



**Maru v Wafula (Environment & Land Case 103 of 2008)
[2023] KEELC 15951 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 103 OF 2008
FO NYAGAKA, J
MARCH 2, 2023**

BETWEEN

MANSUKHALAL JESANG MARU PLAINTIFF

AND

FRANK WAFULA DEFENDANT

RULING

1. When this matter came up for further defence hearing today the Defendant sought an adjournment for reasons that his two witnesses were not in Court or available. He also stated that for reason of having filed a preliminary objection yesterday and served, it had to be determined first before the further defence hearing could proceed. I looked at the preliminary objection and noted that indeed it was dated 01/03/2023 and filed the same date. The Defendant informed the Court that he had filed and served it this morning.
2. On his part counsel for the plaintiff acknowledged that indeed he had been served with the Preliminary Objection today morning. But he moved the court to reject the preliminary objection and strike it out for reason that it was brought too late in the day to be heard and was just a gimmick to secure an adjournment given that the Court had given a last one to the Defendant.
3. Having considered the objection to the preliminary objection being on the file, and considering the law that a preliminary point of law can be raised at any stage of a suit and it is a party's right to so do, and that once it is raised, the Court has little room than to hear it first and determine it before taking further steps, the Court overruled the plaintiff's argument and directed that the Preliminary Objection be heard first irrespective of its effect on the adjournment, hearing or the status of the suit. This is because if it succeeded then the suit would be retired on that account. If it did not, the suit would proceed from where it had reached, whether today or another day depending on when the Court would determine it.



4. The court then directed the defendant to prosecute the preliminary objection. At that point the defendant started arguing that he was not prepared to argue the objection orally but would be ready to make written submissions. Regarding that, this Court read bad faith in urging or bringing the preliminary objection at the last hour, just a date to the last defence hearing, and it refused an adjournment of the preliminary objection to another date. It placed the file aside and gave parties time to prepare their arguments on the preliminary objection and argue it later, after the court hearing one matter.
5. In the meantime, the further reason for refusing to give another date for the objection was that owing to the history of this matter, which was in brief, that the defendant had applied for an adjournment of the same for more than a dozen times and also made so many applications in it that in two occasions court has fallen short of declaring him a vexatious litigant but ordered that he seeks leave of court before filing subsequent applications, and as late as 09/02/2023 he had filed an application for both leave and prayers for striking out evidence that had been admitted in 2017 and cross-examined on later, and that application was brought only thirteen days to the last defence hearing, and the court burned midnight oil to determine it by the date of hearing. Thus, the court considered that the preliminary objection may have been brought the last hour to cause an adjournment, but it had to determine it. Lastly, since the preliminary objection takes precedence over other things, the court decided to rule on it before considering the application for adjournment on account of unavailability of witnesses. The court shall consider it after this ruling.
6. In his preliminary objection, the defendant raised four grounds. But when the court prompted him to demonstrate how each was on a point of law purely, he backtracked on the 1st and 4th grounds. He decided to argue grounds 2 and 3 only. He abandoned ground 1 and 4 both having been based on facts and not law.
7. About ground 2, the defendant argued that the suit was statute barred by virtue of Section 7 of the Limitation of Actions act. He argued that by virtue of the plaintiff's claim being that he was the owner of the suit land since November 28, 1991 when he was allocated it, he ought to have filed the suit within 12 years. He argued that the plaintiff claim arose on the November 28, 1991 hence by virtue of Section 7 of the Limitation of Actions Act, the plaintiff could not claim the land from him. The claim was therefore statute barred since it was filed after 12 years.
8. His further argument on the limb was that the plaintiff did not seek leave of court to file the suit. Further, that earlier in the proceedings the court had issued orders barring him from filing applications in the suit without leave of court hence that should apply equally to the plaintiff. He relied on Article 15 (a) (2) (d) of the Constitution, stating that the court should do substantive justice by staying the instant suit on that account.
9. Regarding the 3rd ground of the preliminary objection, the defendant stated that the suit was *res judicata* and ought to be stayed (*sic*). The reason of it being *res judicata* was that the issues being litigated on herein were canvassed and concluded in Kitale CMCC No. 334/2011 as between the parties and there was a judgment delivered by that court on 11/12/2015 and it has never been set aside or appealed from. That the CM's court was of competent jurisdiction and therefore by this suit proceeding this court was being made to sit on the issues on appeal yet this suit was not an appeal.
10. The plaintiff on his part opposed the preliminary objection on the grounds that it had been overtaken by events since evidence had been tendered herein. He argued further that he was the registered owner of the parcel of land in question, having been duly registered as such in 2001 when he obtained title thereto from government. Thus, the suit having been filed in 2008 which was less than seven years since then, it was in time since time started running in 2001.



