Dysara Investments Limited v Woburn Estate Limited & another (Environment & Land Case E0106 of 2024) [2025] KEELC 1117 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1117 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE E0106 OF 2024

EK MAKORI, J

MARCH 5, 2025

BETWEEN

DYSARA INVESTMENTS LIMITED ..... PLAINTIFF

AND

WOBURN ESTATE LIMITED ..... 1ST DEFENDANT

WOBURN MANAGEMENT LIMITED ..... 2ND DEFENDANT

RULING

1. In the Motion submitted and dated 9th October 2024, the Plaintiff urgently requested several Orders of Injunction as specified within the Motion. This application is supported by the justifications presented in the Motion and the Applicant's affidavit sworn to support the application. The Respondents provided their response to the motion through a replying affidavit. Concurrently, the Respondents raised a preliminary objection on two grounds: first, that this court lacks jurisdiction over the suit concerning the service charge, and second, that the issue of service charge has already been litigated, (thus invoking the doctrine of res judicata) with a decision previously rendered, explicitly noting that the following suits have addressed the matter of service charge:

    a. Malindi ELC No. 51 of 2014- *Dysara Investment limited & others v Woburn Estate Limited & another*.

    b. Civil Appeal No. 20 of 2018 - *Dysara Investment limited & others v Woburn Estate Limited & Another*.

    c. Malindi ELC Petition No. 6 of 2020 - *Dysara Investment limited v Woburn Estate Limited & another*.

    d. Supreme Court Petition No. 40 of 2018 - *Dysara Investment limited & others v Woburn Estate Limited & Another*.

e. Malindi ELC No. ELC No. E056 of 2023 - *Mwekangi Holdings Limited v Woburn Estate Limited & another*.

f. Now, Malindi ELC No. E106 of 2024 - *Dysara Investment Limited & others v Woburn Estate Limited & others*.

2. The court directed the application and the preliminary objection to be heard in tandem and canvassed through written submissions. The parties complied.

3. I frame the issues for this court's decision as whether the preliminary objection is merited, whether the application for injunction should be granted, and who should bear costs.

4. On whether the preliminary objection is merited, the starting point is the test set in the leading decision in this realm, *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. This case is significant as it established the criteria for determining the validity of a preliminary objection, providing a clear framework for such legal challenges, thus at page 700:

> " ... A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court"

5. Mr. Otara, learned counsel for the respondents, contends that a notice of preliminary objection was filed in Malindi ELC No. 51 of 2014 on the jurisdiction of the ELC Court to entertain and determine any issue surrounding service charge concerning Woburn Estate Limited. This court, (Angote J.) dismissed the preliminary objection, stating that the ELC had jurisdiction to entertain the suit. Woburn Estate Limited preferred an appeal, Civil Appeal No. 20 of 2018, in which the Court of Appeal found that the ELC Court had no jurisdiction to entertain the dispute centered around service charge. Pursuant to the Court of Appeal's decision, a preliminary objection was filed in Malindi ELC No. E056 of 2023 challenging the Court's jurisdiction. The Court was referred to the decision in Civil Appeal No. 20 of 2018, wherein the Superior Court made it clear that the ELC Court lacks jurisdiction to entertain issues surrounding the service charge of Woburn Estate Limited. The plaintiff withdrew its suit without waiting for the hearing and determination of the said notice of preliminary objection.

6. Mr. Otara further states that the parties herein entered into a lease agreement to be bound by the terms and conditions set out by themselves in a willing state. Among the terms and conditions set out by the lease is the internal mechanism for solving any dispute centered on service charge, which term is contained within clause 2.5 of part B of the lease agreement:

> " If the owner shall at any time during the term object to any item of the charges as being unreasonable or the insurances mentioned in section 5 as being insufficient, then the matter shall be determined by a person to be appointed by the chairman for the time being of the institute of surveyors of Kenya (or such institution's successor or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding on the parties provided that any objection by the owner under this paragraph 2.5 shall not affect the obligation of the owner to pay to the company the charges in accordance with the terms of this lease and after the decision of the person appointed as aforesaid any overpayment by the owner shall either be credited against future payments due from the owner to the company under this Fourth Schedule or (if the owner so requests) repaid by the company to the owner."

