



**Nzioki v Lukenya Ranching & Farming Co-operative Society & 3 others (Environment & Land Case E24 of 2020) [2022] KEELC 2676 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E24 OF 2020**

**A NYUKURI, J**

**MAY 4, 2022**

**BETWEEN**

**GERALDINE GUDI NZIOKI ..... PLAINTIFF**

**AND**

**LUKENYA RANCHING & FARMING CO-OPERATIVE SOCIETY .... 1<sup>ST</sup>  
DEFENDANT**

**THERESIA NDUKU MUALUKO ..... 2<sup>ND</sup> DEFENDANT**

**JAMES MUTISYA MUTUKU ..... 3<sup>RD</sup> DEFENDANT**

**ALI MOHAMED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. Vide a Notice of Preliminary Objection dated 5<sup>th</sup> March 2021, the 3<sup>rd</sup> Defendant stated that he will raise a preliminary objection on a point of law to the Plaintiff's suit on the following grounds;
  - a) The subject suit land before this court is the same subject before the Co-operative Tribunal case No. 195 of 2008.
  - b) The suit before this court is a duplicity of the said Co-operative Tribunal case.
  - c) This Honourable court lacks jurisdiction over the Plaintiff's claim.
2. The Preliminary objection was canvassed by way of written submissions. On record are the 3<sup>rd</sup> Defendant's submissions filed on 18<sup>th</sup> June 2021. No submissions were filed by the Plaintiff.



## Submissions

3. Counsel for the 3<sup>rd</sup> Defendant submitted that the Plaintiff had pleaded that she was the administrator of the estate of the late Fredrick Mwosa Nzioki, who was the claimant in the Tribunal case, and that she pleads that the said suit is still pending before the Tribunal. Counsel argued that the subject matter in this suit is the same subject matter in the Tribunal case, to wit Plot number 483 (Now registered as Mavoko Town Block 3/3155).
4. Counsel relied on the case of *Joseph Kibaara M'icuga v M'Chabari Kinoro* [2020] eKLR and *Republic v Registrar of Societies-Kenya & 2 Others ExParte Moses Kirima & 2 Others* (2017) eKLR and argued that Section 6 of the *Civil Procedure Act* to argue that this suit is sub judice. Counsel averred that on 3<sup>rd</sup> November 2008 the Tribunal granted interim orders of injunction, which are the same orders the Plaintiff is seeking; that on 16<sup>th</sup> February 2009 the parties entered a consent before the Tribunal for maintenance of status quo; that the orders of the Tribunal made on 3<sup>rd</sup> November 2008 and 16<sup>th</sup> February 2009 renders the Plaintiff's application res judicata and that the Plaintiff filed this suit despite being aware that the Tribunal suit was pending. Counsel argued that these proceedings are parallel to the cooperative proceedings and sought to have the Plaintiff as well as the application dated 29/10/2020 be struck out for being res judicata.

## Analysis and Determination

5. I have considered the preliminary objection as well as submissions filed by the 3<sup>rd</sup> Defendant. Although the Plaintiff did not file any submissions in respect of the Preliminary objection, it is upon the 3<sup>rd</sup> Defendant to satisfy the court that the preliminary objection is a valid preliminary objection and that the same is merited, as those are the issues that this court will address.
6. A preliminary objection is an objection based purely on a point of law and which if considered may dispose of the suit without the need to ascertain the facts of the case. A preliminary objection cannot be anchored on disputed facts. (See the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* [1969] EA 696). Jurisprudence on preliminary objections within our jurisdiction point to the position that a preliminary objection must be stated with precision and ambiguity in terms of the objection will render the objection invalid.
7. While the 3<sup>rd</sup> Defendant merely stated that the subject matter in this suit is the same as that in Cooperative Tribunal Case No. 195 of 2008, and that there was duplicity of cases and this court lacked jurisdiction, the objection did not state which law the suit offended, or how the same subject matter in the two suits meant lack of jurisdiction on the part of the court. It is only in the submissions that the 3<sup>rd</sup> Defendant mentioned Section 6 of the *Civil Procedure Act* and also stated that the suit is both sub judice and res judicata and sought for the suit to be struck out.
8. Besides, the 3<sup>rd</sup> Defendant raised factual matters in his submissions stating that an order was made on 3<sup>rd</sup> November 2008 and a consent order made on 16<sup>th</sup> February 2009 in the case before the Tribunal and therefore the application is res judicate while the suit is subjudice. In my understanding, these are factual matters upon which a preliminary objection cannot be premised. The argument that the application is res judicata while the Plaintiff is sub judice is an argument only raised in the submissions as the preliminary objection does not mention any application. It is my considered view that matters of subjudice and resjudicata require evidence and cannot be canvassed by way of a preliminary objection, which is limited in scope. In my considered view, the question as to whether a suit is sub judice or res judicata is a matter that needs proof by way of evidence and cannot be raised by way of preliminary objection. They ought to be raised by way of Notice of motion to allow the applicant avail evidence of



res judicata or sub judice. I am persuaded in my reasoning by the case of *Kandara Residence Association & Another v Ananas Holdings Ltd & 4 Others; Director of Survey & 3 others (Interested Parties)* [2020] eKLR, where the court cited with approval the reasoning in *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* [2014] eKLR, where the court held as follows;

That restatement of the limited scope of a preliminary objection brings me to the point where I hold that the Preliminary objection by the 1<sup>st</sup> Defendant is not a true preliminary objection in the sense of the law. The issues of Resjudicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objections. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly.

9. Indeed the practice of raising preliminary objections on matters that cannot be raised by way of preliminary objection should not be encouraged by courts. Seeking to have a suit struck out for want of jurisdiction is a serious matter which should only be entertained in clear cases where the law shows that the court lacks jurisdiction and not where the defendant refers to evidence; which the court should not consider in preliminary objections. In view of the foregoing, I find and hold that the preliminary objection dated 5<sup>th</sup> March 2021, is not a proper preliminary objection and the same is dismissed with costs.
10. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4<sup>TH</sup> DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

No appearance for the Plaintiff

No appearance for the Defendants

Ms Josephine Misigo – Court Assistant