11. On *res judicata*, the plaintiff's learned counsel directed the court to its ruling of 10/03/2022, specifically at paragraphs 6 and 27 where, according to him, the issues being raised as to the similarity or otherwise of the instant suit with CMCC No. 334/2011 were considered and determined by this court. He then argued that this was an issue that the defendant should have filed an application on and attached evidence in support thereto and that it did not thus qualify as a preliminary objection.
12. To the plaintiff's submissions, the defendant responded that the issue of *Limitation of Actions Act* was pleaded by him at paragraph 4(b) of his defence and counterclaim. Further, he argued that there was an appeal from an order of this court regarding whether or not it had jurisdiction to hear this matter. He said the appeal was being argued in the Court of Appeal in Eldoret, being Appeal No. E006/2023 He then asked that this court stays the proceedings herein pending the determination of the said appeal. He relied on Section 6 of the *Civil Procedure Act* to say this suit was pending determination elsewhere hence it be stayed.
13. This court considered the arguments of the parties for and in opposition to preliminary objection. It also considered the submissions thereto and the law on the same. It noted that if it is not anything about being a design to delay this suit, then the preliminary objection was not well taken by the defendant. It was not well responded to by the plaintiff. Actually, the plaintiff's arguments did not assist this court to determine the issues herein. Lastly, as can be seen from the defendant's submissions that this suit be stayed upon considering the ground of *Limitation of Actions Act* and also that there was a pending appeal in the Court of Appeal, arising from a ruling of this court on jurisdiction, the defendant's intention and desire was and has always been that his suit does not proceed to its meritorious and just conclusion. But thank God and the wheels of justice still turning, today, upon the determination of this preliminary objection, the suit shall either end by way of preliminary objection or be adjourned if the issues raised for adjournment merit it being accepted though it was a last adjournment to the defendant, or the defence proceeds, time allowing: this ruling is being done some minutes to 4.00 pm. There is still time to proceed with the hearing.
14. The issue herein is whether or not the two points taken in the preliminary objection are merited. Since the ruling is being done in the middle of proceedings the court does not have the luxury of quoting verbatim the numerous excerpts on definitions or content on the issues under consideration or even the provisions of law relied on. But it will refer to or mention them in reference as it considers the issues: the ruling ought to be delivered today.
15. A preliminary objection was defined in the seminal case of *Mukisa Biscuits Manufacturing Ltd - vs- West End Distributors* [1969] EA 696: In it the main point by the court was that a preliminary objection has to be on a pure point of law on the assumption that the facts as pleaded are correct. It should not be supported by subsidiary or additional facts than from pleadings. In regard to the correctness of facts pleaded, this court is of the view that the filing of a verifying affidavit goes to buttress the perspective of the Mukisa Biscuits case as to correctness of facts. In that regard it is time that parties who are defendants or whenever plaintiffs/claimants file replies to defences, too should file affidavits verifying the correctness of what they plead in those pleadings. The Rules Committee needs to consider amending the *Civil Procedure Rules* accordingly.
16. That said, I now proceed to consider the first ground of the preliminary objection. Even as I move to that point I wish to state that the prayer by the defendant that this suit be stayed on account of the argument that it is brought outside the *Limitation of Actions*, Section 7 thereof, is not what the law contemplate. In case this court finds the point merited, it can only dismiss the suit or strike it out. A stay of proceedings of a suit is provided for by the law in two ways, or main instances. The first one is where there is a suit previously instituted between the same parties over the same issues, litigated under



