



**Moledina v Vasant (Environment & Land Case E132 of 2021)
[2023] KEELC 712 (KLR) (6 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E132 OF 2021
LL NAIKUNI, J
FEBRUARY 6, 2023**

BETWEEN

TAHERA MOHAMED HUSSEIN MOLEDINA PLAINTIFF

AND

RUKIA VASANT DEFENDANT

RULING

I. Introduction

1. The ruling before this Honorable Court is for the determination of a preliminary objection raised by M/s. Rukia Vasant, the defendant herein. The objection emanates from the contents of the filed plaint by the plaintiff herein dated July 7, 2021. From the said plaint the plaintiff sought for the following reliefs. These were:-
 - a. An order for vacant possession of the suit premises known as Land Reference Numbers Mombasa/Block XXXI/34 situated at Mombasa Island occupied by the Defendant.
 - b. Mesne profits at the rate of Kenya Shillings Eight Thousand (Kshs. 8, 000.00) per month from January 1, 2011, until the delivery of vacant possession.
 - c. Costs of and incidentals to this suit.

II. The Defendant's objection

2. The objection raised by the defendant herein were two (2) prong in nature, namely:
 - a. That this suit was unconcluded and thus "Sub - judice".
 - b. That this suit was Concluded and thus it was Res Judicata.



Accordingly, the defendant argued that the above salient features of the two legal doctrines were in existence of a previous suit. She averred that this suit was between the same parties or parties who were litigating under the same title. Further, she held that the subject matter was literally the same (directly or substantially); in the same court or any other court having jurisdiction and hence the court ought to hold that no court should entertain such a suits.

3. Upon service with Summons to enter appearance, the Defendant herein, filed an amended defence dated July 4, 2021. From the filed defence, she admitted to the contents of Paragraphs 1 and 2 of the Plaintiff in so far as the same related to the description of the parties in this suit by the plaintiff. However, her contention was that she was a stranger to the averments contained in Paragraph 3 of the plaintiff and put the plaintiff to strict proof. She further argued that without prejudice to the contents of Paragraph 3 of the defence she was estopped from raising such defence by dint of section 121 of the *Evidence Act*, cap 80 Laws of Kenya. The defendant denied the contents of Paragraphs 4, 5, 6 and 7 of the Plaintiff.
4. By and large, the defendant averred that this suit was in breach of the doctrine of “Res Judicata and/ or Sub – Judice” by dint of the existence of the Civil suit CMCC No. 237 of 2011 which according to her it was between the Plaintiff and the defendant herein and which was pending awaiting to be finally determined. For that reason, she prayed for the suit instituted by the Plaintiff to be dismissed whatsoever.

III. The Plaintiff’s Replies

5. The plaintiff responded to these averments raised from the filed Defence through an amended reply to the defence dated September 29, 2022 where he reiterated the contents of the plaintiff as if the same were set out herein seriatim. The plaintiff admitted the contents of paragraph 2 of the defence in so far as the same is merely descriptive of the parties herein. In response to the contents of paragraph 3 of the defence, the plaintiff reiterated the contents of Paragraph 3 of the Plaintiff. The plaintiff concurred with the Defendant on the contents of Paragraph 4 of the defence.
6. In response to the contents of Paragraph 6 of the Defence, the Plaintiff reiterated the contents of Paragraph 7 of the Plaintiff and further refuted that the suit was “Res Judicata” as the parties in CMCC No. 237 of 2011 were different from the parties to the present suit. The Plaintiff held that the claims by the Plaintiff in the present suit arose from a different period of time from that in the Civil case CMCC No. 237 of 2011. Furthermore, the Plaintiff stated that the Civil Suit CMCC No. 237 of 2011 had by the effluxion of time abated by dint of the provision of order 24 Rule 3(2) of the *Civil Procedure Rules*, 2010. Indeed, by that time, the Plaintiff averred neither had the said suit been heard nor finally decided or determined on merit.

VI. Submission

7. On June 28, 2022, while all the parties were present in court, the Honorable Court directed them to have the preliminary objection raised by the Defendant be disposed off by way of written submission. Pursuant, to that each of the parties complied accordingly. Thereafter, the Honorable Court reserved a date for delivering a ruling on notice.

