



REPUBLIC OF KENYA



**Koskei & 9 others v Yegon & 3 others (Environment & Land Case
E009 of 2021) [2023] KEELC 16016 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E009 OF 2021**

MC OUNDO, J

MARCH 9, 2023

BETWEEN

JOHANA KOSKEI 1ST APPLICANT
REUBEN KOSKEI 2ND APPLICANT
ELIUD CHERUIYOT 3RD APPLICANT
JOHANA KOSKPI 4TH APPLICANT
DAVID TOWETT 5TH APPLICANT
NELSON ROTICH 6TH APPLICANT
WESLEY KITUR 7TH APPLICANT
JOEL MUTAI 8TH APPLICANT
GEOFFREY KOSKEI 9TH APPLICANT
JOEL ROTICH 10TH APPLICANT

AND

EZEKIEL KIPRONO YEGON 1ST RESPONDENT
JOEL KIPNGETICH YEGON 2ND RESPONDENT
JOSEPH CHERUIYOT YEGON 3RD RESPONDENT
KORGOREN KIBET DAVID 4TH RESPONDENT

RULING

1. Before me for determination is a Notice of Preliminary Objection dated the November 9, 2021 and filed by the respondents in which they seek that the suit herein be struck out for being *res judicata* the



- Bomet Principle Magistrates ELC No. 21 of 2019 which matter had been determined, and judgment delivered evicting the Applicants. That there had been no appeal preferred against the said judgment.
2. In response to the application, the Applicants filed their Grounds of Opposition dated January 30, 2023, opposing the said application for reasons that the matter filed in the Bomet Principle Magistrates Court ELC No. 21 of 2019 concerned the suit property herein which was over Ksh, 30,000,000/= and therefore beyond that court's jurisdiction.
 3. That since the value of the suit property was in contention and could only be ascertained by production of evidence, the ground of objection fell outside the ambit of a Preliminary Objection.
 4. That the parties in this matter are different from the parties in the lower court's matter as the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th applicants were not parties to the lower court's proceedings.
 5. That the issues in the two matters were different and distinct, the main issue in lower court being an eviction and permanent injunction while the subsequent matter herein concerned adverse possession which was not pleaded in the lower court.
 6. That the subsequent matter herein was purely a land matter wherein the parties herein are not in any way related and/or litigating on the realm of succession and therefore the Preliminary Objection should be dismissed with costs.
 7. Subsequently, on the March 24, 2022, parties were directed to dispose of the application on the Preliminary objection by way of written submissions.

Applicants/Respondent's submissions.

8. The respondent's submission was to the effect that the applicants began this case by way of Notice of Motion dated October 19, 2019 wherein several applications in the cause of the case had been filed seeking inter alia an order for stay of proceedings in regard to Bomet Principal Magistrates Court's ELC Case No.21 of 2019, inhibition order thereto and an injunction to maintain status quo which was thus granted.
9. That the cardinal issue canvassed in the application herein was that having acted partially for the above Respondents in Bomet High Court Succession No. 31 of 2015 and EIC No.21 of 2019, the argument was anchored on the fact that the suit property had been dealt with and prior to the filing of this suit, the applicants had been aware of the ongoing case which had sought to have the trespassers evicted from the suit land. That had they not been satisfied with the verdict by the lower Court in EIC No.21 of 2019, they ought to have filed an Appeal.
10. That the Proprietorship of L.R Kericho/Merigi/507 was given to the respondent as their hereditary share vide Bomet High Court Succession No. 31 of 2015 from the original proprietor Tapropgoi w/o Rotich who was the registered proprietor prior to adjudication in 1972.
11. The respondents relied on the provisions of section 7 of the *Civil Procedure Act* and the decided case in *Uhuru Highway Development vs. Central Bank* [1996] LLR CAK 2126 (sic) to submit that the test in res judicata was as follows:
 - i. There must be a previous suit in which the matter was in issue;
 - ii. The parties must be the same or litigating under the same title;
 - iii. There must be a competent court which heard the matter in issue;
 - iv. the issue must have been raised once again in a fresh suit;



