



Kiugu & another v Mwiti & another (Sued as the legal representatives of the Estate of the Late M'Ikiome M'Twerandu - Deceased) (Environment and Land Appeal E054 of 2023) [2024] KEELC 6569 (KLR) (2 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E054 OF 2023
CK NZILI, J
OCTOBER 2, 2024**

BETWEEN

STANLEY KIUGU 1ST APPELLANT

ISAAC KIRIMI 2ND APPELLANT

AND

JOHN MWITI & PAUL NTEERE M'IKIOME (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE M'IKIOME M'TWERANDU - DECEASED) RESPONDENT

(Being an appeal from the ruling of Hon. Ndegwa E.W – SRM at Githongo delivered on 2.11.2023 in SPMC ELC No. E019 of 2022)

JUDGMENT

1. What is before the court is an appeal by the appellants, who were the plaintiffs at the lower court. They had sued the respondents by a plaint dated 17.10.2022 for breach of trust over LR No Abothuguchi/Githongo/111, and prayed for a declaration that the respondents held the two acres of the suit land in trust for them and that should be transferred to them.
2. The respondents opposed the claim through a preliminary objection dated 10.8.2023 on *res judicata* due to Githongo SPMC ELC Case No 24 of 2019 and Meru H.C Succession Case No 245 of 2008. Directions were given for the parties to canvass the preliminary objection by way of written submissions. The respondents relied on written submissions dated 23.10.2023, while the appellants relied on written submissions dated 31.10.2023.
3. The respondents contended that the issues before the trial court had been litigated in the previous suits and had not been appealed against and hence could not be re-opened through another suit. The respondents submitted that the appellants had previously been sued for trespass by their father in Meru



- CMCC No 43 of 1984, which suit was dismissed for want of prosecution on 31.3.2021. Further, it was averred that in Meru HC Succession, Cause No 345 of 2008, the appellants, as objectors had applied for the revocation of the grant leading to a ruling on 30.5.2019 dismissing the application and directed to file in the Environment and Land Court.
4. The appellants further submitted that they filed a customary trust claim in Githongo CMCC ELC No 24 of 2019 that was struck out for being res sub-judice Meru CMCC No 430 of 1984 which was then pending hearing and determination, orders which they sought to be reviewed in vain by a ruling delivered on 23.6.2021; leading to a fresh claim filed on 17.10.2022. By a ruling dated 29.11.2023, the trial court upheld the preliminary objection and struck out the suit with costs.
 5. The decision is now appealed against before this court on the grounds set in the memorandum of appeal dated 6.12.2023. The appellants complain that the trial court:-
 - i. Failed to appreciate the law on *res judicata*, hence arrived at a wrong conclusion.
 - ii. Failed to find that the plaintiffs were not heard on merits and to finality.
 - iii. Failed to find that striking out of the previous suits was not a bar to the instant suit.
 - iv. Failed to appreciate that a court of competent jurisdiction had not heard the issues before the court.
 - v. Failed to find that the striking out of the previous suits did not amount to a determination of the issues on merits and with finality.
 6. This court, pursuant to Order 42 Rule 18 of the *Civil Procedure Rules*, directed that the appeal be canvassed by way of written submissions due by 25.8.2024. The mandate of this court, as per Order 42 *Civil Procedure Rules* and Section 78 of the *Civil Procedure Act*, is to relook at the lower court record with a fresh mind and arrive at independent findings as to facts and the law. See *Gitobu Imanyara & others v AG* (2016) eKLR.
 7. The singular issue raised by this appeal is whether the preliminary objection on *res judicata* raised by the respondents was merited and if the trial court was correct to uphold it.
 8. A preliminary objection consists of a pure point of law that has been pleaded or which arises by clear implication out of the pleadings. It includes a plea of limitation of time and jurisdiction. See *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) E.A 696. In *Oraro v Mbaja* (2005) KLR 144, the court held that anything that purports to be a preliminary objection must not deal with disputed facts, and it must not derive its foundations from factual information which stands to be tested by rules of evidence.
 9. The preliminary objection raised by the respondents was based on Section 7 of the *Civil Procedure Act*. In *IEBC v Jane Cheperenger & others* (2015) eKLR, the court observed that a preliminary objection should be founded upon a settled and crisp point of law. The test to be applied in determining if a preliminary objection meets the threshold is the capability to dispose of the entire suit based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts, facts are not contested or disputed or liable to be contested and proved through evidence and lastly, what is sought is not an exercise of judicial discretion.
 10. The guiding principles to apply on whether a plea of *res judicata* is appropriately taken and applicable were set out in *Maina Kiai & others v IEBC & others* (2017) eKLR. They include:
 - a. The suit or issue was directly and substantially in issue in the former suit.



- b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating at the same time.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
11. The purpose of *res judicata* is to bring finality to litigation and to prevent the re-opening of concluded matters on merits. It seeks to avoid wastage of time and resources for parties who have lost, seeking to forum shop for a favorable outcome, rendering the judicial process a nuisance. It acts as a bar to those concluded matters on finality determined by a competent court. See *John Florence Maritime Services Ltd v C.S Transport & Infrastructure & others* (2015) eKLR.
 12. In this appeal, other than a preliminary objection, the respondents had not filed any statement of defense accompanied by a list of witness statements and documents, setting out the former suits, the parties involved, pleadings thereof and the outcomes made by courts of competent jurisdiction.
 13. In *Henry Wanyama Khaemba v Standard Chartered Bank Ltd and another* (2014) eKLR, the court held that the issues of *res judicata*, the duplicity of suits and suits having been spent would require probing of evidence and, therefore, did not fall under the limited scope and jurisdiction of preliminary objection. In *George Kamau Kimani & others v County Government of Trans Nzoia & another* (2014) eKLR, the court observed that the best way to raise a plea of *res judicata* was through a notice of motion and to annex the pleadings for the court to consider the same and ascertain the facts by way of evidence.
 14. The preliminary objection before the trial court was based on contested facts requiring probing through evidence. There were no copies of pleadings, judgments and decrees in the former suits on which the trial court could base its findings that the subject matter, title, parties and issue in the instant suit, were similar to and determined to finality by previous courts competent to hear and determine the issues or the matter. See *Bernard Mugo Ndegwa v James Nderitu Gitbae & others* (2010) eKLR.
 15. A preliminary objection should not be blurred with factual details liable to be contested and to be proved through evidence. See *Oraro v Mbaja* (supra). There were no certified proceedings and judgments in the former suits to authenticate the allegations of *res judicata*. Preliminary objections should not be used to stifle the cause of justice and endlessly derail matters. It cannot be used to determine a whole matter where facts are not precise and clear.
 16. The upshot is that I find the appeal has merits. The same is allowed, and the order striking out the suit made on 29.11.2023 is as a result of this set-aside. Costs to the appellants.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU *ON THIS 2ND DAY OF OCTOBER, 2024

In presence of

C.A Kananu

Miss Kerubo for Mwiti for appellant

HON. C K NZILI

JUDGE

