



**Nyanyuki v Openda & another (Environment and Land Appeal
19 of 2022) [2023] KEELC 20469 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 19 OF 2022**

M SILA, J

OCTOBER 4, 2023

BETWEEN

LAZARO MAINYE NYANYUKI APPELLANT

AND

SHADRACK OPENDA 1ST RESPONDENT

DANIEL OMBOGI 2ND RESPONDENT

*(Being an appeal against the ruling of Hon. P.K Mutai (Senior Resident Magistrate)
delivered on 24 August 2022 in the case Kisii CMCC (ELC) No. 48 of 2022)*

JUDGMENT

(Appellant filing suit contending that the respondents have caused creation of a road through his land; together with the plaintiff, the appellant filing an application for injunction; 1st respondent filing a preliminary objection that the suit is res judicata; no previous suit disclosed in that preliminary objection; court directing that the preliminary objection be heard by way of submissions and it is with the submissions that the 1st respondent provided evidence of the previous suit; irregular for the plea of res judicata to be argued through a preliminary objection for evidence of the previous case is required; best that res judicata be canvassed through a formal application supported by an affidavit annexing evidence of the previous suit, or if it is raised in reply to an application by the plaintiff, the replying affidavit should be elaborate and should provide evidence of the previous suit; erroneous for the trial magistrate to have proceeded to address the issue of res judicata in the manner presented; in any event, the documents presented of the previous suit demonstrate that the issue of whether or not a road passes through the appellant's land was never determined; appeal allowed)

1. This is an appeal against the ruling and order of Hon. P.K Mutai (SRM) dated 24 August, 2022 in Kisii Chief Magistrates Civil Case No. 48 of 2022. In the ruling, the trial Magistrate dismissed the said suit for being res judicata after the respondent had



filed a preliminary objection. Various grounds of appeal have been raised but before I address them, I think it is necessary that I give a background to the circumstances leading to this appeal.

2. The trial suit was commenced by way of a plaint dated 23 June, 2022 which was filed in the Chief Magistrate's Court at Kisii on 24 June, 2022. The plaintiff (who is the appellant in this appeal) pleaded that he is the sole registered proprietor of the land parcel LR NO. Kitutu Central/Daraja Mbili/1384. He sued the defendants, the respondents herein, complaining that in the year 2019 they unlawfully entered his land without his consent and proceeded to create an illegal murrum access road therein. The appellant inter alia asked for a declaration that the respondents are trespassers and for a permanent injunction to restrain them from the suit land. Together with the plaint, the appellant filed a notice of motion application seeking a temporary injunction to restrain the defendants from the suit property pending the hearing and determination of his suit.
3. The 1st respondent (sued as the 1st defendant in the suit) entered appearance but did not file a reply to the application nor file defence. Instead, he filed a notice of preliminary objection dated 15th July, 2022. In the preliminary objection the 1st respondent claimed that the court was devoid of jurisdiction to deal with both the application and the suit as the same had expressly been ousted by the provisions of Section 7 of the Civil Procedure Act. In essence, he raised issue that the suit is res judicata. However, no particulars of the previous suit were expounded in the notice of preliminary objection.
4. The parties appeared before the trial Magistrate on 18 July 2022 for hearing of the application for injunction, when Mr. Wesonga, learned counsel for the 1st respondent, stated that he had filed a preliminary objection though he had not served it, and asked to file submissions to the preliminary objection in seven (7) days. Mr. Ochoki, learned counsel for the plaintiff, stated that he was agreeable to dealing first with the preliminary objection. The trial Magistrate directed the preliminary objection to be addressed first and for the parties to file submissions within seven (7) days and the matter was fixed for mention on 27 July 2022. On 26 July 2022, the 1st respondent filed his submissions in support of the preliminary objection. But he did not just file submissions, he also filed what he described as '1st defendant's List of Documents' on 'notice of Preliminary Objection Dated 15th July 2022.' To that document was annexed the following :
 - i. Originating Summons in Kisii CM Misc. No. 4 of 2021.
 - ii. Ruling in Kisii CM Misc. No. 4 of 2021.
 - iii. Order in Kisii CM Misc. No. 4 of 2021.
 - iv. Appeal in Kisii HC ELC No. 22 of 2021.
5. On 27 July 2022, the matter was mentioned as scheduled. Only Ms. Moguche appeared for the plaintiff and there was no appearance on the part of the defendants. It was never made clear whether the submissions and the new document had been served, but Ms. Moguche stated that she would be filing her submissions that day and the court proceeded to reserve ruling for 24 August 2022. I see from the record that the appellant's counsel filed submissions on 11 August 2022.