A). The Written submissions by the Defendant

8. On November 22, 2022, the Learned Counsel for the defendant the Law Firm of Messrs. Gichana B.W. Omwando & Co. Advocates filed their written submissions dated November 21, 2022. Mr. Gichana Advocate submitted that the preliminary objection was on the two (2) proxy issues:-
 - a. that the suit was sub-judice and



- b. it was concluded and hence it offended the doctrine of “Res Judicata” under the provisions of sections 6 and 7 of the [Civil Procedure Act](#) cap 21.
9. He averred that from the filed submissions by the plaintiff they were trying to split laws by stating that the suit property had been registered in the names of the deceased and which were facts to be adduced during a full trial and hence they misconstrued the legal import of Mukisa Biscuits case on preliminary objections.
10. He averred that the Civil Suit CMCC No. 237 of 2011 was instituted by one self-appointed Mohamed Hussein Moledina as the Legal Administrator Executor of the estate of the deceased – Mohamed Moledina.
- He referred court to the provisions of section 5 of the [Civil Procedure Act](#) and held that it fell on the back drop that courts had been on the receiving end accused of delaying matters and this was due to the backlog of cases a thing which was being rectified by preventing frivolous or numerous matters of the same nature to be tried.
11. The Counsel held that the principle of “Sub - Judice” had been enacted with an aim of preventing multiplicity of suit between the same parties who were before a competent court over the same subject matter. He submitted that all the ingredients over the provisions of section 6 and 7 of the [Civil Procedure Act](#) cap 21 had been met in the instant case in that the parties in civil suit No. 237 of 2011 and the present suit were the same and so were the orders. While the former was acting as a Legal Administrator, the latter was a daughter of the deceased. Therefore, they had only managed to replace the plaintiff who was still the same disguised as another. He held that the orders being sought by the plaintiff in both suits were the same and the suit were pending before a competent court of same jurisdiction.
12. The Counsel reiterated that the existence of the two suits were contrary to public policy. It would not only lead to multiplicity of suits on the same subject matter but also to having backlogs and/or different decision. Further it would cost the Defendant to defend two (2) suits at the same time and also a waste of court’s valuable time and resources. To buttress on this point he relied on the decision of:- HC JR No. E054 of 2020 Republic –Versus- Paul Kihara Kariuki & Another.
- He averred that should the suit succeed in the first decision; the said decision shall be binding to the present matter thus rendering it “Res – Judicata”. He prayed for the suit to be dismissed with costs.

B. The Written Submissions by the Plaintiff:

13. On September 30, 2022, the Learned Counsel for the Plaintiff the Law Firm of Messrs. Kasmani & Company Advocates filed their written submissions dated September 29, 2022. M/s. Kasmani Advocate commenced her submission by stating that the Plaintiff sought in the filed Pliant orders for delivery of vacant possession of building occupied by the Defendant comprising development on Mombasa/Block XXXI/34 and mesne profits from the Defendant from the date of filing suit until the date of delivery of vacant possession. She held that the Defence claimed that the suit was Res - Judicata on the basis of the existence of a Civil Suit No. CMCC No. 237 of 2011.
14. According to the Counsel, the Civil suit CMCC No. 237 of 2011 was filed by Mohamed Hussein Moledine as the Legal Administrator of the estate of the Late Hussein Mohamed Moledina (Deceased) against the Defendant who was a tenant at the suit property seeking for vacant possession of the property and mesne profit. The Counsel averred that at the time of the filing the suit the property was registered in the name of the deceased. She informed the Honorable Court that the said Mohamed Hussein Moledina passed away sometimes in the year 2017 and the Plaintiff inherited the property by



virtue of being his widow. She further informed court that the tenant had continued to occupy the property.

15. For these reasons, therefore, it was the Counsel's contention the doctrine of "Res – Judicata" never applied in the instant case. She held that the principle embodied under the Provisions of section 7 of the *Civil Procedure Act* cap 21 and well captured in the case of "*Independent Electoral Commission – Versus - Maina Kia & 5 Others* 2017 eKLR. was meant to prevent multiplicity of suits between the same parties over the same subject matter.
16. Hence based on these principles of law the Counsel submitted that though the Plaintiff in Civil Suit CMCC No. 237 of 2011 and the present matter sought the same orders over the same property, but the parties were not the same. She held that the plaintiff in the Civil case CMCC No. 237 of 2011 was the Legal Administrator of the Late Hussein Mohamed Moledina while the Plaintiff in this matter is Tahera Mohamed Hussein Moledina. Naturally, these were two different persons altogether.
17. Further, she argued that the plaintiff in the Civil Case - CMCC No. 237 of 2011 sought rent for a different period of time than what the Plaintiff in the present suit sought. Thus the issues in the present suit was substantially different from those raised in aforesaid suit.