7. It is Mr. Otara's view that the parties had freely agreed in a contract on the resolution mechanism to be adopted in case of any service charge dispute. The dispute as regards the objection to payment of service charge should be addressed and determined in accordance with clause 2.5 of part B of the fourth schedule of the lease agreement. Clause 2.5 of the B of the lease was once invoked by the defendants herein, and the matter was referred to the chairman of the Institute of Surveyors Kenya, who, in turn, appointed Paul Wambua. The matter was thus resolved in accordance with clause 2.5 of part B of the fourth schedule, whereupon, an expert by the name Paul Wambua, who was duly appointed by the chairman of the Institute of Surveyors, did a report which became final and binding upon all parties. Mr. Paul Wambua was appointed by the chairman of the Institute of Surveyors of Kenya to determine the reasonableness of the service charge levied, and in so doing, he was acting as an expert. Arising from some of the cases filed in the ELC Court in Malindi by the Plaintiff herein, Civil appeal No. 20 of 2018 was preferred to the Court of Appeal which arose from a ruling on a preliminary objection similar to the one herein on jurisdiction of the court by virtue of clause 2.5 of part B of fourth schedule of the lease agreement. The court in Civil Appeal No. 20 of 2018 made its finding on that issue, and found that the ELC had no jurisdiction on the issues of service charge.

8. Mr. Otara asserts that, in Civil Appeal No. 33 of 2022, the Court of Appeal emphasized the decision made in Civil Appeal No. 20 of 2018.

9. Mr. Wena learned counsel for the plaintiff urges that this court has jurisdiction to hear the matter. This court is created following Article 162(2) (b) and (3) of the *Constitution* of Kenya 2010. Section 13 of the *Environment and Land Court Act* 2011 grants the court jurisdiction to determine disputes relating to contracts to land, and even ownership, and other instruments granting any enforceable interests in land. Clause 2.5 of the Lease Agreement between the Plaintiff and the Defendant ousts the jurisdiction of this court to hear and determine a dispute between the parties on the amount of service charge payable and nothing more. The clause does not oust the court's jurisdiction to determine any other issue in dispute between the parties. Even on service charges, the ouster of the court's jurisdiction is limited only to a dispute to determine the amount of service charge payable. The court is denied jurisdiction to calculate the service charge payable, but not disputes on other issues regarding the Lease or other issues other than the amount payable.

10. Mr.Wena proceeds to submit that one of the issues raised by the Plaintiff in this suit is that the Defendants are in breach of an executed contract dated 3rd November, 2022 in which the Plaintiff and the Defendants agreed on the amount of service charge arrears to be paid by the Plaintiff and the mode of payments. This contract is a separate and distinct between the parties creating its legal obligations. This is not a dispute on the amount of service charge payable as contemplated in clause 2.5 of the Lease. In the agreement dated 3rd November, 2022, the parties have agreed on the amount to be paid and the mode of payment. Both the Plaintiff and the Defendant are alleging that the other party is in breach of that agreement. This is a dispute of fact over which the court has jurisdiction.

11. The Plaintiff has also raised the issue of the Defendant entering the premises and changing the locks without a Court Order. This is not a dispute on the amount of service charge payable as contemplated in clause 2.5. Whereas clause 6.1. and 6.2 of the Lease Agreement grants the Defendants the right of forfeiture and Re-possession on account of Non-payment of service charge, the issue of whether or not the Plaintiff is in arrears of service charge is in dispute and the Plaintiff's case is that the right of forfeiture has not crystallized. Even if it had, it could only be enforced by a court order after the court had satisfied that the right had crystallized. The court has jurisdiction to determine whether forfeiture and re-possession can be effected without a Court Order. This jurisdiction is expressly conferred to the Court by Section 76 of the *Land Act* 2012.

12. The Plaintiff has also raised the issue of the Defendant agreeing to sell the common areas used by the Plaintiff and other home owners to third parties without consent, disregarding the Plaintiff's rights of a revisionary interest, and failing to comply with the *Sectional Properties Act*. These issues go beyond the dispute contemplated in Clause 2.5 of the Lease Agreement.

13. Mr. Wena states that the ouster of the court's jurisdiction under clause 2.5 of the Lease is limited to disputes regarding the amount of service charge payable and no other disputes. This court has jurisdiction to determine the disputes before it.

14. On res judicata Mr. Wena contends that the doctrine is anchored in Section 7 of the *Civil Procedure Act*. Its essential provision is that no court should try a suit in which a court has finally determined the issues raised in a previous suit between the parties. For the doctrine to apply, the following ingredients must be proved;

    i. There is a judgment in a previous suit.

    ii. The judgment was on merit and was final and conclusive.

    iii. The issues in the previous suit are similar to those in the current suit.

    iv. The parties in the two (2) suits were the same.

15. To support this contention, Mr. Wena cites the decisions in *Dina Management Limited v County Government of Mombasa & others* and *Kennedy Mokua Ongiri v John Nyasende Mosioma & another* [2002] eKLR.

16. He avers that to decide whether a suit is res judicata, the court must look at the decision claimed to have settled the issues in question, and the instant suit to ascertain;

    i. What issues were determined in the previous suit?

    ii. Whether they are the same in the subsequent suit.

    iii. Whether the parties are the same.

17. Mr. Wena concludes that the instant suit is not res judicata for the following reasons: The issue for determination in ELC No. 51 of 2014 was a preliminary issue of jurisdiction as to whether clause 2.5 of the Lease Agreement ousted the courts' jurisdiction to determine a dispute on the amount of service charge payable. The issues in the instant suit are not about the validity of clause 2.5 of the Lease. Several other issues can be seen in the plaint and other pleadings. The issue for determination in ELC Petition No. 6 of 2020 was whether Clause 2.5 of the Lease was unconstitutional for infringing Article 46 of the *Constitution*. That is not the issue in the instant suit. The judgment in ELC No. 51 of 2014 and the subsequent appeals in the Court of Appeal and Supreme Court were not final judgments based on merit. They emanated from a preliminary objection to the court's jurisdiction on clause 2.5 regarding disputes on the amount of service charge due. From the foregoing, the doctrine of res judicata does not apply to the instant proceedings.

18. As Mr. Otara referenced, the parties involved in the current litigation have previously appeared this court. Notably, in Malindi ELC No. 51 of 2014, the ELC Court's authority was considered to address any matters regarding service charges related to Woburn Estate Limited. This court, presided over by Angote J., rejected the preliminary objection, asserting that the ELC possessed the jurisdiction to handle the case. Woburn Estate Limited then filed an appeal, designated as Civil Appeal No. 20 of 2018, where the Court of Appeal determined that the ELC Court lacked jurisdiction over the dispute concerning service charge. This ruling is reported as *Woburn Estate Limited & another v Dysara*

Investments Limited & 6 others [2018] KECA 302 (KLR), where the court expressed the following regarding service charges:

> " Based on the foregoing, we, unlike the learned Judge, find that the objection raised by the appellants was on a pure point of law, namely, jurisdiction. It was also based on uncontroverted facts, that the parties had agreed on a dispute settlement mechanism under Clause 2.5 of the Fourth Schedule of the various leases which reads in part:
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> "If the owner shall at any time during the Term object to any item of the Charges as being unreasonable or, the insurances mentioned in Section 5 as being insufficient then the matter in dispute shall be determined by a person to be appointed by the Chairman for the time being of the Institute of Surveyors of Kenya (or such institution's successors or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding upon the parties ..."
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> .... In light of the fact that parties to a contract are free to determine terms that govern their relationship and courts role is limited to enforcement of those terms (See *Filipo Fedrini vs. Ibrahim Mohamed Omar* [2018] eKLR) we agree with the appellants that the ELC had no jurisdiction to entertain the dispute which was centred around service charge. The parties were bound by the terms of their respective leases to have the dispute resolved through the mechanism set out thereunder.
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> 22. It is also not in dispute that the parties invoked the dispute resolution mechanism in question which ultimately resulted in the report prepared by Mr. Wambua. As for the effect of the letter dated 15th January, 2014 we believe that Mr. Wambua who acted as an expert within the terms of the dispute resolution mechanism lacked the mandate or power to withdraw his report. Consequently, the learned Judge erred in relying on the allegation of withdrawal of the report as the basis of dismissing the preliminary objection."

19. On an appeal to the Supreme Court in *Dysara Investment Limited & 2 others v Woburn Estate Limited & 5 others* [2020] KESC 15 (KLR), it was held:

> " Having gleaned through all the pleadings before us, we find that the Appellants' before this court did not raise any constitutional issue either in the Environment and Land Court in the first instance neither was such an issue addressed in the findings of the Court of Appeal. We have also not seen any issue taking a constitutional trajectory in either of the two courts. It is our view therefore that the issues raised and the arguments presented turned on the terms of the contract which was the subject of the suit and on the interpretation of not any constitutional provision. In fact, there was no effort demonstrated by the applicant as to the existence of such a constitutional trajectory."

20. The plaintiff also filed Malindi ELC Petition No. 6 of 2020 on the issue of service charge, it is reported as *Dysara Investments Limited & another v Woburn Estate Limited & another* [2021] KEHC 4822 (KLR), this is what the court stated:

> " Applying the law as stated, it was clear to me that the Petitioners ought to have brought the alleged Constitutional connotations of the dispute on service charge before the Courts that dealt with the previous suit all the way to the Appeal. Otherwise, this Court has an obligation to afford closure and respite to the Respondents from the spectre of being vexed,

haunted and hounded by issues and suits that have already been determined by a competent Court."

