filed ELC Case Number 348 of 2014 against Anastacia Aloo Odongo which case had been heard and determined. This previous suit hinged on a boundary dispute between the suit property and West Sigoma/Uranga/1253. It was his contention that this court and the court which had dealt with the dispute had concurrent jurisdiction and the only way this court could be moved was by way of an appeal against the decision of the 1st respondent. He relied on the cases of [Clement Masanga Atonga v Lewkadia Milungi](#) [2021] eKLR and [Mwangi Stephen Muriithi v Daniel T Arap Moi & another](#) [2017] eKLR and [Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another](#) [2021] eKLR.

Ex parte Applicants' Submissions

4. The *ex parte* applicants counsel filed written submissions dated May 31, 2022. They asserted that by virtue of section 13 of the [Environment and Land Court Act](#), the ELC had jurisdiction to determine disputes on redress of a denial, violation or infringement of rights pertaining to land and environment. Therefore, this court had jurisdiction to determine the matter.
5. Further, the suit was not *res judicata* for several reasons; the parties, issues and reliefs sought in the two matters were different and that they were not guilty of laches. They asserted that the preliminary objection had not met the standards of [Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited](#) [1969] EA 696. They also relied on the case of the [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR where the court relived the ingredients of *res judicata*.



Analysis and Determination

6. Having considered the notice of preliminary objection and the parties' rival submissions, this court will render its determination two issues; (i) whether this suit is *res judicata* and (ii) whether this court has jurisdiction. Before proceeding further, I must address a pertinent issue in the parties' submissions; they have not proffered the cited authorities to this court and for that reason, I will not consider them.
7. The locus classicus case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has long settled the principle of a preliminary objection and this court need not reinvent the wheel. The import of this decision is that such preliminary objections can only be raised when they relate to pure points of law, on uncontested facts or if it is capable of disposing off a suit preliminarily without the court being forced to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.
8. The Supreme Court of Kenya in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR took a more liberal approach on the parameters to be used in determining whether or not a preliminary objection could stand when it stated thus;

“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is 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.”
9. It is common ground between the parties that Kisumu ELC Case Number 348 of 2014 that was between the *ex parte* applicants and Anastacia Aloo Odongo had been heard and determined by a court of concurrent jurisdiction with this court. The only point of departure is that the respondents argued that the previous suit rendered subsequent suits *res judicata* and that the *ex parte* applicants' only available forum ` was in an appeal while the *ex parte* applicants were of a contrary view. This court is satisfied that two issues squarely fall within the realm of preliminary objections. I will now proceed to address the two issues in a sequential manner.

I. Whether this Suit is Res Judicata

10. The doctrine of *res judicata* ousts the jurisdiction of a court to try 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. Section 7 of the *Civil Procedure Act* provides as follows on this doctrine;

“No Court shall try any suit 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.”
11. The Court of Appeal in the case of *Independent and Electoral Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR which had been cited by the *ex parte* applicants pronounced itself 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 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) The 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.”

12. I had a chance to scrutinise Kisumu ELC Case Number 348 of 2014 and it reveals that firstly the parties are not substantially the same; the ex parte applicants were the plaintiffs in the other suit while the respondents were not parties. Lastly, though the prayers sought in Kisumu ELC Case Number 348 of 2014 are substantially different from those sought in this suit; the former being on trespass against Anastacia Aloo Odongo who was the registered or beneficial owner of land parcel number West Sigoma/Uranga/1253 and the latter on mandamus, the issues in the two cases are substantially the same. They all relate to a boundary dispute between the suit property and land parcel number West Sigoma/Uranga/1253.
13. In Kisumu ELC Case Number 348 of 2014, the competent court rendered itself by determining that the 1st and 2nd respondents had settled the dispute and the only way the ELC court could be moved was by way of an appeal against the decision of the 1st respondent.
14. Though some of the issues in Kisumu ELC Case Number 348 of 2014 have spilled over to this suit, I am not satisfied that they have met all the ingredients that would render this suit *res judicata* and for that reason, the 1st ground fails. However, the pronouncement of Kisumu ELC Case Number 348 of 2014 will be laid bare as I address the 2nd issue.

II. Whether this Court has Jurisdiction.

15. By virtue of section 13(7)(b) of the *Environment and Land Court Act*, this court has jurisdiction to hear and determine judicial review cases.
16. Judicial review is not panacea for all decisions made by a public body, nay, judicial review concerns itself with the decision-making process and not the merits of the decision itself. It deals with illegality, irrationality and procedural impropriety by the decisions of bodies or persons whose decisions are susceptible to judicial review. See *Meixner & another v Attorney General* [2005] 2 KLR 189, *Republic v Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR and *Municipal Council of Mombasa v Republic & Umoja Consultants Limited*, Civil Appeal No 185 of 2001.
17. My brother Ombwayo J in Kisumu ELC Case Number 348 of 2014 had the advantage of scrutinising and investigating the report by the 1st respondent dated 25/9/2018 and that of the 2nd respondent. He was satisfied that the 1st and 2nd respondents had determined the dispute and was equally satisfied that the only way the appellant could move the ELC was by way of an appeal. He found and stated thus;

“I have considered the evidence on record and do find that this is basically a boundary dispute that has been determined by the land registrar, siaya...does find that the land registrar determined the dispute...plaintiff can only appeal to this court...” .
18. The *ex parte* applicants neither appealed against the decision of the 1st and 2nd respondent nor did they appeal against this judgment. I do not have jurisdiction to sit on appeal against the decision of a court with concurrent jurisdiction. I find that I am bereft of jurisdiction to handle this matter and I must



down my tools. I rely on the Supreme Court of Kenya decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the court stated thus;

“...a court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law..”.

19. Before I conclude, I must address my mind to my observations on the conduct of the ex parte applicants as evidenced from the court record. They did not proffer the report of the 1st respondent dated 25/9/2018.
20. It is the considered view of this court that this was deliberate, mischievous and intended to obtain court orders through the backdoor. This is an abuse of the court process. I say so for several reasons. Well knowing that the 1st and 2nd respondents had determined the boundary dispute between the suit property and West Sigoma/Uranga/1253, they lodged another boundary dispute between the suit property and West Sigoma/Uranga/1253 probably in guise, they roped in another parcel of land known as West Sigoma/Uranga/1252. It is my considered view that it was not open for them to relitigate on West Sigoma/Uranga/1253; that window had been shut by the judgment in Kisumu ELC Case Number 348 of 2014. The court cannot assist them to perpetuate an illegality.
21. The upshot is that I uphold the 2nd, 4th and 5th grounds of preliminary objection dated March 25, 2022 and dismiss the motion dated 9/02/2022. Costs abide the event and I award costs to the respondents.

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

22/9/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing the Presence of:

Ms. Mathairo h/b for Mr. Okoth for the exparte applicants

N/A for the applicant

Court assistant- Ishamel orwa