Additionally, the Counsel averred that, the Civil Case CMCC No. 237 of 2011 which abated by dint of the provision of order 24 (3) of the *Civil Procedure Rules*, 2010 was never concluded as judgment had never been delivered. She argued that the suit was not "Sub Judice" and could not be stayed under the provision of section 6 of the *Civil Procedure Act*, cap. 21 due to the elaborate facts provided above.

In conclusion, she urged court to dismiss the Preliminary Objection as it was unfounded and without any merit whatsoever.

IV. Analysis And Determination

18. I have keenly considered the filed pleadings, oral and written submissions made by the parties herein. In order to reach an informed decision on the matter, the court has framed the following three (3) issues as a guide.
 - a. Whether the preliminary objection meets the threshold of raising such an objection as founded in Law and precedents.
 - b. Whether the assertion that the suit by the plaintiff breaches or offends the doctrine of "Res Judicata" as alleged by the defendant herein and hence it should be dismissed with costs.
 - c. Who will meet the Costs of the application?

Issue No. a). Whether the Preliminary objection meets the threshold of raising such an objection as founded in Law and precedents.

18. Taking that the defendant has raised an objection on the two (2) issues of Res Judicata and Sub - Judice, this Honorable Court will deal with them at a later stage. According to the Black Law Dictionary a preliminary objection is defined as being:

"In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."

18. The above legal proposition has been made graphically clear in the now famous case of "*Mukisa Biscuits Manufacturing Co. Ltd – VS- West End Distributors Ltd.* [1969] E.A. 696. Where Lord Charles



Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in 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 issue. The improper practice should stop”

18. I have further relied on the decision of “*Attorney General & another – Versus – Andrew Mwaaura Gitbinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- a. A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- b. A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- c. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

18. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial. In the instant case the Defendant holds that there is a similar matter pertaining the same subject matter and parties being Civil case CMCC No. 237 of 2011. Based on this legal ratio, I therefore, find that the filed Preliminary objection raised by the Defendant fails to satisfy this ingredient for a Preliminary objection. In saying so, the Court will proceed to demonstrate this assertion here below.

Issue No. b). Whether the assertion that the suit by the Plaintiff breaches or offends the doctrines of “Res Judicata” and “Sub Judice” as alleged by the Defendant herein and hence it should be dismissed with costs.

18. The doctrine of Res Judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of ”*Nicholas Njeru – Versus – the Attorney General and 8 others* Civil Appeal No. 110 of 2011 [2013] eKLR.

18. I have perused the pleadings herein. From the filed defence the defendant has averred that there was a case between herself and the plaintiff touching on the same matter and with the same parties. The plaintiff rebutted this position in their amended reply to the defence



25. The law pertaining to the doctrine of “Res Judicata” is captured under the provisions of section 7 of the *Civil Procedure Act*, cap.21 which states:

“No court shall try any suit 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 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.”

25. The doctrine of Res judicata has stated been explained in a plethora of decided cases. In the recent case of the *Independent Electoral and Boundaries Commission – Versus - Maina Kiai & 5 others* (2017)eKLR, the Court of Appeal held as follows:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a. The suit or issue was directly and subsequently in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- 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.”

25. The court explained the role of the doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of res judicata thus rest in the public interest for swift, sure and certain justice.”

25. In my understanding the principle of “Res Judicata” is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. I fully concur with the assestion by the Learned Counsel for the Defendant that it is also meant to clear backlog cases and reducing unnecessary expenses and time taken on suits by Court. Further, it avoids leading to conflicting and embarrassing decisions by the same Courts of Competence Jurisdiction over the same subject matter. The question therefore is whether the Defendant herein has satisfied the conditions for the principle of res judicata in view of the facts of this case.

26. From the pleadings it is not in dispute that the subject matter in the previous litigation and the current suit is the same. However, the only slight difference is that the parties from the former suits and the present suit were not the same. There were different. Additionally, the Plaintiff’s argument, is



that the issues in the instant suit were not adjudicated and/or determined in the previous litigation. Undoubtedly, therefore, this is a major distinction from what the law under the provision of section 7 of the Civil Procedure Act, Cap. 21 envisages.

