



REPUBLIC OF KENYA



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**Ndolo v Reuben & 72 others (Environment & Land Case E019 of 2022)  
[2023] KEELC 21521 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21521 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E019 OF 2022  
TW MURIGI, J  
NOVEMBER 8, 2023**

**BETWEEN**

**ANDREW NDOLA NDOLO ..... PLAINTIFF**

**AND**

**REUBEN & 72 OTHERS ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Notice of Preliminary Objection dated 28<sup>th</sup> of December 2022 raised by the Defendants on the following grounds:-
  1. The suit/Application is res judicata to ELC No. 226 of 2014 Elizabeth Kamene Ndolo vs Reuben & 84 others.
  2. The application is filed contrary to Section 7 of the *Civil Procedure Act* 2010 and therefore the court lacks jurisdiction to grant the orders prayed for.
  3. The application is bad in law, vexatious and an abuse of the court process.
2. The parties were directed to canvass the preliminary objection by way of written submissions.

**The Applicants Response**

3. The Applicant filed a replying affidavit on 8<sup>th</sup> May, 2023 in opposition to the preliminary objection. He averred that the preliminary objection does not meet the threshold of what amounts to a preliminary objection. The Applicant contended that he filed Civil Suit No. 226 of 2014 together with the application seeking leave to file suit out of time. He averred that the Plaint in Civil Suit No. 226 of 2014 was not admitted because the application for leave to file suit out of time was dismissed.
4. The Applicant argued that Section 7 of the *Civil Procedure Act* applies in cases where the same parties have been heard and the matter determined on merits as opposed to suits which are dismissed on



technical points. He insisted that the civil suit No. 226 of 2014 was dismissed on the grounds of being filed out of time.

### **The Respondents Submissions**

5. The Respondents submissions were filed on 24<sup>th</sup> March, 2023.
6. On their behalf, Counsel submitted that the instant preliminary objection has met the threshold set out in the case of *IEBC Vs Jane Cheperenger & 2 Others [2015]* eKLR where it was held that 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.
7. It was submitted that the Applicant had filed a similar application against the Respondents herein vide Nairobi ELC Case No. 226 of 2014 Elizabeth Kamene Vs Reuben & 84 Others and that judgment was delivered in the previous suit. Counsel maintains that the issues raised in the preliminary objection are not contested, hence it is valid and properly taken. To buttress his submissions, Counsel urged the Court to uphold the preliminary objection and dismiss the suit with costs to the Respondents.

### **The Applicants Submissions**

8. The Applicant's submissions were filed on 8<sup>th</sup> May, 2023.
9. On his behalf, Counsel raised the following issues for the court's determination:-
  - i. Whether this suit is res judicata to ELC No.226 of 2014.
  - ii. Who bears the costs.
10. On the first issue, Counsel submitted that the principle of res judicata is anchored on Section 7 of the *Civil Procedure Act* 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 nor 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.”
11. Counsel contended that in ELC Case No. 226 of 2014, the Applicant intended to file a suit seeking orders similar to the orders in the present application. That since the Court did not admit the suit out of time, the matter was not heard and finally determined.
7. Relying on the Court of Appeal case of *Uhuru Highway Development Limited Vs Central Bank of Kenya & 2 Others [1996]* eKLR, Counsel submitted that for a plea of *res judicata* to succeed, the Applicant must satisfy the following conditions: -
  - i. The suit or issue was directly and substantially in issue in the former suit;
  - ii. The former suit was between the same parties or parties under whom they or any of them claim;
  - iii. Those parties were litigating under the same title;
  - iv. The issue was heard and finally determined in the former suit;
  - v. 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.



