



**Nyarotso v Wandako (Environment and Land Appeal E057 of 2022)
[2024] KEELC 1189 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1189 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E057 OF 2022**

DO OHUNGO, J

MARCH 6, 2024

BETWEEN

AGNETA NYAROTSO APPELLANT

AND

CHARLES ISIMBISHIRA Wандако RESPONDENT

*(Being an appeal from the ruling and order of the Senior Principal
Magistrate's Court at Mumias (Hon. G P Omondi, Principal Magistrate)
delivered on 26th October 2022 in Mumias MCELC No. E036 of 2022)*

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court when the Respondent filed plaint dated 27th June 2022 wherein he averred that his deceased father was the registered proprietor of the parcel of land known as East/Wanga/Isongo/364 (the suit property) and that the Appellant's deceased husband fraudulently obtained registration of the suit property in his name and that subsequently the Appellant obtained letters of administration in respect of her deceased husband's estate.
2. The Respondent therefore prayed for judgment against the Appellant for cancellation of the registration in the Appellant's deceased husband's name, a permanent injunction restraining the Appellant from interfering with the suit property, mesne profits, and costs. Alongside the plaint, the Respondent filed Notice of Motion dated 27th June 2022, through which she sought an interlocutory injunction.
3. The Appellant reacted to both the suit and the application by filing Notice of Preliminary Objection dated 8th July 2022. The objection was pleaded as follows:
 1. That the application has no merit, is frivolous, vexatious does not disclose a reasonable cause of action and is otherwise an abuse of the due process of court.



2. That the suit as well the notice of motion are res judicata in view of the determination in Mumias MCE & L Cause No 25 of 2019 which was a litigation of between same parties over the same subject matter.
 3. That the principles governing granting of injunctions in favor of a grant of orders sought by the plaintiff.
 4. That the entire suit together with the notice of motion are not only bad in law but are incompetent, unjustified and or without any legal basis.
 5. That the application is bad in law and or incompetent and the same should be struck out with costs.
4. The Preliminary Objection was canvassed before Hon. G P Omondi (Principal Magistrate) who delivered the ruling on 26th October 2022 and dismissed it on the ground that it lacked merit. Aggrieved, the Appellant filed this appeal through Memorandum of Appeal dated 4th November 2022. She prayed that the ruling be set aside and that the Preliminary Objection be upheld. She also prayed for costs of the appeal.
 5. The following grounds are listed on the face of the Memorandum of Appeal:
 1. The Learned Magistrate erred in law, in fact and in principle by misapprehending and misapplying the concept of res judicata particularly as regards:
 2. The Learned Magistrate erred in law, in fact and in principle by failing to consider the appellant's substantive submissions on the concept of res judicata.
 3. The Learned Magistrate erred in law and in fact by failing to accord the appellant a fair hearing on her objection proceedings.
 4. The Learned Magistrate erred in law and in fact by loading onto the appellant the weight of a claim not founded in law.
 6. The appeal was canvassed through written submissions, which both parties duly filed. The Appellant argued that the Respondent sued her in Mumias MCELC No. 25 of 2019 which suit was struck out through judgment dated 23rd September 2021. That MCELC No. E036 of 2022 is a replica of the earlier suit and therefore res judicata. Relying inter alia on Section 7 of the *Civil Procedure Act* and the cases of A N M v P M N [2016] eKLR, Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR and James Njuguna Chui v John Njogu Kimani [2017] eKLR, the Appellant argued that the dispute had been determined in Mumias MCELC No. 25 of 2019 and that res judicata should be invoked. She therefore urged this court to find merit in the appeal.
 7. In response, the Respondent argued that Mumias MCELC No. 25 of 2019 was not determined on its merits but was struck out for want of locus standi and that consequently, res judicata was not established and the Preliminary Objection failed to meet the basic ingredients of a valid Preliminary Objection since it did not raise a pure point of law. He therefore urged this court to affirm the decision of the Subordinate Court.
 8. As the first appellate court in this matter, this court has an obligation to re-consider and re-evaluate the Preliminary Objection, the pleadings, and the material on record and to determine whether the conclusions reached by the learned magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.



9. I have considered the grounds of appeal, the pleadings, the Preliminary Objection, the parties' submissions, and the authorities cited. The issues that arise for determination are whether there was a valid preliminary objection and if so, whether res judicata was established.
10. The parameters for consideration of a preliminary objection are well settled. A preliminary objection 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. Any objection whose determination rests on disputed facts is not a valid preliminary objection. See *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* (1969) EA 696. To the extent that determination of grounds 1, 3 and 4 of the Preliminary Objection would require evidence, the said grounds are not valid preliminary objection.
11. Regarding ground 2 of the Preliminary Objection, I note that the Appellant contended therein that both the suit and the application were res judicata in view of the determination in *Mumias MCELC No. 25 of 2019*. A perusal of the plaint, the witness statements and the affidavits filed by the respondent prior to the filing of the Preliminary Objection shows that the Respondent did not expressly mention *Mumias MCELC No. 25 of 2019*. The closest he went was when he annexed the plaint as annexure CIW3 to his affidavit in support of the application. Even then, he did not annex the ruling or judgment that terminated the said case.
12. Since ground 2 of the Preliminary Objection raised res judicata and the Appellant has contended that res judicata ought to have been upheld, it is important to revisit the law relating to res judicata. Res judicata has found statutory expression in Section 7 of the [Civil Procedure Act](#) as follows:

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.
13. For an objection based on res judicata to be upheld, 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 the merits by a competent court and the issue is raised once again in the new suit. See *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR. Certainly, both the Subordinate Court and this court would need to receive evidence, at least in the form of a copy of the judgment in *Mumias MCELC No. 25 of 2019*, to determine if the said case was heard and determined on the merits and to ascertain the issues raised therein. The law relating to preliminary objections does not permit the Appellant to bring own evidence on which to prop up her Preliminary Objection. Her Preliminary Objection must stand or fail based on the pleadings and evidence that the Respondent had placed on record as of the date Notice of Preliminary Objection dated 8th July 2022 was filed.
14. I find that Notice of Preliminary Objection dated 8th July 2022 was not a valid Preliminary Objection to the extent that the Appellant sought to prop it up by supplying evidence and that the learned magistrate did not err in dismissing it.
15. I find no merit in this appeal. I dismiss it with costs to the Respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF MARCH 2024.

D. O. OHUNGO

JUDGE



Delivered in open court in the presence of:

Ms Kegehi for the Appellant

Mr Mutoka for the Respondent

Court Assistant: M Nguyayi