12. That in instant suit, the parties herein Ezekiel Kiprono Yegon, Joel Kipngetich Yegon, Joseph Cheruiyot Yegon and Korgoren Kibet David were parties in ELC No. 21 of 2019 and had sworn an affidavit and/or given authority to plead on behalf of the parties herein.
13. That in the present suit, the applicants had sued the respondents after being served with notice of eviction pursuant to a judgment dated October 24, 2019 in ELC No. 21 of 2019 which was over the same subject matter being L.R Kericho/Merigi/507
14. Reliance was also placed in the decision in *Joshua Ngartu v Jane Mpinda & 3 others* (2019) eKLR, where the court had relied on the decision in *Attorney General & another v ET* (2012) eKLR, to submit that the current matter fell squarely within the parameters of res judicata described in section 7 of the *Civil Procedure Act*.
15. That parties had been litigating endlessly since 2014 over L.R Kericho/Merigi/507 by giving the suits some cosmetic face-lifts and introducing new angles to it until a court of competent jurisdiction finally determined the rights of the parties in ELC No. 21 of 2019.
16. The respondents also brought in the issue as whether or not the suit herein was sub judice wherein they relied on the provisions of section 6 of the *Civil Procedure Act* as well as the decision by the Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR to submit that the instant suit was filed despite the existence of a pending a suit in the Principal Magistrate's Court being ELC No. 21 of 2019 which suit, in relation to the current suit, had similar parties herein and was in respect to the parcel No. Kericho/Merigi/507, the suit property herein.
17. That the filing of a new and separate case despite the existence of a similar case relating to the same subject matter therefore amounted to an abuse of the court process as was described in *Muchanga Investments Limited v Safaris Unlimited (Africa) limited & 2 others* [2009] eKLR. In conclusion, the respondents submitted that the application herein was sub judice and/or res judicata and should be struck out with Costs.

Applicant s' submissions.

18. In response to and in opposition of the grounds of the preliminary objection raised by the respondents, the applicants' issue for determination was whether the Preliminary Objection raised was sustainable and whether what had been raised by the parties therein had satisfied the ingredients of a Preliminary Objection in accordance to the holding in the case of *Oraro v Mbaja* [2005] 1KLR 141 and *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696.
19. That a cursory glance of the grounds of the Preliminary Objection revealed that it failed the test of being a pure point of law since disputable sets of facts had been presented.
20. That the matter filed in the Bomet Principal Magistrate Court being ELC No. 21 of 2019 concerned the land herein which is valued at over Kenya Shillings Thirty Million (Ksh. 30,000,000) and therefore was beyond the lower court's jurisdiction. That since the court would have to investigate facts therein, this was not a pure point law and thus did not qualify as a Preliminary Objection.
21. The applicants further submitted that the allegation of contempt of court was false and unsubstantiated as there was no factual basis on record to indicate that the applicants had been held in contempt and therefore, this ground failed the pure point of law test. Reliance was placed on the decision in *National Council for Persons with Disabilities vs Elizabeth Irako Shiakamiri* [2019] eKLR.



22. On the issue of whether the subsequent suit was res judicata, the applicants submitted that the parties in the present matter were different from the parties in the previous matter. That the 3rd, 4th, 5th, 6th, 7th, 8th 9th and 10th applicants were not parties in the lower court proceedings. That further, the issues in the two matters were different and distinct, the main issue in lower court having been on eviction and permanent injunction orders while the matter herein concerned adverse possession which had not pleaded in the lower court. Reliance was placed on the decision in *George Kamau Kimani & 4 others v County Government of Trans Nzoia & another* [2014] eKLR to submit that the best way to raise a ground of *res judicata* would have been by way of Notice of Motion where pleadings would have been annexed to enable the court to determine whether the current suit was res judicata.
23. On the issue as to whether the suit fell within the family division, the applicants submitted that the issue herein was purely a land matter and it was evident that the parties herein were not in any way related and/or litigating in the realm of succession and therefore this issue must also fail for not being a pure matter of law. The applicants relied on the decision in *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu High Court Civil Case N 53 of 2004 to submit that a point of law was derived from statute and a party could not therefore raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds was from the face of it, a breach of rules of procedure and amounted to an abuse of court process.
24. In conclusion, the applicants submitted that the Preliminary Objection and Grounds of opposition dated November 9, 2021 did not deserve to see the light of the day, and were ripe for dismissal for being a gross abuse of the court process as they were tantamount to inviting the Court to bar parties from accessing substantive justice by condemning them unheard.

