



REPUBLIC OF KENYA



**Nyawira & 13 others v Galot Industries Limited (Enviromental and Land Originating
Summons E5 of 2020) [2022] KEELC 4841 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4841 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E5 OF 2020
A NYUKURI, J
SEPTEMBER 21, 2022**

BETWEEN

**MARTHA NYAWIRA 1ST APPLICANT
LOISE WANGUI WAWERU 2ND APPLICANT
ELIZABETH WANGARI WAWERU 3RD APPLICANT
MORRIS MAINA WAMBUGU 4TH APPLICANT
JACQUELINE ANDALO SHIBALIRA 5TH APPLICANT
CHARLES MUCHIRI WAGURA 6TH APPLICANT
FREDRICK MAJIMBO LUGANDA 7TH APPLICANT
WILKISTER KEMUMA 8TH APPLICANT
GEORGE GICHURU WAWERU 9TH APPLICANT
FRANCIS MUTHAMIA TWAMIKWA 10TH APPLICANT
SAMSON NYAMWEYA KAGERA 11TH APPLICANT
GRACE MUENI MUTUA 12TH APPLICANT
EVANS MAGABI 13TH APPLICANT
NAHASON ONSANDO JUMA 14TH APPLICANT**

AND

GALOT INDUSTRIES LIMITED RESPONDENT



RULING

1. This ruling is in respect of the preliminary objection dated February 15, 2021 brought by the respondent seeking for striking out of the applicants' suit on the following grounds;
 - a. This instant proceedings are barred by the doctrine of estoppel and it is extended form of *res judicata* in section 7 of the [Civil Procedure Act](#) cap 21 in view of determined proceedings in ELC Case No 26 of 2014 Galot Industries Ltd vs Rose Nyaga Njambi & 3 Others and as such is bad in law.
 - b. The applicants alleged cause of action has been determined through ELC Case No 26 of 2014 Galot Industries Ltd vs Rose Nyaga Njambi & 3 Others on account of the fact that they were put into possession of the suit property by Rose Njambi who was the 1st defendant in ELC Case No 26 of 2014 Galot Industries Ltd vs Rose Nyaga Njambi & 3 Others through whom they are deemed to have litigated.
 - c. The applicants alleged cause of action has since been overtaken by events and therefore stands extinguished, since the applicants have peacefully given up vacant possession of the suit property to the respondent.
2. By the order of this court made on October 13, 2021, parties were directed to file and exchange submissions in regard to the preliminary objection in 14 days of the said date. On record are submissions filed by the respondent dated November 24, 2021. No submissions were filed by the applicants.

Submissions

3. Counsel for the respondent submitted that the issue of ownership of the suit property was raised in 2012 and challenged in ELC Case No 26 of 2014; Galot Industries Ltd vs. Rose Nyaga Njambi & 3 Others. According to counsel, this court pronounced itself on the issue of ownership of parcel LR No 1286/511 located in Mavoko Municipality in ELC Case No 26 of 2014, on April 24, 2020 where the court affirmed that the respondents are the registered proprietors of the said parcel.
4. Further, counsel submitted that the judgment debtors being aggrieved with the decision of this court filed an appeal in the Court of Appeal whereof the Court of Appeal dismissed the application for stay of execution on ground that the appeal did not raise arguable grounds.
5. Counsel also pointed out that the applicants had filed an objection dated September 22, 2020, against the execution of the decree of this court, but the same was overtaken by events as by then the judgment debtors had already been evicted from the suit property. It was also maintained for the respondent that the applicants having given up vacant possession of the suit property to the respondent on December 19, 2020, their cause of action had been extinguished.
6. Counsel relied on section 7 of the [Civil Procedure Act](#) and argued that in view of the determination of ELC Case No 26 of 2014, this court is barred from hearing and determining this matter as the issues herein were directly and substantially in issue, in the former suit, which was conclusively determined on April 24, 2020.
7. It was argued for the respondent that the applicants herein are tenants of Rose Njambi Nyaga who was the 1st defendant in ELC Case No 26 of 2014, and therefore claimants under Rose Njambi Nyaga within the meaning of section 7 of the [Civil Procedure Act](#). Reliance was placed on the case of [Electoral](#)



Et Boundaries Commission vs Maina Kiai Et 5 Others [2017] eKLR, where the Supreme Court laid down the elements that must be proved to establish the defence of res judicata.