6. In his submissions, counsel for the 1st respondent, in urging that the preliminary objection be allowed, contended that the suit before court was res judicata owing to the suit Kisii CM's Court Miscellaneous Application No. 4 of 2021. He submitted that this suit was determined through a ruling of 19 October 2021, when it was dismissed with costs. He submitted that the present suit was similar to that which was dismissed. In response, counsel for the appellant submitted that the preliminary objection did not raise pure points of law, but factual issues, which were contestable and thus called for evidence. Counsel pointed out that the Notice of Preliminary Objection did not disclose the case which was alleged to be res judicata. He proceeded to submit that by filing the 'List of Documents' the applicant was inviting the court to rely on evidence in support of the preliminary objection. He invited the court to inter alia consider the decision in the case of *George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another* (2014) eKLR, where Obaga J, dismissed a preliminary objection raising the issue of res judicata, and held that the best way to raise the ground of res judicata is to file a Notice of Motion where pleadings are annexed so as to enable the court determine whether the ongoing suit was res judicata. Counsel added that even if the court was to consider the said 'List of Documents' the suit would not be res judicata as the ruling was on an interlocutory application and not the main claim thus res judicata would not arise.
7. In the ruling, delivered as scheduled on 24 August 2022, the honourable Magistrate held that the suit was res judicata. He found the issues to be similar to those raised in the suit Kisii CMs's Court Miscellaneous Application No. 4 of 2021 and that the issues were determined through the ruling of 19 October 2021. He further held that on 11 November 2021, the plaintiff filed an appeal to the Environment and Land Court 'which was withdrawn.' He proceeded to dismiss the suit on that basis.
8. Aggrieved, the plaintiff filed this appeal on the following grounds :-
 1. That the learned magistrate erred in law and in fact by failing to appreciate that the preliminary objection filed by the 1st and 2nd respondent raised contentious issues of facts as opposed to pure points of law.
 2. That the learned magistrate erred in law and in fact by failing to appreciate that the respondents did not satisfy the salient features/ingredients that are necessary for a holding of a suit being res judicata to be made.
 3. That the learned magistrate erred in law and in fact by failing to appreciate that he alleged former suit filed by the appellant herein against the respondents, the same being the chief magistrate's court ELC Msc Case No. 4 Of 2021 Lazarus Mainye Nyanyuki Vs Shadrack Openda & Another was never heard and determined on merit.
 4. That the learned magistrate erred in law and in fact by failing to take into account that the issues presented in the former suit were not similar as to the issues in the present suit since whereas the former suit was lodged by way of a miscellaneous



application, the present suit was lodged as a substantive suit by way of a plaint.

5. That the honorable court's ruling contravenes chapter 4 of *the constitution* of Kenya, 2010.
6. That the learned magistrate erred in law in not being guided by the strictures enunciated in the famous case of *Mukisa Biscuit Manufacturing Co. Ltd vs West end Distributors Ltd* (1969) EA 696 with regard to what needs to be considered in determining a preliminary objection.
7. That the learned magistrate erred in law and in fact by failing to consider the appellant's submissions and thereby ignoring relevant guiding facts to reach to a fair and reasoned determination and thereby improperly striking out the appellant's suit
8. That the ruling and order of the learned trial magistrate was made with undue regard to technicalities and was in the circumstances unjust.
9. In his prayers, the appellant prays that the ruling of 24th August 2022 be set aside, reviewed and/ revised and the suit be reinstated for hearing and determination.
10. The appeal came up directions on 17th January, 2023, whereby the same was admitted and the court directed the same to be heard by way of written submissions. I have seen the submissions of both counsel for the appellant and counsel for the 1st respondent. In his submissions, counsel for the appellant submitted that the issue raised in the preliminary objection was not a pure point of law as defined in the case of *Mukisa Biscuit Manufacturing Limited vs West End Distributors* (1969) EA 696. He further submitted that the court was wrong in concluding that the present suit was res judicata since the previous suit was never substantially heard and was only an interlocutory application. For the 1st respondent, it was submitted, more or less, that the trial court correctly considered the preliminary objection and came to a proper finding on it. Both counsel relied on various authorities which I have also considered.
11. I think at the outset, I need to address preliminary objections which raise the issue of res judicata. It needs to be understood that when a party is raising the plea of res judicata, what he is saying is that there was a previous similar suit, thus the plaintiff is barred from now filing a new suit raising the same matters addressed in the earlier suit. It goes without saying that one cannot determine whether the current suit is similar to the previous suit without first looking at the pleadings and judgment/order(s) made in the previous suit. The only way a court can determine the question of res judicata is by looking at the evidence presented of the previous suit. Thus, where a defendant merely files a preliminary objection stating that there has been a previous suit, there is no way a court can make a decision, for there will be no evidence of the previous suit attached. Evidence must be adduced. That is why it is not prudent to canvass the plea of res judicata by way of preliminary objection and indeed res judicata is best argued through the filing of a substantive application, supported by an affidavit which annexes and elaborates the previous pleadings. The plaintiff will in such instance have



