



**Namu & 2 others v Joseph & 3 others (Environment & Land Petition
1 of 2023) [2023] KEELC 21902 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21902 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND PETITION 1 OF 2023
A KANIARU, J
NOVEMBER 8, 2023**

BETWEEN

**MARITINO NJIRU NAMU 1ST PETITIONER
DANIEL IRERI NAMU 2ND PETITIONER
ANDREW IRERI NAMU 3RD PETITIONER**

AND

**GABRIEL NJUE JOSEPH 1ST RESPONDENT
HAZRON NJIRU NAHASHON 2ND RESPONDENT
PIUS KARIUKI NJUE 3RD RESPONDENT
LAWRENCE F.M KAMUGANE 4TH RESPONDENT**

RULING

1. This ruling is on a Preliminary Objection dated 08.02.2023 and filed on 10.02.2023. The objection has been brought by the 1st, 3rd & 4th Respondents and is premised on the following postulates:
 - a. That the Petition is *res judicata*.
 - b. That the Petition is scandalous, frivolous or vexatious, bad in law and is otherwise an abuse of the process of the court.
 - c. That upon the petition being dismissed, this honourable court grants an order that the Petitioners herein vacate from land parcels No. Evurore/Nguthi/2705 - 2706 within thirty (30) days of such dismissal and in default, the Petitioners herein be forcefully evicted by Quickline Auctioneers from the Suit land.



2. It was agreed that the objection be disposed by way of written submissions. The 1st, 3rd & 4th Petitioner's submissions were filed on 07.03.2023. They submitted that there was a petition filed by the Petitioners in court on 06.01.2023 and the subject of the Petition is land parcel No. Evurore/Nguthi/2705 and 2706; that the Petitioners case in the petition is that the 2nd, 3rd and 4th Respondents sold the two pieces of land knowing that the Petitioners are living there; that the 1st Respondent had given them Notice to vacate the said parcels of land and that Namu Ndumo (who was the Petitioners father and is now deceased) had lived on the land and that the land has been developed by the Petitioners who have also buried their relatives there. They stated that they have developments on the land valued at Kenya Shillings Seven Million and that they now seek protection by way of injunction so that status quo can be maintained till their case is heard and determined.
3. The Respondents have further submitted that this case is Res-Judicata because a similar case had only recently been determined by this court vide a judgement delivered on October 19, 2022 in Embu ELC Case No. 55 of 2016 (O.S); that the case involved the 1st & 2nd Petitioner as the Plaintiffs and that in the current case they have only added the 3rd Petitioner to try and make it different; that similarly in the previous case the Defendants were the 2nd and 3rd Respondents herein and that they have added 1st Respondent who is a purchaser and the 4th Respondent who was the registered owner of the suit land and who sold it to the 1st Respondent.
4. It is their case that the prayers in the petition and the Originating Summons are the same because the parties in the Petition and the Originating Summons are substantially the same people and they are seeking ownership of the same land which the court decided with finality that it did not belong to them. They urge on this basis that the Petition herein is Res judicata and that the same should be dismissed with costs. They also urge that once the same is dismissed, the court do order that the Petitioners vacate from the land within 30 days of dismissal failing which they be forcefully evicted.
5. The Petitioners on the other hand filed their submissions on June 21, 2023. They submitted that the Preliminary Objection has no legal basis and urged the court to hear them on their petition and to strike out the said preliminary objection.
6. I have considered the preliminary objection and the rival submissions. The issue for determination is whether the Preliminary Objection has merit.
7. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where Sir Charles Newbold P. stated 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.”

More recently, this same position was expressed in *Muiruri v Kimemia* [2002] 2 KLR 677 and *Sirma v Kiprono* [2005] 1 KLR 197

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.



8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR as cited in the case of *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling) made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

