



**Kagumo Munyaka & Co. Advocates v Kagumo Munyaka Company Ltd & 10 others
(Land Case E31 of 2021) [2022] KEELC 13753 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE E31 OF 2021
FM NJOROGE, J
OCTOBER 27, 2022**

BETWEEN

KAGUMO MUNYAKA & CO. ADVOCATES PLAINTIFF

AND

KAGUMO MUNYAKA COMPANY LTD & 10 OTHERS DEFENDANT

RULING

1. The defendants filed a preliminary objection dated May 16, 2022 seeking the plaintiff's suit be dismissed with costs to the 1st to 10th defendants on the following grounds:
 1. That the issues raised in this suit are similar and substantially in issue in Nairobi Misc Civil Case No 615 of 1989 Kagumo Munyaka Company Limited –vs- Hon AG & 2 others and Nakuru ELC 217 of 2012 (formerly Nakuru Civil Suit No 501 of 1996) Joseph Mureithi Kinyua & others –vs- Kagumo Munyaka Company
 2. That this honourable court is barred from entertaining this suit by the doctrine of res judicata.
 3. That the issues raised herein are capable of being addressed and determined in full in the said suits to avoid parallel judgments and contradictory orders.
 4. That this suit is an abuse of the court's process and should be dismissed with costs to the 1st to 10th defendants.
2. The only issue therefore that arises from the said preliminary objection is whether the suit is res judice Nairobi Misc Civil Case No 615 of 1989 Kagumo Munyaka Company Limited –vs- Hon A G & 2 others and Nakuru ELC 217 of 2012 (formerly Nakuru Civil Suit No 501 of 1996) Joseph Mureithi Kinyua & others –vs- Kagumo Munyaka Company



3. The objection was disposed of by way of the objector's submissions filed on June 21, 2022 and the plaintiff's submissions filed on June 22, 2022. I have perused the court record and I have not found any submissions filed on behalf of the 11th respondent.
4. In their submissions the objectors correct themselves and aver that they are relying on the doctrine of res judicata and not res sub judice. They aver that in Nakuru ELC 217 of 2012 (formerly Nakuru Civil Suit No 501 of 1996) Joseph Mureithi Kinyua & others –vs- Kagumo Munyaka Company RPV Wendo J ruled that a consent was entered into that a committee should share out the defendant's farms and that the land has already been subdivided and members issued with title deeds for their respective parcels. They aver that the suit land herein, LR Number 6471/2/3, is the same as the subject land in Nakuru ELC 217 of 2012 (formerly Nakuru Civil Suit No 501 of 1996) Joseph Mureithi Kinyua & others –vs- Kagumo Munyaka Company.
5. They rely on the decision in *Diocese of Eldoret Registered Trustees vs Attorney General (On Behalf of the Principal Secretary Treasury) and Another 2020 eKLR*
6. The plaintiff on the other hand urge that the main issues arising are whether the preliminary objection is correctly before the court and whether the instant suit is sub judice. In respect of the first issue it avers, citing *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Limited (1969)* and the case of *Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK PET No 10 of 2013 [2014]* that a preliminary objection is urged on the assumption that all the fact pleaded are correct and it is a point which has been expressly pleaded or which arises by clear implication arising out of pleadings. They aver that a preliminary objection cannot be raised if facts have to be ascertained from elsewhere. It states that in the present case, in order for the court to determine whether the doctrine of res sub judice applies, it would have to peruse the pleadings in the said cases which have not been exhibited by the defendants. For that reason, the plaintiff avers that the present objection cannot be classified as a preliminary objection at all.
7. The plaintiff also avers that since the suits pointed out by the objectors are not pending before any court of law the doctrine of res sub judice cannot apply to the instant suit. On this point I must point out that the objectors have clarified that they have abandoned the doctrine of res sub judice and settled on the doctrine of res judicata as the basis of their preliminary objection.
8. After a brief analysis of the perceived facts which facts this court is unable to verify at the moment, the plaintiff avers that though the cases revolve around the same land the issues before court in each case are very different and that none of the defendants were party to that previous litigation. The plaintiff maintains that the issues involved have not been determined by any other court.
9. The tergiversation from reliance on the res sub judice doctrine to reliance on the res judicata doctrine by the objectors appears to considerably vex the plaintiff who avers that the objectors cannot raise any new issues or grounds not raised in their pleadings. The plaintiff relied on the case of *Re Estate of Ndungu Mwaniki Deceased 2014 eKLR*, The *R vs Tribunal of Inquiry To Investigate The Conduct Of Mbaluto & Others Ex Parte Tom Mbaluto 2018 eKLR*, and the case of *George Kamau Kimani & 4 Others vs County Government Of Trans Nzoia 2014 eKLR* for that proposition and further aver that the preliminary objection is premature and that the question before the court is of both law and fact and so it is not a proper preliminary objection.
10. On this court's part, it is not even necessary to determine whether the instant suit is res sub judice or res judicata since the notice of preliminary objection is premised on the doctrine of res sub judice while the arguments of the objectors are premised on the doctrine of res judicata. It is my view that if



the objectors wished to raise any other ground, however closely related to the one already raised in the preliminary objection as served, they should have moved to amend the notice dated May 16, 2021.

11. It is a well settled principle of law that parties are bound by their pleadings and unless amended, the evidence adduced shall not deviate from the pleadings. This legal position was reaffirmed by the Court of Appeal in the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others Civil Appeal No 76 of 2014 [2014] eKLR* where the court held: -

' In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.'

12. Further, in the Supreme Court case of *Raila Amolo Odinga & Another vs IEBC & 2 others* (2017) eKLR the court held as follows: -

' In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings'

13. I do not think that the objectors have really raised any arguments in their submissions in favour of what they raised in writing in the notice of preliminary objection; I also hardly think that in the circumstances it would be fair to call upon the plaintiff to answer those submissions. Consequently, I find that the preliminary objection dated May 16, 2021 lacks merit and I hereby strike it out with costs to the plaintiff.
14. The plaintiff shall comply with order 11 of the *Civil Procedure Rules* within 14 days from today and the defendants shall comply within 28 days from today with those timelines specified herein running concurrently. This suit shall be mentioned on November 9, 2022 for confirmation of compliance and issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 27TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