the opportunity to rebut the assertion of res judicata, through his own evidence or other explanation, after which the court can then assess the material presented and will be well placed to make a determination on the question.

12. What I am saying above was indeed expounded by Obaga J, in the case of *George Kamau Kimani & 4 Others vs County Government of Trans Nzoia* (supra). In that case, the first defendant filed a preliminary objection that the suit was res judicata. In opposing the preliminary objection, it was urged that if the first defendant wished to raise the plea of res judicata, then he ought to file an application. The Judge accepted this view and dismissed the preliminary objection stating as follows :-

“One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata.” The best way to adduce evidence is through an affidavit so that the plaintiff can also there being evidence of the previous pleadings, judgement and/or ruling.

13. I have already expressed myself as upholding this view. If a defendant wishes to contend that a suit is res judicata, the most appropriate way is to file an application to have the suit struck out, where all the evidence relating to the former suit is disclosed; the plaintiff can then have a chance to rebut this position by filing a reply. If it is intended to argue res judicata as a reply to an application filed by the plaintiff, especially an application for injunction, then the replying affidavit must have all the evidence of the previous suit and the plaintiff needs to be given an opportunity to also file an affidavit of his own to respond to the issue. The court can then proceed to make a reasoned determination after all parties have presented their evidence on the subject. Merely stating in a preliminary objection that a suit is res judicata is not sufficient.
14. In our case, the preliminary objection did not even mention what case caused the current suit to be res judicata. It was with his submissions that the 1st respondent submitted what he considered to be evidence of the previous suit. It was irregular for evidence to be tendered to support the preliminary objection, more so at the submissions stage, and I am persuaded that the trial Magistrate fell into error in entertaining the preliminary objection. What he needed to direct, in the circumstances of the case, was the filing of a formal application by the 1st respondent.
15. Apart from the above, even looking at what was presented, I am not persuaded that the trial court came to a correct finding that the suit was res judicata. I have looked at what was said to be the previous suit. There was never any substantial determination of whether or not there is a road passing through the suit land or whether the respondents herein have trespassed into the appellant’s land. In fact, the Magistrate who handled that matter directed that the issues be canvassed in a substantive suit. This is what he said in his ruling of 19 October 2021:

“Some issues have been clarified. Let the relevant authorities from Kisii County Government and/or court (sic) (must have meant County) land



registrar's office visit the site and do a report. The report can be used in a suit if there is any existing now that this is a miscellaneous application.”

16. There having been no decision made, the present suit does not qualify to be res judicata as outlined in Section 7 of the *Civil Procedure Act* which provides as follows :

“No court shall try any suit or issue 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 can claim, litigating under the 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.”

17. As explained above there is nothing that was heard and determined by the previous court. The issue of trespass and whether or not there is a road passing through the suit land is still pending determination.
18. I don't see the need of saying more for it is apparent that I find merit in this appeal. I allow the appeal and set aside the ruling of 24 August 2022 dismissing the suit. I proceed to reinstate the case Kisii CMCC (ELC) Case No. 48 of 2022, and direct that the same do proceed to its logical conclusion.
19. The appellant shall have the costs of this appeal as against the 1st respondent.
20. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 4 DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