27. In the case of:- "E.T.V – Versus - Attorney General & another (2012)eKLR Majanja J stated that:

“The courts must be vigilant to guard against litigants evading the doctrine of Res Judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”

25. In the case of:- "Gurbachau – Versus - Yowani Ekori (1958)EA 450, the Court of Appeal of Eastern Africa, while considering the doctrine of res judicata, cited at page 453 a passage from the judgment of the “Vice Chancellor in Henderson – Versus - Henderson (1) 67 ER 313 at page 319 wherein it was stated that:-

“In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time”

25. Applying the stated law to the facts before me, it is clear that the plaintiffs seek to open issues that were raised or ought to have been raised in the earlier proceedings as they were relevant to the issues that were decided by the courts in those cases. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this suit, the Plaintiff is not trying to litigate a concluded matter by bringing issues or causes of action which rightly could have been raised in the former suits. To me this are purely different cause of action as the other suit abated under the dint of the provision of order 24 (3) of the Civil Procedure Rules, 2010 following the demise of the deceased.

26. At this ripe stage, from the suit I am not able to establish that the Plaintiff is in contravention of section 7 of the Civil Procedure Act. It shall be heard on merit and where the court the final stages finds that truly there is Res Judicata shall dismiss it in that instant.

27. Now turning to the issue of Sub judice as provided for under Section 6 of the Civil Procedure Act, CAP. 21 which provides as follows:-

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where



such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court”.

25. The Defendant contended that the suit offends the doctrine of Sub - Judice. She claimed that there was another pending suit between the same parties being CMCC No. 237 of 2011. The Defendant has disputed the Plaintiff’s claim. From keen assessment, it is found out that there has been numerous decisions which have put the issue on “the Doctrine of Sub Judice” into perspective. In the case of:- ”Kenya National Commission on Human Rights – Versus - Attorney General; Independent Electoral & Boundaries Commission & 16 Others (2002) eKLR, the Supreme Court of Kenya held:-

“The purpose of Sub - Judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter-----When two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of Sub - Judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.

25. In the case of” Margaret Wachu Karuri – Versus - John Waweru Ribiuro (2021) eKLR”, the Court was faced with a similar question whether “the doctrine of Sub – judice” could be raised as a preliminary point and held as follows:-

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is “Sub – Judice”, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this Court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited”.

Consequently, the court finds and holds that the notice of preliminary objection dated 30th August, 2019, by the defendant/objector is not merited and the same is dismissed entirely with costs to the Plaintiff/Respondent”.

25. This Honorable Court entirely agrees with this legal reasoning in the above decision which is in all fours with the instant case. I reiterate that the Preliminary objection cannot be successful.

ISSUE No. b). Who will bear the Costs?

25. The issue of costs is a discretion of the court. Costs means any award that is granted to a party at the conclusion of any legal action, proceedings or proves of any litigation. Under the proviso of section 27 (1) of the Civil procedure Rules, 2010, provides that Costs follow the events of such legal action, process or proceedings. By following events it means the result of the case.



26. From the instant case, the Honorable court finds that the preliminary objection raised by the defendant is non meritorious. Hence, the defendant will bear the costs of the objection the plaintiff hereof.

VI. Conclusion & Disposition

25. The upshot of this, and after conducting an indepth analysis of the framed issues, the court proceeds to make the following holdings. These are:-

- a. That the preliminary objection raised by the defendant herein be and is hereby dismissed with Costs.
- b. That the assertion made out by the Defendant in her filed statement of Defence that the suit filed by the Plaintiff offends and/or breaches the Doctrine of “Res Judicata” as founded under the provision of section 7 of the Civil Procedure Act. Cap. 21 be and is hereby dismissed for lack of merit whatsoever.
- c. That for the sake of expediency, this suit should be fixed to be heard and disposed off within the next one hundred and eighty (180) days from the date of the delivery of this ruling, hearing on 2May 2, 2023. There shall be a mention date on March 21, 2023 for Pre – Trial session pursuant to the provisions of Order 11 of the Civil Procedure Rules.
- d. That the Costs of the preliminary object to be borne by the defendant.

It is so ordered accordingly.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 6TH DAY OF FEBRUARY, 2023.

HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:

- a. M/s. Yumna, Court Assistant;**
- b. No appearance for the Plaintiff.**
- c. Mr. Gichana for the Defendant.**