8. Counsel for the respondent also referred to the cases of *Okiya Omtatah Okoiti Et Another vs Attorney General Et Another* Petition No 593 of 2013, *Henderson vs Henderson*(1) [1843-60] ALL ER 378, *ET vs Attorney General Et Another* [2012] eKLR, *Omondi vs National Bank of Kenya Limited Et Others* [2001] EA 177, *Gurbacham vs Yowani Ekoru* [1958] EA 450 and *Nguruman Limited vs Jan Bonde Nielson Et Another* [2017] eKLR, which decisions have been considered by the court.
9. Counsel emphasized that this court ought to guard itself against being used as a tool to frustrate execution of its orders and cited the case of *Diocese of Eldoret Trustees (Registered) vs Attorney General (On behalf of the Principal Secretary Treasury) Et Another* [2020] eKLR for the proposition that adding or subtracting parties in a suit that is substantially and directly related to a previous suit does not sanitize a suit and make it a fresh suit.
10. Counsel argued that the court that determined ELC Case No 26 of 2014 was competent and had jurisdiction to do so by dint of article 162 (2) (b) of the *Constitution* of Kenya and section 13 of the *Environment and Land Court Act* No 19 of 2011.
11. On whether the suit is statute barred, counsel argued that the applicants cannot claim adverse possession when this court already confirmed that the respondent is the rightful owner of the suit property. Counsel cited the cases of *ANM vs PMN* [2016] eKLR, *Smt. Usba Jain Et Others vs Manmohan Bajaj Et Others* [AIR 1980 (Vol 67) M.P 46] and *Brahmdeo Chaudhary vs Rishikesh Prasad Jaiswal and Another* [1997] (3) SCC 694) which the court has considered.

Analysis and Determination:

12. Having considered the preliminary objection as well as submissions, the issues that arise for determination are;
 - a. Whether the preliminary objection raised is a valid preliminary objection.
 - b. Whether the preliminary objection raised has merit.
13. A preliminary objection is an objection to the suit or any pleading based on pure points of law arising from the pleadings and does not need evidence to be proved. In the case of *Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited* [1969] EA 696 Law JA stated as follows;

“So far as I am aware, a preliminary objection consists of a pure 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 on 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.”

Newbold, P in the same case stated as follows;

“A preliminary objection is in true 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 has 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 nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop”.



14. Similarly, in the case of *Oraro vs Mbaja* [2005] 1 KLR 141, the court held as follows;

“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 process 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 principle, 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 point. ...anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....

15. This position was also upheld by the Supreme Court in the case of *Ali Jobo & Another vs Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR where the Supreme Court held as follows;

“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.”

16. It is therefore clear that a preliminary objection must only be anchored on pure points of law and not on disputed facts which will need the court to interrogate the truth of such facts.

17. In the instant suit, the respondent argues that this court is barred from hearing and determining this matter as the issues raised herein are substantially and directly the same as those raised and determined by this court in ELC Case No 26 of 2014, *Galot Industries Ltd vs Rose Nyaga Njambi & 3 Others*, by dint of section 7 of the [Civil Procedure Act](#).

18. Section 7 of the [Civil Procedure Act](#) 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.

19. As correctly pointed out by the respondent, for a party to prove the doctrine of *res judicata* under which section 7 of the [Civil Procedure Act](#) is predicated, they must demonstrate that;

- a. The suit or issue was directly and substantially in issue in a former suit.
- b. That the former suit was between the same parties or parties under whom they or any of them claim.
- c. The issue was heard and finally determined in the former suit.
- d. The court that heard and determined the suit or issue was competent to try the subsequent suit or issue raised.



20. What therefore arises is whether proof of the elements of *res judicata* set out in section 7 of the [Civil Procedure Act](#) can be done by way of preliminary objection, without recourse to facts. This question was not addressed by the respondent.
21. in my considered view, proof of the elements stated in section 7 of the [Civil Procedure Act](#), requires proof of the existence of a previous suit, the parties involved, the issue in controversy and the decision of the court. I have observed elsewhere in several decisions, that the question of *res judicata* ought not be raised as a preliminary objection as it calls on the court to interrogate facts and evidence and therefore it does not constitute a pure point of law. The issue of *res judicata* just like *sub judice* and all other legal questions that need factual proof ought to be raised by way of notice of motion which would ordinarily be supported by affidavit annexed with evidence proving elements under section 7 of the [Civil Procedure Act](#). Raising the issue of *res judicata* as a preliminary objection is merely increasing costs and does not assist the court in determining that question, as a preliminary objection does not require filing of evidence, as the same must be premised on undisputed facts.
22. In the premises, the preliminary objection raised is not a proper preliminary objection and the same is hereby struck out with no orders as to costs.
23. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 21ST DAY OF SEPTEMBER 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ogutu holding brief for Mr. Tiego for the respondent

No appearance for the Applicant

Court Assistant – Josephine Misigo

