



**Mwaniki & another v Suriya & another (Environment & Land Case
E.030 of 2021) [2022] KEELC 13700 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E.030 OF 2021**

CK YANO, J

OCTOBER 26, 2022

BETWEEN

MILLIAM KARIMI MWANIKI 1ST PLAINTIFF

TASLIM MUENI WASON 2ND PLAINTIFF

AND

RESHMA SHAHID SURIYA 1ST DEFENDANT

DISTRICT LANDS REGISTRAR AT MERU 2ND DEFENDANT

RULING

1. Before court for determination is the preliminary Objection dated July 22, 2022 filed by Reshina Shahid Suriya, the 1st defendant herein.
2. By way of background, the plaintiff's Milliam Karimi Mwaniki and Taslim Mueni Wason filed this suit on September 15, 2021 against the 1st defendant and the District land Registrar Meru. In the plaint, the plaintiffs are seeking a declaration that the transfer of the parcel of land known as Ntima/igoki/9245 (A subdivision of Ntima/igoki/788) and the issue of a title deed is null and void the same having been obtained by fraud, a declaration that the plaintiffs are the legal owners of title Ntima/Igoki/9245 (a sub-division of Ntima/igoki/788) and entitled to ownership and exclusive use, occupation of the same to the exclusion of the 1st defendant or any one claiming under her, an order directed to the 2nd defendant to cancel the transfer to the 1st defendant and rectify the register transferring the land to the plaintiffs, general damages for trespass, nuisance and breach of rights to property, a permanent injunction against the 1st defendant, and costs of the suit.
3. On July 7, 2022, the plaintiffs filed an application for injunction restraining the defendants from trespassing, encroaching, alienating, transferring, selling, leasing and charging or in any other way dealing in the suit property pending the hearing and determination of this suit and criminal case Number MCCR/E590/2021.



4. In response to the application for injunction, the 1st defendant filed a replying affidavit sworn on July 22, 2022 and the preliminary objection herein in which she raised the following grounds;
 - “ 1. Take notice that the 1st respondent herein shall raise a preliminary point of law that the instant suit application (sic) is *res judication* (sic) by dint of HCCC No. 60 of 2002 and E002 of 2020.
 2. That the entire suit offends provisions of Art. 47 & 50 of 2010 constitution.
 3. The applicant lacks locus standi to institute the suit under company act (sic).”
5. The 1st defendant seeks that the entire suit be dismissed with costs.
6. Pursuant to directions given by the court, the parties agreed to canvass the preliminary objection by way of written submissions. The 1st defendant filed her submissions on August 25, 2022 while the plaintiffs filed theirs on September 26, 2022.

1St Defendant’s Submissions

7. In her submissions, the 1st defendant seeks the court to deem that the suit offends the provisions of section 7 of the Civil Procedure Act and that it is therefore re judicata by dint of HCCC No. 60 of 2002, Meru CM ELC Misc. No. 002 of 2020 and HCCC 13 OF 2019. That the applicant avers that the respondent alleged husband had sued the applicant’s father *vide* ELC No. 60 of 2020 and the suit was dismissed on December 18, 2017 by L.N Mbugua J.
8. The 1st defendant submitted that ELC No. 60 of 2020 revolved similar issues as those sought in the instant suit. That in ELC No. 60 OF 2002, the respondent substitute (sic) his (sic) alleged husband and the suit was dismissed on February 20, 2020 and that the respondent has never appealed or reviewed those orders, but instead filed the current suit.
9. It was further submitted that in HCCC No. 13 of 2019, the respondent sued the applicant, his father (now deceased) and the 2nd defendant. That the issues in HCCC No. 13 of 2019 are similar to those sought in the instant suit. That HCCC No. 13 of 2019 was dismissed on July 9, 2019 by A Onginjo J. and the respondent never appealed or reviewed those orders.
10. In addition, that *vide* ELC Misc. No. E002 of 2020, the applicant sought similar issues as those prayed in the instant suit and that the same was concluded on November 4, 2021 before Hon. E. Mbicha, and the respondent never reviewed nor appealed the orders.
11. The 1st defendant accuses the plaintiffs for claiming the suit property in the current suit without disclosing to the court the existence of orders in ELC Misc Application No. E002 of 2020 which ordered the eviction of the respondent from the suit land.
12. Learned counsel for the 1st defendant submitted that the previous suits involved matters that are directly and substantially in issue in the instant suit and that those previous suits were tried by competent courts. That the matters are also between the same parties or those under whom they claim.
13. Counsel for the 1st defendant submitted hat the suit offends the provisions of Articles 47 and 50 of the constitution, adding that the claim is pegged on a company known as Wason Timber Limited (a family company) and that it has not been disclosed whether the said company was limited by share of guarantee or a private company, and also that the core business/articles of association or memorandum of association have not been disclosed. That the respondent failed to disclose that she has never been a member of the said company to warrant her sue on any capacity without a resolution of the company.