- the same title and is pending. That is by virtue of Section 6 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya. If that happens to be the case, the court will stay the subsequent matter or issue until that previous one is concluded. The conclusion of that previous matter on merits will actually lay the basis for the issue being termed as *res judicata* in terms of Section 7 of the [Civil Procedure Act](#).
17. The second instance is where an appeal has been preferred against the decision of an issue in the suit or the suit itself. In this case Order 42 Rule 6 of the [Civil Procedure Code](#) comes in. Of course, the court is alive to fact that according to the [Civil Procedure Rules](#), there are a number of other instances where the court may stay proceedings, for instance, to await and upon selection of a test suit, in interpleader proceedings or when a next friend of a minor is removed or dies. But in relation to the instant preliminary objection, the defendant argued for staying of the instant suit, pending the hearing of an appeal preferred by him against the ruling of this suit. The said ruling was delivered on 05/12/2022 and from the record, it is clear that the defendant ‘took up that issue with himself’ soon after the ruling and the court settled that he would not apply for stay of proceedings as a result. In any event that cannot in any way evolve to form the point of law urged herein.
 18. Turning to the point of law argued, the defendant argued that the suit was statute barred and that he had pleaded Limitation of Action in paragraph 4(b) of his counterclaim hence by virtue of Section 7 of the Act, the suit be struck out.
 19. I have considered the pleadings herein. This suit was filed on November 27, 2008. At paragraphs 4 - 6 of the Plaintiff, the plaintiff averred that the defendant trespassed onto the suit land in September, 2008. He then sought a declaration that he was the owner of the suit land, mesne profits from the defendant, an injunction (permanent) against him and costs of the suit.
 20. The defendant filed a defence and counterclaim on 11/10/2016. In it he pleaded that he had been on the land since 1996. He pleaded Limitation of Actions at paragraph 4(b) of the counterclaim. From the pleadings, it is clear that the claim herein is both on contestation as to ownership and also on trespass onto the suit land. To the plaintiff the defendant entered onto the suit land in September, 2008. The defendant contends that he did in 1996. To my mind, the claim is that the issue of entry onto the land was in September, 2008 and the suit was filed only two months later. Thus, the claim is not based on when ownership may be alleged to have been acquired by the plaintiff whether in 2007 or in 1991. As to whether the defendant has been on the land since 1996 it is a matter of evidence just as the plaintiff claim is. Since the counterclaim is not standing on its own, and must be looked at in terms of the claim by the plaintiff then the issue of Limitation is not at all a bona fide one in terms of Section 7 of the [Limitation of Actions Act](#). To me time for the claim started running in September, 2008 when the alleged trespass took place. This ground therefore fails.
 21. The other ground of preliminary objection was that the suit was *res judicata*. The doctrine of *res judicata* is, to my mind not a preliminary point of law flowing from the pleadings herein clearly. Be that as it may, the defendant claimed that by virtue of the issues herein being similar with those determined by a court of competent jurisdiction in Kitale CMCC No. 334 of 2011, then this suit was *res judicata*. *Res judicata* is provided for under Section 7 of the [Civil Procedure Act](#). The provision is to the effect that “No court should try a suit or issue substantially in issue that has been directly or indirectly in a previous or former suit between the same parties, who litigated under the same title, in a court of competent jurisdiction”.
 22. Further, in [Suleiman Said Shabbal -vs- Independent Electoral and Boundaries Commission & 3 Others](#) [2014] eKLR the Court of Appeal was clear that the issues must have been conclusively determined in the sense of settling the rights of the parties regarding all or any of the matters in issue. Thus, this



court is called upon to look at the preliminary point herein from prism of those requirements the law and the Court of Appeal have given above.

23. I have stated above that the point did not flow directly from the pleadings herein. But I looked at the plaint, the averments in it and the reliefs sought in comparison with the judgment which both parties referred this court to, being Kitale CMCC No. 334/2011. First, I note that the issues had not been directly and or indirectly determined in this court's ruling of 10/02/2022. In that ruling, specifically the paragraphs the plaintiff referred this court to in submissions, the court only noted in passing that the issues did not relate to the instant one and that the judgment was one of the documents of the defendant not admitted by this court. Actually, to support the preliminary objection on that point, the defendant submitted calling upon this court that though not brought in by way of an application, the same judgment had been relied upon by the plaintiff in one of his affidavits. I found the argument neither here nor there as the parties just wanted this court to pronounce itself on the issue on the third point of law - *res judicata*. This court looked at the affidavit of the Applicant sworn on November 18, 2021 which contained the judgment relied on by the defendant, as annexure FW1. I carefully analyzed it. The parties in that case, being Kitale CMCC No. 334/2011 was delivered on 11/12/2015. In terms of Section 7 of the [Civil Procedure Act](#), the Explanation 1 thereof although Kitale CMCC No. 334/2011 was filed about three years after the institution of this suit, it was determined earlier than when the issues herein are being determined. Had it been that the issues therein were similar to the current one, that suit should have been the one to be stayed and not the current one. But it was not. Be that as it may, the court carefully considered that suit in light of Section 7 of the [Civil Procedure Act](#). The judgment in that suit, which was actually attached to the affidavit in support of the application filed by the defendant himself on 05/12/2019 had the following relevant summary features:
- (1) The plaintiff therein was Frank Wafula who is the defendant herein.
 - (2) The defendants therein were Mansukhala J. Maru who is the plaintiff herein, and the Attorney General.
24. That means that the parties litigated under different titles, save for what would have been similar of the counterclaim would have been the one standing on its own. Of fundamental difference is that in Kitale CMCC No. 334/2011 the plaintiff sought general damages, and specific damages of Kshs.50,000/= against the defendants. These were due to malicious prosecution, arrest and detention. These are not the same issues in this suit. As stated above herein, the reliefs are trespass, ownership of title and injunction. Clearly the suit cannot in any way be *res judicata*. And Section 6 of the [Civil Procedure Act](#) cannot apply regarding staying of the suit. The appeal in the Eldoret Court of Appeal does not apply herein since the appeal arose from a ruling of this court and only Order 42 Rule 6 could have applied, and cannot form the basis of the preliminary objection herein and the court has considered it elsewhere.
25. The upshot is that this preliminary objection is hereby dismissed with costs to the plaintiff. As the court was called upon to consider an adjournment, it will do so after this.

RULING DATED, SIGNED AND DELIVERED AT KITALE IN OPEN COURT, THIS 2ND DAY OF MARCH, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE

Ruling read in open Court, in the presence of:

R. E. Nyamu Advocate for Plaintiff

Frank Wafula, Defendant.

