



**Delta Connections Limited v Deche (Environment & Land Case
16 of 2019) [2022] KEELC 13305 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2019**

**MAO ODENY, J
OCTOBER 3, 2022**

BETWEEN

DELTA CONNECTIONS LIMITED PLAINTIFF

AND

ALFRED MWARINGA DECHE DEFENDANT

RULING

1. This ruling is in respect of the defendant's notice of preliminary objection dated May 3, 2019 on the grounds: -
 - 1) That this suit is time barred by dint of section 7 of the [Limitation of Actions Act](#);
 - 2) That this suit is res judicata Civil Suit No 203 of 2000, Land Disputes Tribunal Case No 2/96, Kilifi SRMCC No 32 of 1996, Mombasa High Court Case No 161 of 1997, Civil Appeal No 2013 of 2000 and Civil Suit No 4707 of 2004; and that the suit is also sub judice Civil Suit No 203 of 2000, Mombasa High Court Case No 161 of 1997, Civil Appeal No 2013 of 2000 and Civil Suit No 4707 of 2004.
2. The plaintiff, through a further affidavit sworn on July 22, 2019 by Moses Waweru Ndung'u denied any participation in the former suits by itself, its directors or its advocates Messrs Omondi Waweru & Company Advocates.
3. Counsel agreed to canvas the application vide written submissions of which the plaintiff's counsel did not comply.

Defendant's Submissions

4. Counsel submitted that the directors and shareholders of the plaintiff company were the same plaintiffs in the mention suits above where the dispute was over land portion no 67 Takaungu plot 1, the suit property herein hence the present suit is *res judicata* by dint of section 7 of the [Civil Procedure Act](#).



5. Counsel relied on the cases of *ET v Attorney General & another* [2012] eKLR; *Omondi v National Bank of Kenya Limited* [2001] EA 177; *Njagu v Wambugu & another* Nbi HCCC No 2340 of 1991; Nyahururu ELC Case No 184 of 2017 *Charity Njanja Mwanji v James Mwaniki Gatari & another*; and Eldoret ELC No 19 of 2019 *Diocese of Eldoret Trustees Registered v Attorney General & 2 others* and urged the court to uphold the preliminary objection and dismiss the plaintiff's suit with costs.

Analysis and Determination

6. The issue for determination is whether the preliminary objection has merit to render this suit res judicata. The court is guided by the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, on preliminary objections which states that preliminary objections consist of pure points of law which has been pleaded and if argued may dispose of the suit.

7. Preliminary objections must also not deal with disputed facts as was held in the case of *Oraro v Mbaja* (2005) eKLR, where the court stated that: -

“As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

8. Section 7 of the *Civil Procedure Act* which stipulates 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.”

9. The defendant claims that the suit is *res judicata* as the plaintiff company and its directors have been parties to Civil Suit No 203 of 2000, Land Disputes Tribunal Case No 2/96, Kilifi SRMCC No 32 of 1996, Mombasa High Court Case No 161 of 1997, Civil Appeal No 2013 of 2000 and Civil Suit No 4707 of 2004; and that the suit is also sub judice Civil Suit No 203 of 2000, Mombasa High Court Case No 161 of 1997, Civil Appeal No 2013 of 2000 and Civil Suit No 4707 of 2004.

10. From the pleadings annexed, it is evident that the plaintiff company herein was never at any point a plaintiff in the former suits mentioned by the defendant which the defendant also admits. However, the defendant contends that the directors and shareholders of the plaintiff company are one and the same as the plaintiffs in the former company.

11. It is trite law that a company is a separate legal entity from its directors and shareholders. Section 7 provides that the former suit must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title.

12. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & another* (2014) EKLR, the court held that: -

“That re-statement of the limited scope of a preliminary objection brings me to the point where I hold that the preliminary objection by the 1st defendant is not a true preliminary objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st defendant. They are incapable of being handled as preliminary objections because of



the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

13. 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* or whether it is *sub judice*. Even though the defendant filed a list of documents with submissions in support that this suit is res judicata, this should have been annexed to a supporting affidavit to the application to enable the plaintiff respond to such allegations. This amounts to backdoor shortcut to a hearing and determination of the suit through partial evidence that does not benefit from the veracity of cross examination.
14. On the issue whether the suit is time barred the applicant dwelt largely on the issue of *res judicata* but did not address this issue. From the plaint, it is shown that the cause of action arose in 2012 and this matter was filed in 2019. It follows that the plaintiff's right to sue for recovery of land has not been extinguished.
15. I find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

