



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Agola v Ngodhe (An administrator to the Estate of Zakayo Ngodhe) (Environment and Land Appeal E025 of 2024) [2025] KEELC 1367 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E025 OF 2024**

**FO NYAGAKA, J
MARCH 6, 2025**

BETWEEN

DAVID ALIEDO AGOLA APPELLANT

AND

**JOSEPH ODERO NGODHE (AN ADMINISTRATOR TO THE ESTATE OF
ZAKAYO NGODHE) RESPONDENT**

(Being an appeal from the entire ruling of the Principal Magistrate Hon. M. Agutu (PM) delivered on the 30th May, 2024 in Mbita ELC E016 of 2024)

JUDGMENT

Brief Facts

1. This is an appeal arising from the ruling of Honourable M. Agutu Principal Magistrate, delivered on 30th May, 2024 in Mbita ELC No. E016 of 2024.
2. The Appellant filed a Memorandum of Appeal dated 4th June, 2024 appealing against the said ruling on the following grounds: -
 1. The learned Magistrate erred in law and fact by finding that the suit in ELC E016 OF 2024 was not res judicata to Mbita Land Case Number 21 of 2019.
 2. The learned Magistrate erred in law and fact by finding that the Appellant did not prove that Mbita Land Case Number 21 of 2019 was not heard and determined and consequently misdirected herself on what constitutes a determination of a matter.
 3. The learned Trial Magistrate purported to sit as an Appellate court by determining the circumstances leading to dismissal of Mbita Land Case Number 21 of 2019.



3. The Appellant seeks orders for setting aside the ruling and order declaring that ELC Case No E016 OF 2024 is res judicata to Land Case No. 21 of 2019. He also prays for costs of the present appeal and that of the subordinate court.

Brief Facts

4. The Respondent had filed a suit against the Appellant vide a Plaint dated 1st March, 2024. He sought a permanent injunction against the Appellant over the suit land, namely, Lambwe West/Lambwe West 'B'/708. He also sought the costs of the suit.
5. The Appellant denied the allegations in the Plaint vide his Statement of Defence dated 18th March, 2024. He also raised a preliminary objection in the said defence where the trial court directed that parties first dispose of the preliminary objection by way of submissions.
6. The trial magistrate dismissed the Preliminary Objection on the ground that the issue of res judicata could not be raised by way of preliminary objection since it required proof of evidence.
7. The Appellant being dissatisfied with the ruling filed the present appeal which was canvassed by way of written submissions.

Submissions

8. Counsel for the Appellant file his submissions dated 9th October, 2024 where he gave a background of the case and identified four issues for determination. The first issue was whether the learned magistrate indeed erred in finding that Mbita ELC E016 of 2024 was not res judicata to Mbita ELC No. 21 of 2019. He relied on Section 7 of the *Civil Procedure Act* and the case in Constitutional Petition No. 301 of 2019 Musankishay Kalal Paulin v The Director of Criminal Investigations and 4 Others that set out the elements of res judicata. On the first element, he argues that there was a final order in ELC No 21 of 2019. Going to the second element, he submits that the ruling was on merit since it found that the suit was time barred. The third element as to whether the court had jurisdiction, counsel submits in the affirmative. He also submits that in both cases, Mbita ELC E016 of 2014 and Mbita ELC No. 21 of 2019 the parties are brothers despite having different names and that the subject matter Lambwe West 'B' 708 was hived off to form Lambwe West 'B' 813. It was his submission that the trial magistrate erred in finding that the matter was not res judicata. He cited the case in E.T. v Attorney General & Another [2012] eKLR.
9. The second issue for determination was whether the learned magistrate erred in finding the Mbita ELC No. 21 of 2019 had not been heard and determined and ought to be consolidated with Mbita ELC No. E016 of 2024. He relied on the case of Menginya Salima Murgani V Kenya Revenue Authority [2014] eKLR and submits that Mbita ELC No. 21 of 2019 was determined and the court erred in finding otherwise. He argued that it would be unprecedented if the court sits on its own judgment by proposing to have a matter already finalized consolidated with a new matter.
10. The third issue was whether the appeal has merit. He submits in the affirmative and argues that the two cases are a duplication of each other and thus the appeal should be allowed with costs. The fourth issue on costs, counsel relied on Section 27 of the *Civil Procedure Act* and urged the court to award the Appellants costs of the suit.
11. Counsel for the Respondent filed his submissions dated 14th November, 2024 where he relied on the case of Elyjoy Kageni v Bank of Africa (K) Limited & 3 Others [2017] eKLR and submits that the issues raised in the Appellant's memorandum of appeal are frivolous and not arguable. On whether ELC No. E016 of 2024 is res judicata, counsel submits in the negative and relied on the case of Benard



Mugo Ndegwa v James Nderitu Githae & 2 Others [2010] eKLR. It was his submission that the parties in E016 of 2024 are different from the parties in ELC No. 21 of 2019. He argues that in as much as the Respondent is the common denominator in both suits, the matter cannot qualify as being res judicata. He submits that the parties in the present suit is different from the parties in the former suit thus not res judicata. He submits that the subject matter in ELC No. 21 of 2019 was Lambwe West B/813 while the one in E016 of 2024 is Lambwe West/Lambwe West B/708. He relied on the case of James Katabazi and 21 Others v The Attorney General of the Republic of Uganda EACJ and submits that the matter in issue between the two suits are different with different reliefs sought.

