



**Keya v Adingo (Environment and Land Appeal 4 of 2024)
[2024] KEELC 6618 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL 4 OF 2024**

E ASATI, J

OCTOBER 9, 2024

BETWEEN

DORCAS KEYA APPELLANT

AND

BASTON MUDASHI ADINGO RESPONDENT

*(Being an appeal from the ruling in VIHIGA PM E&L
CASE NO E050 OF 2023 dated 8th January 2024)*

JUDGMENT

1. The appeal herein arises from the ruling dated 8th January 2024 in Vihiga PM ELC Case No. E050 of 2023 (O.S) (the suit). The appellant is the plaintiff in the suit suing in her capacity as the legal representative of the estate of one Petero Rotich Kabusundu. The record of appeal shows that the appellant filed a Notice of Motion application dated 30th August 2023 in the suit seeking for an order of temporary injunction and an order of inhibition to preserve land parcel known as Tiriki/Senende/34, the suit land.
2. The record further shows that in response to the application, the Respondent herein filed Notice of Preliminary objection on the grounds that the suit was res judicata as the same was similar to Hamisi ELC Case Number E012 of 2023 which is pending determination, that the honourable court lacks jurisdiction to hear the suit as the suit land falls within the jurisdiction of Hamisi Law courts. That the Chamber Summons dated 31st August 2023 is an abuse of the court process.
3. The proceedings show that the preliminary objection was heard before the trial court by way of written submissions. The trial court vide its ruling dated 18th January 2024 found that the Preliminary objection had merit and upheld it and awarded costs to the Respondent.



4. The effect of allowing the Preliminary objection was that the Originating Summons (the suit) was dismissed as sought in the Preliminary Objection. Aggrieved by the ruling, the appellant filed the present appeal seeking that the appeal be allowed and the ruling set aside.
5. The grounds of appeal as contained in the Memorandum of Appeal dated 5th February 2024 are that; -
6.
 - a. the trial Magistrate erred in law and fact by striking out the suit on the grounds of want of jurisdiction, which is contrary to the Magistrate courts' Act, 2015 a recent legislation governing the jurisdiction of the Magistrate's Courts generally.
 - b. the trial Magistrate erred in law and fact by determining issues of fact without Affidavit evidence and thus rendering her ruling unfair and unjust.
 - c. The trial Magistrate erred in law and fact by failing to consider that there is concurrent jurisdiction between Hamisi and Vihiga court whereby administratively Hamisi court is under Vihiga Law Courts and because of the concurrent jurisdiction the appellant had an option of filling the suit in either court.
 - d. The decision to strike out the appellant's suit with costs was in the circumstances of the trial Magistrate draconian, unfair and occasioned a miscarriage of justice and as such the said decision should be reviewed and/or set aside.
10. The appeal was argued by way of written submissions pursuant to directions given on 13th March 2024.
11. Counsel for the appellant relied on the case of Mukhisa Biscuits Manufacturing Co. Ltd v West End distributors Ltd [1969] on what constitutes a preliminary objection. Counsel also relied on the case of Oraro v Mbaja [2005]1KLR 141 where it was held that anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by the rules of evidence. That the preliminary objection was based partly on res judicata and that in order for the court to find out whether the matter was res judicata or not it will have to probe the evidence on record, a matter outside the scope of preliminary objections.
12. On lack of territorial jurisdiction, it was submitted that since Hamisi law Courts and Vihiga Law Courts enjoy territorial jurisdiction the court would have ordered transfer of the suit to Hamisi for hearing and disposal instead of striking it out.
13. It was submitted on behalf of the Respondent that the issues for determination in the appeal are; -
 - a. whether the lower court had jurisdiction to hear the suit.
 - b. whether the suit in the lower court was an abuse of the court process and whether the appeal should succeed.
 - c. who should bear the costs of the appeal.
14. On whether the lower court had jurisdiction to hear the suit, Counsel relied on the Supreme Court holding in the matter of Interim Independent Electoral Commission (2011) eKLR that assumption of jurisdiction by courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. Counsel also relied on section 12 (d) of the *Civil Procedure Act* and paragraph 14 of the Practice Directions on Proceedings in the Environment and Land Courts Gazette Notice No. 5178 and submitted that no good or sufficient reason has been given as to why a



decision was made to file suit in Vihiga despite Hamisi being the trial court the suit property is closely located to.

