Gitonga v Njuguna & another (Constitutional Petition E010 of 2024) [2025] KEHC 8387 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8387 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CONSTITUTIONAL PETITION E010 OF 2024

DKN MAGARE, J

JUNE 12, 2025

BETWEEN

CHARLES WAMBUGU GITONGA .... PETITIONER

AND

DORCAS WAITHIRA NJUGUNA .... 1ST RESPONDENT

JOHN MWAURA KAMAU .... 2ND RESPONDENT

RULING

1. This is a ruling arising from a Preliminary Objection dated 13.3.2025 and raised by the Respondents. The preliminary objection is on the ground that the petition is res judicata within the meaning of Section 7 of the *Civil Procedure Act*.
2. The pleading on the face of the notice of preliminary objection about the practicing status of the advocates and lack of audience before court on account of failure to satisfy costs are not matters to be settled under a preliminary objection. I disregard them as such and summarily dismiss those prayers save for the first prayer on res judicata.

Submissions

3. The Respondents filed submissions dated 19.5.2025 in support of the Preliminary Objection. It was submitted that the preliminary objection raised by the Respondents was based on res judicata under Section 7 of the *Civil Procedure Act* which bars the court from trying any suit or issue that has been previously adjudicated upon by a competent court as the issues raised in the present Petition have already been directly and substantially dealt with in a previous suit, Chief Magistrate's Court at Nyeri Civil Suit No. 69 of 2023 – Charles Wambugu Gitonga vs Dorcas Waithira Njuguna and John Mwaura Kamau.

4. Reliance was place inter alia on the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, where the Court of Appeal while considering the said provision held that the elements outlined thereunder have to be satisfied conjunctively for the doctrine to be invoked. That is: (a) The suit or issue was directly and substantially in issue in the former suit. (b) That 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.

5. The Petitioner also filed submissions dated 20.5.2025. It was submitted that the Preliminary Objection dated 13th March 2025 by the Respondents, is not merited on the ground that the matter between the Petitioner and the two Respondents has never been tried on merit nor is there a final and valid judgment regarding the issues as there was only a ruling striking out the matter for having been filed outside the stipulated statutory period.

6. The Petitioner cited Section 7 of the *Civil Procedure Act*, (Cap 21), which defined Res Judicata as follows;

> " No court 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 titles, in a court competent to try such subsequent suit or the suit in which issues has been subsequently raised, and has been heard and finally decided by such court…"

7. Reliance was also placed on Christopher Mwangi Gakuru vs Kenya National Highway Authority & 5 others [2013] eKLR, as follows:

> " .....for Res Judicata to be invoked in matter, the issue in the present suit must have been decided by the competent court…

Analysis

8. The issue is whether the Preliminary Objection is merited.

9. The court has first to find whether the Preliminary Objection meets the test of what a preliminary objection is before venturing to determine its merit. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation as hereunder : -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

10. The proper contents of a preliminary objection would be allegation that relate but are not limited to objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from. In the Tanzania Court of Appeal sitting in Dar Es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020)

[2010] TZCA 30 (29 December 2010), Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> “ At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.”

11. Based on the above disposition, a Preliminary Objection does not anticipate a demur that leads the court into an evaluation of the facts and evidence. A preliminary objection is not to be regarded as a bushel well hidden in chuff or light hidden under a bushel. There can be no inference on a matter of evidence without trying the information or the document that is thought to contain the evidence and the moment this happens, the matter ceases to be a preliminary question of inquiry based on which preliminary objections stand.

12. In this case, the contention is on the doctrine of res judicata. The Respondents’ position is that the matter is res judicata since the Petitioner filed a civil suit in Nyeri CMCC No. E069 of 2023 alleging the same cause of action against the Respondents and which was struck out on the basis of being time barred. The Petitioner indeed admitted to this fact and averred that as the decision striking out the suit was a ruling, it did not determine the rights of the parties who were not heard on the merits.

