



REPUBLIC OF KENYA



**Mwangi & 10 others v Registered Trustees of Shree Cutch Satsang Swaminarayan & another
(Civil Appeal E264 of 2023) [2024] KEHC 16918 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 16918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E264 OF 2023
F WANGARI, J
SEPTEMBER 20, 2024**

BETWEEN

**ANDREW MWANGI 1ST APPELLANT
ANGELA MUNYAO 2ND APPELLANT
BEVAN I WYNES 3RD APPELLANT
ALICE ADHIAMBO OBUOLA 4TH APPELLANT
DAVID AKOYO OBARE 5TH APPELLANT
FARIDAH K. MBALA 6TH APPELLANT
BEATRICE JUMWA KARISA 7TH APPELLANT
JUNE WANGECI MAINA 8TH APPELLANT
FELISTAS W. NJOROGE 9TH APPELLANT
NANCY WAKARINDI GACHAGE 10TH APPELLANT
WAKESHO MWAKIO 11TH APPELLANT**

AND

**REGISTERED TRUSTEES OF SHREE CUTCH SATSANG
SWAMINARAYAN 1ST RESPONDENT
ALFAJIRI AUCTIONEERS 2ND RESPONDENT**

RULING

1. The ruling relates to a Notice of Preliminary Objection by the Respondent dated 16/04/2024. The Preliminary Objection is premised on the following grounds:



- a. That the application filed is *res judicata*.
 - b. That the application is filed contrary to section 7 of the [Civil Procedure Act](#) and therefore the honorable court lacks jurisdiction to grant the orders prayed for.
 - c. That the continued pendency of this application is an abuse of the process of this honourable court.
2. The Preliminary objection was in respect to the Applicant’s Notice of Motion dated 26/03/2024. Directions were taken that the Preliminary Objection be canvassed by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions.

Analysis and Determination

3. I have considered the pleadings and the court proceedings. The issues for determination are;
- a. Whether the Preliminary Objection dated 16/04/2024 has merits.
 - b. Whether the application dated 26/03/2024 is *res judicata*.
4. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“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.”

At page 701, Sir Charles Newbold, P added: -

“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...”

5. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.
6. The Respondent submitted that the application in issue is *res judicata*. Section 7 of the [Civil Procedure Act](#) on *res judicata*, reads 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.”

7. The rationale of the doctrine of *res judicata* is to ensure that every litigation must come to an end. In the case of the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, the Court of Appeal enunciated the elements to be satisfied in proving a matter to be *res judicata* as follows;

[F] or 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 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.
8. The Respondent submits that the application dated 22/09/2023 which was heard and determined on 23/02/2024 in which the application was dismissed. It had similar facts and circumstances as in the application subject to the Preliminary Objection, thus making the application dated 26/03/2024 *res judicata*.
9. On the other hand, the Applicant submitted that the application dated 22/09/2023 sought for a temporary preservation order, while the application dated 26/03/2024 sought for temporary injunction orders. Based on the finding of the court that ‘temporary preservation orders are not the same as ordinary orders of injunction’, the Applicant submitted that the substratum of the applications is not the same as the court had not pronounced itself on orders of injunction, hence the application in issue is not *res judicata*.
10. I have perused through both the applications and the ruling dated 23/02/2024. The orders being sought for in the Notice of Motion dated 22/09/2023 (see prayers no. 2 and 3, and the Notice of Motion dated 26/03/2024 (see prayers 3 and 4) are similar. The only difference is that in the application dated 23/02/2024 sought for temporary preservatory orders against the Respondent from levying rent distress, while in the application dated 26/03/2024, the Applicant sought for temporary injunction orders against the Respondents from levying rent distress.
11. Both the applications were based on the orders of the Rent Restriction Tribunal dated 24/12/2019 and 12/04/2023. In the ruling dated 23/02/2024 (in respect to the application dated 22/09/2023), this court in paragraph 15 stated as hereunder;

“ 15 The Appellants sought for temporary preservatory orders. It is important to point out that preservatory orders are not the same as the ordinary orders of injunction ”



8. Further in paragraph 16 and 17 of the ruling, the court stated as follows;

“ 16Be it as it may, what is discernible is that the Appellants were seeking injunctive orders. Authorities on grant of injunctive order are now legion. The locus classicus in this area is the case of *Giella v Cassman Brown and Another* (1973) EA 358. A party ought to establish a prima facie case, show that he will suffer irreparable harm if the orders sought is not granted and the balance of convenience tilts in his favour.

17. What is in dispute is rent and as such, it is quantifiable. If the Appellant succeed, they can always claim that which they believe was paid over and above the correct rent. This is not a proper case for grant of injunctive orders. I thus discern no prima facie case and as such, the court need not to consider the other limbs since there is no room for leapfrogging.....Having arrived at the above conclusion I find no merit in the application dated 22nd September, 2023 and the same is hereby disallowed with costs.”

9. From the above, this court dealt with the application dated 22/09/2023 as one seeking for injunctive orders, and it was found not to be with merits. I therefore disagree with the submissions by the Applicants that the court did not make any determination of injunctive orders. Under the circumstances, I find that the application dated 26/03/2024 is *res judicata* as it has met the elements as stated in the *I.E.B.C case (supra)*.

10. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

- a. The Preliminary Objection dated 16/04/2024 has merits and is hereby upheld.
- b. Notice of Motion dated 26/03/2024 is found to be *res judicata* and is hereby dismissed.
- c. Costs to abide the outcome of the appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2024.

F. WANGARI

JUDGE

In the presence of:-

M/S Nyaga Advocate h/b for Bunde Advocate for the Applicant

M/S Mwakizozo Advocate for the Respondent

M/S Salwa, Court Assistant