Determination.

25. I have considered the respondents' Application, the applicants' Grounds of opposition to the same, the submissions herein as well as the authorities cited therein. Briefly, the Applicants herein, via an application dated the October 19, 2021 had sought for orders;
 - i. That this application be certified as urgent and the same be heard on merited basis.
 - ii. That this honourable court be pleased to stay proceedings in Bomet Principal Magistrates Court ELC Case No. 21 of 2019 pending the hearing and determination of this Application.
 - iii. That this Honourable Court be pleased to stay proceedings in Principal Magistrates Court ELC Case No. 21 of 2019 pending the hearing and determination of this suit.
 - iv. That this honourable court be pleased to grant an order of Temporary injunction restraining the respondents by themselves, their agents, employees, Servants, assigns or any other person acting on their behest from evicting or in any other way interfering with the applicants' right of user and occupation of the Property Title Number Lr.no Kericho/merigi/507, pending the hearing and determination of this Application.
 - v. That this honourable court be pleased to grant an order of temporary injunction restraining the respondents by themselves their agents, employees, servants assigns or any other people acting on their behest from transferring, selling, evicting or in any other way interfering with the applicants' right of user and occupation land (sic) parcel L.r No Kericho/merigi/507 pending the hearing and determination of this suit,



- vi. That an order of inhibition be issued inhibiting any dealings in land parcel L.R No. Kericho/merigi/507 pending the hearing and determination of this application and/or until this suit is heard and determined.
 - vii. That the costs of this Application be provided for.
26. Subsequent to filing and service of the application which was accompanied by an Originating summons where the applicants had sought for entitlement to L.R No Kericho/merigi/507 by adverse possession, the respondents filed their Notice of Preliminary Objection to the effect that this matter was *res judicata* Bomet Principle Magistrates Court in ELC Case No. 21 of 2019 which was a similar matter and which had been determined and judgment delivered where the applicants had been evicted from the suit land. That there had been no Appeal preferred.
27. I find the matters for determination as being;
- i. Whether the present suit is *res judicata*.
 - ii. Whether the Preliminary Objection raised is sustainable.
28. On the first issue, the court finds that the doctrine of *res judicata* is important in adjudication of cases and serves two important purposes;
- i. It prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and;
 - ii. It ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.
29. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have been settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
30. The test in determining whether a matter is *res judicata* as stated was summarized in [*Bernard Mugo Ndegwa v James Nderitu Gitbae and 2 others*](#) (2010) eKLR, as follows that:
- i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
31. From the holdings in the above captioned decision, it is clear that a preliminary objection on the ground of *res judicata* cannot be raised as a Notice of Preliminary objection but rather by way of Notice of Motion where pleadings are annexed to enable the court to look at the decision claimed to have settled



the issues in question and the entire pleadings of the previous case and the instant case to ascertain whether the current suit is res judicata or not. In this case, the case number of the previous matter was not disclosed, there were no pleadings or the Judgment and final orders in respect of the impugned case annexed. I also note as did the applicants herein that the Preliminary Objection contained a host of issues that were argumentative and therefore required ascertainment of facts by way of evidence.

32. The all-important case decided by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* (1969) EA. 696 was clear as to what comprised a Preliminary Objection in that the court had held thus:-

“So far as I am aware, a Preliminary Objection consists of 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 dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

33. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, where the court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

34. In the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

35. The upshot thereof is that the Notice of Preliminary Objection dated November 9, 2021, by the respondents is unsustainable herein having failed the test as is stipulated in the above captioned authorities and the same is dismissed with costs to the Applicant s.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 9TH DAY OF MARCH 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