That there was failure to disclose the existence of the company as at the time of instituting the suit. That the documents in support of the claim do not support a claim of land but shares in a company. The 1st defendant therefore prayed to have the entire suit dismissed with costs.

The Plaintiffs Submissions

14. In their submissions, the plaintiffs gave a brief background of the case and submitted that the instant suit and application is not *res judicata* HCC No. 60 of 2002 and E 002 of 2020. While citing the [Black's Law Dictionary](#) and Section 7 of the [Civil Procedure Act](#), learned counsel for the plaintiffs submitted that the instant suit meets (sic) the five (5) step test set out in the [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#) [2017] eKLR, adding that HCCC No. 60 of 2002 was not heard nor finally determined on merit. That HCCC No. 60 of 2002 abated and the 1st plaintiff's application to revive the suit was dismissed on account of failure to comply with Order 24 Rule 7(2) of the [Civil Procedure Rules](#).
15. Similarly, it was submitted that HCCC No. 13 of 2019 was not heard and determined, but was dismissed for having been filed in a civil court instead of ELC which had the requisite jurisdiction. Counsel for the plaintiffs submitted that to hold that the suit is *re judicata* would be contrary to the right to fair hearing under Article 50(1) of [the Constitution](#) as read with Article 159 (2) and Section 19 of the [Environment and Land Court Act](#) on technicalities, and relied on the case of [Joseph Kaguthi & 11 others V Permanent Secretary Ministry of Interior and Coordination of Government and another](#) [2021] eKLR.
16. It was further submitted that E002 of 2002 was not heard nor finally determined on merit. Counsel for the plaintiff relied on the case of [Proto Energy Limited Vs Hashi Energy Limited](#) [2019] eKLR and submitted that the preliminary objection is unmerited and should be dismissed. It was further submitted that the suit is not in contravention of Articles 47 and 50 of [the constitution](#). The plaintiffs' counsel also relied on the case of [Kundau Singh Construction Limited & another v Tanzania National Roads Agency](#) [2019] eKLR.
17. It was their submissions that the plaintiff have locus to institute the suit for having in possession of the suit property since the 1980s and further that the 1st plaintiff is the administrator of the estate of Suresh Kundan Wason (now deceased) who before his demise was a director/shareholder of Wason Timbers Limited, the company that owned the suit property. Further, that the plaintiffs are beneficiaries of all the shares of the deceased vide confirmation of Grant dated November 28, 2012, hence granting them the legal standing to protect their interests in the company through a court of law. The plaintiffs urged the court to dismiss the preliminary objection herein.

Analysis And Determination

18. I have considered the preliminary objection, the submissions in support and the submissions opposing the same as well as the relevant statute and case law.
19. The law on preliminary objection is now settled. In the case of [Mukisa Biscuit Manufacturing co. Ltd v West End Distributors](#) [1969] EA 969, it was held thus-;

“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 has to be ascertained or if what is sought is the exercise of Judicial discretion.”



20. Therefore a preliminary objection can only be raised on a pure point of law and where proof of facts is required then that cannot be said to be a preliminary objection.

21. In the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR, the Supreme Court of Kenya had this to say.

“Thus a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts”

22. On this basis, the questions that emerge are what point of law the 1st defendant has raised in her preliminary objection and are they settled? The point of law being raised are that the suit is *res judicata* to HCCC No. 60 of 2002 and E002 of 2020 and that the plaintiff lacks locus standi to institute the suit.

23. The law on *res judicata* is provided for by Section 7 of the *Civil Procedure Act* that

“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.”

24. In this case, the plaintiffs have denied that the former suits were heard and finally determined on merit. This court cannot prima facie from the 1st defendant’s preliminary objection come to a conclusion that the plaintiffs’ suit is *res judicata*. The court needs to consider factual evidence such as the proceedings of the former suits HCCC No. 60 of 2002 and E002 of 2020 to determine if the requirements for *res judicata* have been met. Once a court needs to refer to facts and evidence to establish a preliminary objection, it ceases to be on a point of law.

25. I therefore find that the preliminary objection dated July 22, 2022 by the 1st defendant has no merit and I disallow it. Accordingly, the same is dismissed. Costs will be in the cause.

26. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 26TH DAY OF OCTOBER, 2022

IN PRESENCE OF

C.A Mwenda

No appearance for plaintiffs

No appearance for defendants.

C.K YANO

ELC JUDGE