9. In this case, the Respondents have raised their preliminary objection for reasons, inter alia that the suit herein is Res-Judicata, scandalous, frivolous or vexatious, bad in law and is otherwise an abuse of the court process. In the same breath they are also seeking for orders that the Petitioners vacate from the suit land or in the alternative that the court grants eviction orders against them.
10. I will deal with the first two grounds on whether the Petition is Res Judicata and whether it is also scandalous, frivolous or vexatious, bad in law and an abuse of the court process. The 1st and 2nd Petitioners had in the lower court instituted a suit by way of Originating Summons against the 2nd and 3rd Respondents where they were seeking orders that titles to land parcels Evuvore/Nguthi/2705 owned by the 3rd Respondent and Evurore/Nguthi/2706 owned by the 2nd Respondent had been extinguished; that the names of the two Respondents be cancelled as proprietors of the two suit parcels and that the Petitioners be registered as joint owners of the suit lands by way of adverse possession. The court after hearing the case made a determination vide a judgement dated 19.10.2022 that the Petitioner’s had not made out a case for adverse possession against the Respondents. It therefore dismissed their case.
11. The Petitioners have now filed a Petition dated 4.01.2023 involving the same parties but have added the 3rd Petitioner as well as the 1st and 4th Respondents seeking for orders that;
- a. That this court do hereby grant a declaration (sic) order to cancel the name of Gabriel Njue Joseph the 1st Respondent from the land register and that the land registrar to cancel title No’s Evurore/Nguthi/2705 and 2706.
 - b. A declaration (sic) order be and hereby be made by this court to direct Siakago Land Registrar to make sure the name Namu Ndumo remains in the Land Register for land registration No. Evurore/Nguthi/2240.
 - c. That this court be pleased to grant a declaration (sic) order to direct the 1st Respondent to pay Kshs. 7,000,000 plus Kshs. 23,000 paid to the valuer and costs of this suit to the Petitioners.
12. In my view, the orders sought by the Petitioners in their Petition are not very different from the orders they were seeking in the Originating Summons. Moreover, one suit could be filed seeking the same orders in the alternative instead of litigating in instalments as they are now doing. They are still disputing ownership of the suit land herein which the court has already made a determination on. The fact that they have introduced more parties to the Petition or framed the orders they are seeking in a new fashion that seeks to have their deceased father registered as the proprietor of the suit land does not change anything. The nature and subject of dispute remains to be ownership of the land parcel originally known as Evurore/Nguthi/2240 which was subdivided into Evurore/Nguthi/2705 & 2706. This is the same land which the court after hearing all the parties determined they were not entitled to. According to me, it would have been more prudent for the Petitioners if they were not satisfied with



the courts judgement to file an appeal. For these reasons, I find that the Petition herein is Res –Judicata. It is so because it focuses on the issue of ownership which is the same issue dealt with in the originating summons. It is res judicata too in the sense that the issues raised as the subject of determination in the petition could have been canvassed in a proper suit filed to canvass all issues on ownership at once. As things are, the court now is being invited to entertain piecemeal litigation where if ownership fails on one score, another suit is filed to claim ownership on another score.

13. In the case of *Christopher Kenyariri v Salama Beach* (2017) eKLR, as cited in *Alfred Sagero Omweri v Kennedy Omweri Sagero* (2021) eKLR the court clearly stated the ingredients to be satisfied when determining Res Judicata as follows;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) Former suit between same parties or parties under whom they or any of them claim.
- c) Those parties are litigating under the same title.
- d) The issue was heard and finally determined.
- e) The court was competent to try the subsequent suit in which the suit is raised.”

14. Section 7 of the *Civil Procedure Act* Cap 21 also provides that:

“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 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.”

15. Again in the case of *Omondi v National Bank of Kenya Limited and others* (2001) EA 177 as quoted in the case of Alfred Sagero supra the court held that;

“‘Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’ Emphasis mine.

16. The doctrine of res-judicata requires that where a given matter is the subject of litigation before a competent court of law, the parties to that litigation are under a duty to bring forward their whole case. *Res judicata* applies not only to points upon which the court is actually required by the parties to pronounce itself on, but to every other point or issue which belongs to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward in the earlier suit.

17. What the petitioners have done here is to change their approach. Their matter is now brought as a constitutional petition and a few parties are added to give it a cosmetic facelift. But it is clear that they are claiming ownership of the same parcels of land. To the extent that the petitioners are trying to have a second bite at the cherry, I find the matter before me to be an abuse of the court process. It is unfair



to allow the respondents to be subjected to litigation twice over the same subject matter and regarding the same issue of ownership. In *Benjob Almagamated Ltd v KCB*: Petition No. 352 of 2007 Emukule J (as he then was) observed that a petition can be struck out or dismissed for being res judicata, or where it is barred by statute, or if it is scandalous, frivolous or vexatious. To me, the petition before this court should suffer this kind of fate. In addition to being res judicata, I also find it frivolous and vexatious having regard to the circumstances.

18. Regarding the third ground that upon the petition being dismissed the court grants orders for the Petitioners to vacate the suit land or for orders of eviction. It is my view that this objection does not constitute a proper ground to be raised in a preliminary objection as it is not based on a point of law. It calls upon this Court to inquire into evidence to ascertain whether or not the Respondents are entitled to the said orders. As outlined above, a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The preliminary objection therefore fails on this ground.
19. The upshot of the foregoing is that I allow the preliminary objection in terms of grounds (1) and (2) with costs to the 1st, 3rd & 4th Respondents and dismiss the Petition filed herein on January 6, 2023 and dated January 4, 2023 with costs to the Respondents.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 8TH DAY OF NOVEMBER, 2023.

A.K. KANIARU

JUDGE

In the presence of;

M/s Wachiaga for M/s Fatuma Wanjiku for respondents petitioners in present in person.

Interpretation: English/Kiswahili