7. Counsel argued that ELC Case No. 226 of 2014 was not heard and determined on merits because the Plaintiff was not granted leave to file the originating summons out of time. It was submitted that the merits of the dispute herein have not been delved into and therefore a cardinal ingredient of the res judicata principle was missing. Counsel implored the Court to grant the parties an opportunity to ventilate their issues as dismissing the suit would amount to ejecting the Plaintiff into the abyss without the prospect of being heard on merits.
7. Urging the Court to dismiss the preliminary objection herein, the Plaintiff/Applicant relied on the list and bundle of authorities filed together with his submissions on even date.

### **Analysis And Determination**

7. Having considered the preliminary objection, the affidavit and the rival submissions, the only issue for determination is whether this suit is res judicata to ELC Case No. 226 of 2014.
8. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
12. The principles as to what constitutes a Preliminary Objection were laid down by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696, where Law JA stated as follows:-
 

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
13. Further on Sir Charles Newbold JA stated:-
 

“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 demurrer. It raises a 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 had to be ascertained or if what is sought is 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.”
14. The Respondents Preliminary Objection is based on the grounds that the instant suit is res judicata and an abuse of the court process. The issue of res judicata is a pure point of law which if argued as a preliminary point may dispose of the suit. The Notice of Preliminary Objection raised by the Respondents fits the description of what amounts to a Preliminary Objection as stated in the Mukisa Biscuits Case (supra).
15. The doctrine of res judicata is anchored in Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya 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 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.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it...

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

Explanation. - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

16. The doctrine of res judicata has been defined in the [\*Black’s Law Dictionary\*](#), 9<sup>th</sup> Edition at page 1425 as follows:

“a thing adjudicated”

1. An issue that has been definitively settled by judicial decision.
2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

17. The elements which must be present to succeed on a defence of res judicata were enunciated in the case of [\*Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others \[2017\]\*](#) eKLR where the Court of Appeal held that:-

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

The suit or issue was directly and substantially in issue in the former suit.

That former suit was between the same parties or parties under whom they or any of them claim.

Those parties were litigating under the same title.

The issue was heard and finally determined in the former suit.

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.”

18. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.
19. 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 Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.

20. The essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. That was the holding in the case of Omondi Vs National Bank of Kenya Ltd and Others (2001) EA 177.
21. Turning to this case, the record shows that the Applicant vide the Originating Summons dated 27<sup>th</sup> of February, 2014 brought under order 37 Rule 6 of the *Civil Procedure Rules* and Section 7 and 22(iii) of the Limitation of Actions Act sought for leave to file suit for permanent injunction to secure property L.R. No 1757/6 from further encroachment, waste, subdivision, grazing upon and acts of waste being committed by the Respondents on the parcel of land out of the prescribed period of time.
22. The application was canvassed by way of written submissions. Vide the ruling delivered on 12<sup>th</sup> February 2015, the application was dismissed with costs to the Respondents. In its ruling the court stated as follows in part:-

“.....Section 22(iii) which the Applicant urges as providing for suits for recovery of land to be brought within 30 years from the date when the action accrued has no application in the circumstances of the present application.....Disability has to be proved and established in order for an applicant who relies on Section 22 of the law of Limitation Act to succeed in an application for extension of the limitation period. The applicant has not shown that she was under any disability and I hold she was not. In the result and for all the reasons canvassed above IO find the application by the applicant dated 27<sup>th</sup> February 2014 to be devoid of merit and I order the same dismissed with costs to the Respondents.”

23. It is clear from the above ruling that the Applicant was not granted leave to file the originating summons out of time. It goes without saying that the Originating Summons was not admitted for hearing and determination. The parties and the matters in issue in both suits are substantially the same.
24. The record shows clear that ELC No. 226 of 2014 was not heard and finally determined. In the end, I find that the doctrine of res judicata does not apply in the instant case.
25. The upshot of the foregoing is that the preliminary objections are devoid of merit and the same is dismissed with costs to the Plaintiff/Respondent.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2023.**

In the presence of:-

Court assistant - Mr. Kwemboi.

Jamatia holding brief for Ndalila for the Plaintiff/Applicant.

Muoka for some of the Respondents