15. That the trial Magistrate was right when she found that issues of territorial jurisdiction are pure administrative as the parties cannot say that they have an option to choose where they want to go. That the suit land is located at Senende which is only 1km from Hamisi Law Court.
16. Counsel also relied on the provisions of section 7 of the *Civil Procedure Act*, the case of E.T v Attorney General & Another [2012] eKLR and the case of Richard Otieno & 9 others v Mildred Otieno Wagudi & Another Kisumu ELC 46 of 2020 to submit that the suit was res-judicata to Hamisi, Environment and Land Court Case No. 12 of 2023, Baston Mudashi v Gilbert Kapsundu.
17. That the Respondent is in possession of the title deed and has been living on the suit land for 29 years culminating immediately after the death of his mother Rebecca Kumalakani whom the Respondent stayed with on the suit land till her death in 1995 and that the appellant neither attempted to evict the Respondent nor lodged a claim in the land on the basis of the alleged purchase. Counsel prayed that the appeal be dismissed.

Issues for determination

18. From the grounds of appeal filed and the submissions made by the parties, the sole issue that arises for determination is whether or not the trial court erred in law and in fact by upholding the preliminary objection and striking out the suit.

Analysis and determination

19. This being a first appeal, the court reminds itself of the duty to re-examine and re-analyze the material placed before the trial court with a view to arrive at independent conclusion and thus determine whether the findings of the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the court held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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.”

The threshold of a preliminary objection as set in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 that;

“...a Preliminary Objection consists a point of law which has been pleaded, or which arises 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.”

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.”

20. Hence 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 preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any facts has to be ascertained; or if what is sought is the exercise of the court’s discretion.
21. The preliminary objection was based partly on the plea of res judicata. Section 7 of the [Civil Procedure Act](#) provides for what the components of the doctrine of res judicata are. It states:

“ 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 in which such issues has been subsequently raised, and has been heard and finally decided by such court”.
22. In the present case, the existence of the former suit at Hamisi was not denied by the appellant. That the suit in Hamisi has been finalized and judgement entered in favour of the Respondent herein concerning the suit land has also not been denied. What is in contest is whether or not the said former suit is a bar to the suit the subject matter of this appeal.
23. While a plea of res judicata is a point of law, in order for a preliminary objection based on it to succeed, all the ingredients of res judicata must be demonstrated. Perusal of the record shows that there was no evidence that the pleadings, proceedings and judgement in the former case were placed before the trial court in order for the court to determine whether the ingredients of res judicata were present. In this appeal, the defence filed by the Respondent before the trial court if any is not part of the record so that at a glance the court can pick out the ingredients of res judicata from the pleadings.
24. It was the Respondent’s case that the Defendant in the former case is a biological son of the appellant. This to me is a matter of evidence which must be adduced in order to determine whether the parties in both suits were the same.
25. The preliminary objection required the trial court to look beyond the pleadings in order to determine whether the suit was res judicata.
26. With respect I find that the trial court erred in finding that the suit was res judicata and in upholding the preliminary objection.
27. The power of an appellate court as provided for in section 78 of the [Civil Procedure Act](#) include to determine a case finally, to remand a case or order a new trial. In the instant case it is in the interest of justice that a new trial be done so that the suit be heard on merit.
28. For the foregoing reasons the court finds that the appeal has merit and hereby allows it in the following terms:
 - i. the ruling dated 8th January 2024 in Vihiga PMC ELC Case No E050 of 2023 (OS) is set aside and matter to proceed to hearing on merit.
 - ii. for expeditious disposal and as the territorial jurisdiction of Vihiga SPM’s court is contested the matter is hereby transferred to Hamisi PM’s court for hearing and disposal.
 - iii. Each party to bear own costs of the appeal.



- iv. The appeal having been determined all interlocutory orders made herein earlier are hereby discharged.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 9TH DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

No appearance for the appellant.

Okello E for the Respondent.

