



**Mwangi v Nairobi City County (Environment & Land Petition
1 of 2023) [2024] KEELC 6758 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 1 OF 2023
MD MWANGI, J
OCTOBER 15, 2024**

BETWEEN

ESTHER KABURA MWANGI PETITIONER

AND

THE NAIROBI CITY COUNTY RESPONDENT

*(In respect of the Preliminary objection dated 3rd July, 2024 by the Respondent
alleging that the petition herein is res judicata in view of Nairobi Civil
Suit NO. 15 of 2016 (Nairobi City County v Esther Kabura Mwangi)*

RULING

Background.

1. The court in this matter had directions on hearing of the petition herein to be by way of viva voce evidence. Thereafter the matter was actually set down for hearing on 4th July, 2024.
2. On the material date of the hearing, the advocate for the Petitioner, Dr. Kamau Kuria S.C, informed the court that he had been served with a preliminary objection by the Respondent. He was ready to argue the same on the same date. Ms. Karanja, the Respondent's advocate however, proposed that the preliminary objection be heard by way of written submissions.

Court's Directions.

3. The court directed that the preliminary objection by the Respondent be heard by way of written submissions. Both parties complied and the court has had the opportunity to read and consider their respective submissions which now form part of its records.



Issues for Determination

4. The sole issue for determination is whether the preliminary objection by the Respondent is merited.

Determination

5. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, the former East Africa Court of Appeal (Charles Newbold J.A) described a preliminary objection in the following words;

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

6. In *Oraro v Mbaja* (2005) 1KLR, the court reiterated that;

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

7. One pertinent question that the court must answer is whether the plea of res judicata may be properly raised by way of a preliminary objection considering the limited scope of a preliminary objection as held in the above cited cases.
8. For purposes of answering the question in its proper context, the court has considered the decision by the Supreme Court in *John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport & Infrastructure & 3 others* (2021) eKLR, where the court re-affirmed its earlier decision on the doctrine of *res judicata* in the following words,

“We restate the elements that must be proved before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter, the following elements must be demonstrated;

- a. There is a former judgment or order which was final,
 - b. The judgment or order was on merit;
 - c. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d. There must be between the first and the second action identical parties, subject matter and cause of action.”
9. For the court therefore to establish whether a matter is res judicata or not, it will have to interrogate the facts as pleaded in the latter suit and those raised by the Objector. The court must necessarily scrutinize the pleadings and the decision in the former suit to ascertain the elements as spelt out in the above case.



10. Consequently, I would agree with the holding in the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* (2014) eKLR, where the court held that,

“The issues of *res judicata*, duplicity of suits and suit having been spent will require probing of evidence as it is already evident

They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objections.”

11. A similar decision was made in the case of *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & Another* (2014) eKLR, where the court stated that,

“One cannot raise a ground of *res judicata* by way of a Preliminary Objection. The best way to raise a ground of *res judicata* is by way of a Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is *res judicata*.”

12. The upshot is that this court finds and holds that the preliminary objection by the Respondent is improper; it does not amount to a preliminary objection. It is not merited and is hereby dismissed with costs to the Petitioner.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mwenda h/b for Dr. Kamau Kuria SC for the Petitioner

Ms. Karanja for the Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE

