



**Nyaga v Gakiavi (Environmental and Land Originating Summons  
E024 of 2022) [2024] KEELC 7535 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7535 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2022  
A KANIARU, J  
OCTOBER 15, 2024**

**BETWEEN**

**PETER MURIITHI NYAGA ..... PLAINTIFF**

**AND**

**CEASAR MURIITHI GAKIIVI ..... DEFENDANT**

**RULING**

1. Before me for determination is a Preliminary objection dated 16.04.2024. The objection has been raised by the defendant on the grounds that:
  - a. The matter is res judicata, a court of competent jurisdiction having heard and determined the issues in the current suit before in Runyenjes Senior Principal Magistrate's court ELC Case No. 26 of 2018 Peter Muriithi Nyaga v Madris Kanini Mbung'u & Ceasar Muriithi Gakiavi and a decree and judgement issued on the 16<sup>th</sup> August 2022 by Hon. J.W Gichimu SPM.  
Annexed to the preliminary objection is a copy of the judgement in the suit referred to.
2. The objection was canvassed through written submissions. The 1<sup>st</sup> defendant's submissions were filed on 29.01.2024 where he mainly highlighted the grounds of his objection. He cited the law on res judicata as provided for under section 7 and 8 of the *civil procedure Act*. His submission was that the plaintiff's never lodged any appeal against the suit mentioned in his preliminary objection and he could therefore not file the instant suit as the same is res judicata. It was urged that the suit be dismissed. The 2<sup>nd</sup> defendant filed his submissions on 09.02.2024 and he supported the 1<sup>st</sup> defendant's position that the preliminary objection ought to be upheld. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file any submissions.
3. The plaintiff's submissions on the other hand were filed on 29.02.2024. He submitted that the components of a preliminary objection were set out in the case of Mukhisa Biscuit Co. Ltd v West End Distributors Ltd (1969) EA 696. That the issue of whether a suit is res judicata would require ascertainment of facts as the court would need to look at the proceedings in the previous suits. That an



issue that requires a court to ascertain facts and calling for evidence should not be raised as preliminary objection as an objection ought to be raised on a pure point of law. The case of Margaret Njeri Gitau v Julius Mburu Gitau & 2 others (2022) Eklr citing the cases of Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Anor (2014)Eklr, and George Kamau Kimani & 4 others v County Government of Trans Nzoia & Anor (2014) Eklr were proffered in support of the said position.

4. It was further submitted that the instant suit is not res judicata to Embu District Land Tribunal case no. 66 of 2006 adopted as award no. 11 of 2007 as the Tribunal did not have jurisdiction to determine the issue of ownership of land. The case of Joseph Malakwen Lelei & Anor vs Rift Valley Land Disputes Appeals Committee 7 2 others (2014) Eklr was cited in support of that position. It was submitted further that the tribunals decision having not been rendered by a court of competent jurisdiction, then the instant suit cannot be said to be res judicata to the said decision.
5. That similarly, the present matter is not res judicata to H.C JR no. 35 of 2008 as judicial review proceedings are not concerned with the merits of a decision, hence the issue of ownership of land could not have been the subject of a judicial review application. It was urged that the preliminary objection be dismissed with costs to the plaintiffs. Further cases proffered in support of the submissions were those of Richard Wefwafwa Songoi v Ben Munyifwa Songoi (2020) Eklr; Vincent Kipsongok Rotich v Orphah Jelagat Ngelechei (2014) Eklr.
6. I have considered the preliminary objection as well as the rival submissions. The issue for determination is whether the preliminary objection has merit.
7. A preliminary objection was described in the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696 as follows:

“ 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.”
8. A preliminary objection therefore raises pure points of law and should not deal with disputed facts, neither should it be raised if it calls for ascertainment of facts, by way of evidence or if it calls for the exercise of judicial discretion. The 1<sup>st</sup> defendant has raised his objection mainly on the ground that the instant suit is res judicata as there have been other proceedings in other levels of court and tribunals regarding the subject land herein. He went ahead to annex copies of the said proceedings to the preliminary objection. The plaintiff's on the other hand dispute that this suit is res judicata as they claim that the issue of ownership of the subject land herein was never heard on merit and that the body that finally determined the said issue did not have the jurisdiction to do so.
9. From the parties' arguments, it is evident that there is no agreement as to the facts of the case. It is also apparent that the 1<sup>st</sup> defendant by annexing the proceedings of the previous suits intends for this court to examine the same in considering whether or not this suit is res judicata. The nature of a claim of res judicata usually requires examining and probing of evidence and ascertainment of facts to determine the same. However were this court to resort to doing so, that would amount to probing of evidence and ascertainment of facts, which goes beyond the confines of the court in determining a preliminary objection. It is also notable that the 1<sup>st</sup> defendant's objection largely raises issues of fact. It is trite law that a preliminary objection should only raise 'pure points of law' and not facts as has been done by the 1<sup>st</sup> defendant. It is therefore not in doubt that the objection as presented is not sustainable as it goes beyond the scope of a preliminary objection.



10. See also the case of *Oraro v Mbaja* [2005] eKLR where the court observed as follows:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, 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, or to be proved through the processes 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 the Court should allow to proceed.”

11. For the foregoing reasons, this court finds and holds that what has been raised by the 1<sup>st</sup> defendant does not amount to a preliminary objection. Therefore the so called preliminary objection lacks merit.

Consequently the alleged preliminary objection dated 16.4.2024 is hereby dismissed in its entirety with costs to the plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15<sup>TH</sup> OCTOBER, 2024.**

In presence of Ms Mwirigi for Muchangi for defendant.

Court Assistant - Leadys

**A. KANIARU**

**JUDGE – ELC, EMBU**

