



REPUBLIC OF KENYA



KENYA LAW
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Mathonye & another (Suing as Personal Administrators of the Estate of Mathonye Agwambo) v Olale & 3 others (Land Case E006 of 2023) [2025] KEELC 4938 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 4938 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE E006 OF 2023

E ASATI, J
JULY 3, 2025

BETWEEN

MARGARET ACHIENG MATHONYE 1ST PLAINTIFF
PEREZ ODERA MATHONYE 2ND PLAINTIFF
SUING AS PERSONAL ADMINISTRATORS OF THE ESTATE OF MATHONYE
AGWAMBO

AND

GILBERT OJEMA OLALE 1ST DEFENDANT
NATIONAL BANK OF KENYA LIMITED 2ND DEFENDANT
THE COUNTY LAND REGISTRAR, KISUMU 3RD DEFENDANT
THE HON ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Vide the Notice of Preliminary Objection dated 29th October, 2024, the 2nd Defendant objected to the suit and sought that it be dismissed with costs to the Defendants on the grounds that the matter was res judicata the Plaintiffs having filed Kisumu ELC Case No.877 OF 2015 which was heard and judgement delivered on 31st May, 2022 by Hon. Justice A. Ombwayo.
2. The preliminary objection was, pursuant to directions given on 17th February, 2025, heard by way of written submissions.
3. On behalf of the 2nd Defendant, Counsel submitted that the Plaintiffs herein who were the Plaintiffs in Kisumu ELC Case No.877 OF 2015 are seeking the same remedies as they had sought in Kisumu ELC Case No.877 OF 2015 (the former suit).



4. That the dispute revolves around the ownership of land parcel known as Kisumu/Dago/791 which was decided in the former suit.
5. Counsel relied on the provisions of section 7 of the *Civil Procedure Act* and the definition of res judicata in *Blacks' Law Dictionary* 10th Edition and submitted that in order to decide as to whether an issue in a subsequent action is res judicata a court of law always looks at the decision claimed to have settled the issues in question and the entire application and the current application to ascertain:
 - i. what issue were really determined in the previous application,
 - ii. whether they are the same in the subsequent application and were covered by the decision,
 - iii. whether the parties are the same or are litigating under the same title and that they previous application was determination by a court of competent jurisdiction
6. Counsel submitted that the prayers sought in the amended plaint dated 17th October, 2024 are the same as those sought in Kisumu ELC No.877 of 2015 which were determined vide judgement delivered on 31st May, 2022 in the former suit.
7. Counsel relied on the cases of *Galaxy Paints Company Ltd -vs- Falcom Guards Ltd* [2000]eKLR, *Gladys Nduku Nibuku -vs- Letshego Kenya Limited Mueni Charles Maingi (intended Plaintiff)* 2022 eKLR and submitted that litigation must come to an end.

Counsel urged the court to strike out the suit.
8. On behalf of the Plaintiffs, written submissions dated 28th March, 2025 were filed. Counsel submitted that in order for a preliminary objection to succeed it must meet the threshold in *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Limited* 1969 EA 696. That the present preliminary objection is premised on facts which require evidence to be tendered before the court to determine the issues.
9. That the subject matter of the former suit is not the same as the present suit. That there are fresh happenings since the decision in the previous suit which necessitate fresh action.
10. As correctly submitted on behalf of the Applicant, a preliminary objection must be based on pure points of law that flow from the pleadings. This threshold for a preliminary objection to be sustainable was set in the case of *Mukisa Biscuit Manufacturing Co. Ltd – vs- West End Distributors Ltd* [1969] E.A 696 relied on by the Applicant herein. The court described a preliminary objection as follows;

“...a Preliminary Objection consists a point of law which has been pleaded, or which order by clear implication out of pleadings and which if argued as a Preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

11. The court further held that:-

“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.”



12. Also in *Avtar Singh Bhamra & Another vs Oriental Commercial Bank* Kisumu HCCC No 53 of 2004 the court held that:-

“a preliminary objection must germinate from the pleadings filed by the parties and must be based on pure points of law...”

13. And in *Oraro vs Mbaja* [2005] eKLR where it was held that:-

“A preliminary objection is now well identified 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 and 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 a court should allow to proceed.”

14. From the foregoing decisions, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained through production of evidence; or if what is sought is the exercise of the court’s discretion and must not raise substantive issues from the pleadings which must be determined by the court upon consideration of the evidence.

15. The purpose of preliminary objections is to ensure compliance with the procedural and substantive law obtaining at the time.

16. In the present case the preliminary objection is based on the plea of res judicata. This is a point of law based on the provisions of section 7 of the *Civil Procedure Act* also relied on by the Applicant.

17. To ascertain that a matter is res judicata the court must have at least the pleadings and decision in the former suit which it will then consider in relation to the current suit/action. Although the parties heavily referred to and relied on to the former suit to support or to oppose the preliminary objection, none of the parties exhibited the pleadings, proceedings or judgement of the former suit. The 2nd Defendant in its submissions referred the court to the pleadings in the present case and submitted that perusal of the said pleadings will reveal that the suit is res judicata.

18. However, in the absence of the pleadings and judgement of the former suit, the court is not able to determine whether the current suit is res judicata or not. The burden was on the 2nd Defendant to avail the documents.

19. The plaintiff contended that there are fresh happenings after the judgement in the former suit which require fresh action. This can only be determined through hearing of the evidence.

20. The court finds that the preliminary objection has not been proved. Let the suit be heard on merit. The application is hereby dismissed. No order as to costs.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 3RD JULY, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.



In the presence of:

Maureen: Court Assistant.

Macogot for the Plaintiff.

Ojuro for the 2nd Defendant.