21. The Court of Appeal addressing a similar appeal filed by other parties concerning similar leases in *Woburn Estate Limited & another v Mwekangi Holdings Limited* [2023] KECA 765 (KLR), had this to say :

> " The Fourth Schedule to the lease agreement in this regard contained provisions on the service charge, and clause 2.2 in Part B thereof provided the manner of computing the service charge payable based on periodical expenditure as shown by accounts prepared by the Appellants, while clause 2.5 the manner of resolution of disputes, which was to be by a person appointed by the Chairman of the Institute of Surveyors of Kenya. As regards the decision of this Court in Mombasa Civil Appeal No 20 of 2018, the appeal therein was by the same Appellants herein after the ELC had dismissed their Preliminary Objection that the Court had no jurisdiction in similar circumstances, where a different group of lessees had also challenged the service charge payable with respect to the same suit premises. The findings by this Court (Visram, Karanja & Koome (as she then was), JJ. A) were as follows:
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> > "19. Based on the foregoing, we, unlike the learned Judge, find that the objection raised by the appellants was on a pure point of law, namely, jurisdiction. It was also based on uncontroverted facts, that the parties had agreed on a dispute settlement mechanism under Clause 2.5 of the Fourth Schedule of the various leases which reads in part:
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> > > "If the owner shall at any time during the Term object to any item of the Charges as being unreasonable or, the insurances mentioned in Section 5 as being insufficient then the matter in dispute shall be determined by a person to be appointed by the Chairman for the time being of the Institute of Surveyors of Kenya (or such institution's successors or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding upon the parties ..."

22. An examination of the current lawsuit indicates that the primary issue remains the contested service charge, as detailed in paragraphs 8 to 10 of the plaint. From paragraphs *11* to *19*, an agreement dated November 3, 2022, is presented concerning settling the service charge arrears. The Plaintiff intends to challenge the figures in arrears at the upcoming hearing. Besides, the Plaintiff pleads that the applicable service charge does not align with those of its neighbor, Mwekangi Holdings Limited, a lessee who occupies a similar apartment in size and pays a lower amount. This is addressed in paragraphs *20* to *25*.

23. Paragraphs 26 to 30 of the plaint address a purported scheme to sell the entire Woburn Residence, which includes the Plaintiff's apartment, and it is pleaded that the lease agreement lacks a reversionary clause applicable to the Management Company or the lessees, a situation that the Plaintiff claims contradicts the *Sectional Properties Act* and is unconscionable.

24. Upon a comprehensive examination of the plaint and the associated pleadings, it is my opinion that the Plaintiff is seeking a judicial determination regarding the service charge. This matter has resurfaced repeatedly in litigation, and based on established precedents, this court has been identified as lacking jurisdiction in the decisions mentioned earlier. The new aspect introduced pertains to the reversionary clause of the lease agreement, which is absent from the entire lease document. The Plaintiff asserts that this absence constitutes a violation of the *Sectional Properties Act*, claiming it represents a significant

oversight during the signing and execution of the lease. It is my perspective that this clause is tangential to the primary issue at hand, which is the service charge that is due.

25. Considering the cited precedents, we are still examining the service charge issue; this court does not have jurisdiction in view of the internal dispute resolution mechanism established by parties.

26. On res judicata and whereas I agree with Mr. Wena, I will think a passage by Olola J. in *Dysara Investments Limited & another v Woburn Estate Limited & another* [2021] KEHC 4822 (KLR), will resolve the issue:

> " That being the case, pleading a Constitutional infringement now is to abuse the process of the Court with a view to subverting the decision of the Court of Appeal which is a decision binding upon this Court. If indeed the Petitioners honestly believed that the dispute on service charge had constitutional connotations, they should have invoked this right from the outset. Otherwise, it is evident that they only want to pursue that path because the Supreme Court in its Ruling rendered on 24th January 2020 declined to entertain their Appeal on account that they had neither raised any Constitutional issues in the Environmental and Land Court nor in the Court of Appeal.
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> 23. As Majanja J., cautioned in *E.T. v Attorney General & Another* [2012] eKLR: -
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> > "The Courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court in another way and in a form of a new cause of action which had been resolved by a Court of competent jurisdiction."
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> 24. Indeed, in *Gurbacham v Yowani Ekori* [1958] EA 450, 458, the Court of Appeal for Eastern Africa while considering the doctrine of res judicata cited with approval a passage of the Judgment from the old English Case of *Henderson v Hernderson* (1) 67 ER. 313 wherein the Lord Vice Chancellor stated as follows: -
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> > "In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

27. Arising from the foregoing, what is being raised in the current suit is not new; it should have been raised in the former suits – constructive res judicata sets in. I down tools.

28. In conclusion, the preliminary objection is hereby upheld to the extent that the pending application and the entire suit are hereby struck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 5TH DAY OF MARCH 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr.Wena, for the Plaintiff

Mr. Otara for the Defendants

Happy: Court Assistant