



**Kahawa Sukari Limited & 2 others v Nkonge (Civil Appeal
E007 of 2024) [2025] KEHC 2351 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E007 OF 2024
FN MUCHEMI, J
MARCH 6, 2025**

BETWEEN

KAHAWA SUKARI LIMITED 1ST APPELLANT

ALICE WACHEKE MUIRURI 2ND APPELLANT

S.B. MBUGUA 3RD APPELLANT

AND

TIMOTHY NJAGI NKONGE RESPONDENT

RULING

Brief facts

1. Coming up for determination is the respondent's Notice of Preliminary Objection dated 13th December 2024 on the grounds that the application is *res judicata*, incompetent, superfluous, fatally defective, misconceived, lacks merit and is an abuse of the court process. The respondent argues that the entire suit is *res judicata* because a similar suit over the same property was heard and determined by Honourable Lady Justice Kemei on 18th November 2024 in Environment and Land Court at Thika. The respondent relies on the Supreme Court case of [John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport & Infrastructure & 3 Others](#) in Petition No. 17 of 2015 [2021] KESC 39 (KLR) (C 40) 9th August 2021 and argues that a plea of *res judicata* holds that once the legal rights of parties have been judicially determined, such edit stand as conclusive statement as to those rights.
2. The respondent refers to the case of [Owners of Motor Vessel "Lilian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR and states that this honourable court has no jurisdiction to hear and determine the prayers on property in the application as the Court of Appeal has made a decision on the same by dismissing similar prayers. The respondent states that the entire memorandum of appeal and appeal ought to be struck out.



3. The appellants did not put in any response.

The Law

Whether the preliminary objection is sustainable.

4. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....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.

5. Sir Charles Newbold P. stated:-

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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

6. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR 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. Further in the case of *Hassan Nyanje Charo v Khatib Mwasbetani & 3 Others*, [2014] eKLR the court held that:-

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. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

9. The respondent argues that the instant appeal is *res judicata* as the appellants filed an appeal in the Environment and Land Court being Thika ELCA No. E002 of 2024 which was determined by the court on 18th November 2024.

10. The doctrine of *res judicata* is anchored in Section 7 of the *Civil Procedure Act*. It provides:-

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 issue has been subsequently raised, and has been heard and finally decided by such court.



11. The Court of Appeal in the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR held:-

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

- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That the former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. 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.
12. It is clear from the decisions cited herein that for *res judicata* to suffice, a court should look at all the four corners 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.
13. The appellants instituted this appeal on 15th January 2024 where they sought to appeal from the decision of Honourable C. K. Kisiangani in Ruiru MC ELC Case No. E069 of 2022 delivered on 14th December 2023. The appellants pray that the said judgment of the trial court be set aside on the grounds that the learned trial magistrate erred by finding that the respondent should be compensated Kshs. 5 million. The appellants further argue that the learned trial magistrate erred in awarding the respondent Kshs. 200,000/- as general damages for breach of agreement and failed to find that there was privity of contract between the respondent and the appellants so as to give rise to breach of agreement. Additionally, the appellants challenged the pecuniary jurisdiction of the court as the value of the suit property was Kshs. 12 million.
14. The appellants instituted an appeal in the Environment and Land Court being Thika ELCA E002 of 2024 against the decision of Honourable CK. K. Kisiangani in Ruiru MCECL No. 69 of 2022 delivered on 14th December 2023. On perusal of the memorandum of appeal dated 12th January 2024, the appellants pray that the decision of the trial court be set aside on the grounds that the trial court erred by awarding general damages of contract and interest on special damages of Kshs. 5 million from 18th March 2017 as opposed to from the date of filing the suit. The appellants further stated that the learned trial magistrate erred by finding the 2nd & 3rd appellants liable by lifting the corporate veil without the same having been pleaded or evidence led to support the lifting of the corporate veil. Additionally, the trial court erred by failing to find that the non joinder of Uzima Investments Limited was fatal to the suit.
15. It is not disputed that ELC court heard and determined the first appeal ELCA E002/2024 and rendered its decision on 18th November 2024. In respect of the judgment of Hon. Kisiangani in Ruiru CM ELC case No. E069 of 2022. This appeal is also against the same Ruiru case. The parties in both appeals are similar and the grounds of appeal are the same. Additionally, the Environment and Land Court in Thika, being a court of competent jurisdiction, rendered its decision on 18th November 2024.



16. It is noted that the appellant did not file submissions in respect of the Preliminary objection. This confirms that he was trying his luck in in this court having lost the first appeal before the Thika ELC court before Hon. Lady Justice Kemei.
17. I reach a conclusion that this appeal is *res judicata* having been determined by a court of competent jurisdiction, rendered its decision on 18th November 2024. It is my considered view that the matter is *res judicata*.
18. Accordingly, the notice of preliminary objection dated 13th December 2024 has merit and is hereby upheld.
19. This appeal is hereby struck out for being improperly before the court with costs to the respondent.
20. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 6TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