13. The issue of limitation of actions was a legal issue and the same position has not changed. 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. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra) as follows: -

> “ A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
>
> “….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. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
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> At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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….”

14. It is the finding of this court that as it is the common position of the parties that the Respondents' Preliminary Objection in Nyeri CMCC No. E069 of 2023 was allowed striking out the suit on the ground that the suit was filed outside the statutory period, the same rested the legal issue of limitation of action.

15. It is my view that a preliminary objection must be based on current law, and be factual. The facts should not be disputed. It is paramount for this court to also discern whether the issues raised by the Defendant in the Preliminary Objection can dispose of the Plaintiff's suit. The objection is premised on Section 6 of the *Arbitration Act*. Justice Prof. J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

16. There being no material before this court or allegation by any party that there is any pending appeal on the said finding of the lower court, that decision has an effect to this Petition. I understand the Petitioner to aver that merely because the issues in Nyeri CMCC No. E069 of 2023 were not determined on merits vide a judgment, then the question of res judicata should not arise. I think not. As the issue of limitation of actions was a legal issue, it settled the issues on timeous filing of the suit and I find basis to draw inference that the questions of the jurisdiction to deal with suits that are outside the time limited by law is alive and applicable herein. The matter is as such res judicata and I dismiss it.

17. The Court of Appeal [Makhandia,Ouko & M'Inoti JJA.] posited as follows regarding *limitation of actions act*, per K. M'Inoti JA:

> In determining whether limitation of a guaranteed right is justifiable in an open and democratic society based on the values set out in Article 24(1), it is permissible to look at the practice of other open and democratic societies. (See the decision of the South African Constitutional Court in Richter V. The Minister for Home Affairs & Others (CCT03/09, CCT 09/09) [2009] ZACC 3). In the PYE CASE, the Grand Chamber stated as follows on adverse possession laws in the European Union:
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> > " 72. It is plain from the comparative material submitted by the parties that a large number of member States possess some form of mechanism for transferring title in accordance with principles similar to adverse possession in common-law systems, and that such transfer is effected without the payment of compensation to the original owner.
> >
> > Bearing in mind the prevalence of laws on limitation of actions and adverse possession, both in commonwealth and civil law jurisdictions, though with clear variations and differences, I would find the limitation to the right to property through the doctrine of adverse

possession to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

18. The Court of Appeal [MSA Makhandia, SP Ouko, K. M'INOTI] in the case of Gabriel Mutava, Elizabeth Kwini & Mary Martha Masyuki v Managing Director Kenya Ports Authority & Kenya Ports Authority [2016] KECA 411 (KLR), held as follows:

> Of course, violations of constitutional rights may nonetheless be different, and more serious than the violations of statutory or contractual rights. There is no clear demarcation however, where one violation begins and ends, and when one violation should attract desperate remedies. In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.
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> A corollary to the foregoing is the principle of constitutional avoidance. The principle holds that where it is possible to decide a case without reaching a constitutional issue that should be done. In the case of Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others, Petition No. 14, 14A, B & C of 2014, the Supreme Court delivered itself thus on the issue:
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> "
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> 256 The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
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> > "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
>
> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936))."

19. There is no other constitutional issue raised that was not raised or could not be raised in the former suit. Consequently, the suit is res judicata. The preliminary objection is therefore merited and I allow it.

20. The next question is the issue of costs. Award of costs in this court are governed by Section 27 of the *Civil Procedure Act*. Costs are discretionary but the discretion must be exercised judiciously.

21. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

22. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

23. Costs of Ksh. 55,000/= will suffice.

Determination

24. The upshot of the foregoing is that I make orders as follows:

    a. The Notice of Preliminary Objection dated 13.3.2025 is merited and is allowed.

    b. The Petition is hereby struck out for being res judicata.

    c. The Respondents shall have costs of Ksh. 55,000/=.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF JUNE, 2025.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Applicant

Ms. Musyimi for the Respondent

Court Assistant – Michael