12. He submits that the issue of trespass between the parties in E016 of 2024 has not been adjudicated in any court. He argues that there is no pending judgment between the Appellant and Respondent as the case is a fresh cause of action that needs substantive adjudication. He cited the Supreme Court Petition No. 17 of 2015 John Florence Maritime Services Limited, Conken Cargo Forwarders Limited v The Cabinet Secretary Transport & Infrastructure & 3 Others. He urged the court to dismiss the appeal with costs.

Analysis and Determination

13. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:
 1. Whether the trial magistrate erred in law and fact in dismissing the preliminary objection.
 2. Who should bear the cost of the appeal.
14. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”
15. Further as was found in the case of *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
16. As for the instant appeal, it is clear that it arose from the low court’s exercise of discretion. Regarding appeals of such nature, the appellate court will not normally interfere with the discretion of the trial court unless the trial magistrate or judge exercised the discretion wrongly, injudiciously or misdirected himself in some matter thereby arriving at a wrong decision, the decision clearly wrong.
17. Thus, in *Supermarine Handling Services Ltd versus Kenya Revenue Authority* [2010] eKLR (Civil Appeal 85 of 2006) the Court stated :-

“... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied



that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

18. Also, in *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR the Court of Appeal held that “...the Court of Appeal, in interfering with the exercise of discretion of the trial Judge appealed from, ought to satisfy itself that the exercise of that discretion either way was improper and therefore warrants interference.” Additionally, in *Edward Sargent versus Chotabha Jhaverbhat Patel* [1949] 16 EACA 63, it was held that there is no bar to an appeal lying to an Appellate Court against an order made in the exercise of judicial discretion, but for the Appeal Court to interfere only if it be shown that the discretion was exercised injudiciously.
19. Additionally, in *Mbogo and Another v Shah* [1968] EA 93 at 96 the court held:

“For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”
20. Having laid the foundation for the process the Court is going to take herein, it is not in contention that the Appellant raised a preliminary objection in his defence on the ground that ELC E016 of 2024 was res judicata to Mbita Land Case No. 21 of 2019. In deciding it the magistrate exercised her discretion. It is also not in dispute that the trial magistrate went ahead and first determined the preliminary objection and dismissed the same on the ground that res judicata could not be raised by way of preliminary objection since facts needed to be ascertained.
21. I have keenly perused the Appellant’s statement of Defence dated 18th March, 2024 and it is not in dispute that the Appellant under paragraph 4 raised a preliminary objection on the ground that ELC E016 of 2024 was res judicata to Mbita Land Case No. 21 of 2019.
22. The parameters for consideration of a preliminary objection are well settled in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. It must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. It therefore means that any objection whose determination rests on disputed facts is not a valid preliminary objection.

Section 7 of the [Civil Procedure Act](#) provides as follows:

23. 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. It is not in dispute that the Respondent disputes that the claim by the Appellant that ELC E016 of 2024 is res judicata to Mbita Land Case No. 21 of 2019. In addition, the ground of res judicata as raised by the Appellant would require evidence to be adduced to support each and every element of res judicata. For a matter to be adjudged res judicata, it is trite law that one must demonstrate that there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined on merit by a competent court and the issue is raised once again in the new suit. Thus, one cannot do by simply reading Section 7 of the [Civil Procedure Act](#) and waving it to the other side and the Court



shouting “res judicata”. What is res judicata and how is it? Thus, res judicata not a pure point of law as to found a preliminary objection.

25. It is this court’s view that both the trial court and this court would need to receive evidence, at least in the form of a copy of the pleadings and judgment in Mbita Land Case No. 21 OF 2019, to determine if the said case was heard and determined on merit and to ascertain the issues raised therein. It is my opinion that the law relating to preliminary objection does not permit the Appellant to bring his own evidence on which to sustain his Preliminary Objection. It is this court’s view that the preliminary objection did not raise points of law and hence the learned magistrate did not err in dismissing it. A plea for res judicata must always be supported by facts laid out through affidavit, unless the matter has been heard fully and the same is raised by way of submissions based on the evidence adduced and pleadings filed.
26. In the upshot, the appeal lacks merit and the same is hereby dismissed with costs to the Respondent. Any orders staying the proceedings in the lower court in relation to this appeal are hereby discharged forthwith.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 6TH DAY OF MARCH 2025

HON. DR. IUR NYAGAKA,

JUDGE

In the presence of,

Ms. Odera Aluoch Advocate for the Appellant

Mr. O. Achanda Advocate for the Respondent (muted).

