



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. E017 OF 2021

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2,10,19,
20,21,22,27,28,47,48 AND 259 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE FAIR AND ADMINISTRATIVE ACTION NO. 4 OF 2015

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

BETWEEN

MOHAMED GITUMA.....1ST APPLICANT

ZEITUN HUSSEIN.....2ND APPLICANT

AND

BAUA ALLI.....1ST RESPONDENT

HASSAN ALI SALEH FARHAN.....2ND RESPONDENT

RULING

(In respect to the Notice of Preliminary Objection dated 12th October 2021)

A. The Preliminary objection

1. The 2nd Respondent raised a preliminary objection in the following terms: -

THAT this application is fatally defective, bad in law and improperly before this Court in that: -

a) The application is Res judicata as the same has been heard to completion and final orders issued under Nairobi Kadhi's Court Misc. Application No. E081 of 2021 in which the Applicants were party to.

b) The Applicants lack locus standi to make the application as they are not the Administrators/Executors of the Estate of Agostino Gikunda Mugambi (Deceased).

c) The 2nd Respondent herein is not a public body and is not the one who issued the Orders in question and so he is wrongfully enjoined as a party and the application is fatal.

2. Pursuant to the directions of this Court issued on 11th November 2021, the Court directed the preliminary objection be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. However, the material

on record shows that the 2nd Respondent filed their written submissions whereas the Applicants' submissions were not on record by the time of preparation of this Ruling.

B. 2nd Respondent's submissions

3. In support of the Preliminary Objection the 2nd Respondent filed his written submissions dated 16th November 2021. The 2nd Respondent submitted that the suit herein is **res judicata** having been dealt with by the Honourable Kadhi's Court on the 14th July 2021 upon which the Kadhi's Court pronounced itself that it lacked jurisdiction and directed the case to be filed before a court of competent jurisdiction.

4. It was also submitted that the Applicants lacked the locus standi to file the suit since they were not the administrators of the estate of the late Agostino Gikunda Mugambi.

5. The 2nd Respondent also submitted that the Applicants had failed to join the public body which made the decision they sought to challenge and failure to do so, rendered the Application fatally defective.

C. Applicants' submissions

6. The Applicants despite appearing in the virtual Court attendance on 11th November 2021 when the matter came up for directions on the hearing and disposal of the preliminary objection failed to file any response or submissions in respect to the same.

D. Analysis and Determination

7. I have considered the preliminary objection, the written submissions filed by the 2nd Respondent and the authorities cited. The issue for determination is whether the preliminary objection is merited.

8. The case of **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696** has been the watershed as to what constitutes preliminary objections. The Court of Appeal in **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** also pellucidly captured the legal principle when it stated as follows:

"...A Preliminary Objection 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..."

9. This statement of the law has been echoed time and again by the courts: see for example, **Oraro -v- Mbaja [2007] KLR 141** where **Ojwang J.** (as he then was) stated as follows: -

"I think the principle is abundantly clear, a "Preliminary Objection" correctly understood, is now well defined as, and declared to be, a 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, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence"

10. In **Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others [2014] eKLR** the Supreme Court stated 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".[emphasis added]

11. The doctrine of **res judicata**, is set out in **Section 7 of the Civil Procedure Act**. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

12. A close reading of **Section 7**, reveals that for the bar of **res judicata** to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that: -

i) ***The suit or issue raised was directly and substantially in issue in the former suit.***

ii) ***That the former suit was between the same party or parties under whom they or any of them claim.***

iii) ***That those parties were litigating under the same title.***

iv) ***That the issue in question was heard and finally determined in the former suit [emphasis added].***

v) ***That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit. [emphasis added].***

13. My reading of the 2nd Respondent's submission in support of their preliminary objection that the instant matter is *res judicata* shows that the proceedings before the Kadhi's court were not determined in finality since the Kadhi's Court pronounced itself that it lacked jurisdiction to try the matter and further directed the Applicant to file their case in a court of competent jurisdiction. It therefore follows that the Kadhi's Court was not the competent court to try the previous matter and neither was the said case determined in finality. Consequently, it is my finding that the doctrine of *res judicata* is not applicable to this case.

14. As regards to the other limbs of the preliminary objection, specifically as to whether the Applicants have no locus to institute the suit by the fact that they are not the administrators of the Estate of Agostino Gikunda Mugambi, the court is of the view that this is a matter that cannot only be determined upon hearing of the Application by referring to the facts and evidence and not by way of a preliminary objection.

15. In respect to whether or not the Applicant failed to join the proper public body that made the impugned decision which led to the commencement of judicial review proceedings, it is my view that non-joinder of necessary parties or misjoinder of parties in a suit is an irregularity which does not go to the root of a suit. It is an omission or irregularity which cannot render a suit fatally defective since it is curable by an amendment. In any event, **Order 1 Rule 9 of the Civil Procedure Rules** is very clear that no suit should be defeated by reason only of misjoinder or non-joinder of parties. The same cannot be a ground for striking out proceedings by way of a preliminary objection.

16. As was stated in the *Oraro vs Mbaja Case (supra)*, a preliminary objection must not be blurred with factual details liable to be contested. The 1st Respondent has equally not filed his response to the Application signaling the fact that they either agree or disagree with the Applicant's suit. It is therefore not tenable for the court to proceed on the assumption that all the facts pleaded by the parties are correct.

17. In conclusion, it is therefore the finding of this Court that the preliminary objection herein is unmerited and doesn't meet the threshold set out in the *Mukisa Biscuit's case (supra)*. The same is hereby dismissed. The costs thereon reserved to abide the outcome of the Application.

18. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF NOVEMBER 2021.

E. K. WABWOTO

JUDGE

In the Virtual Presence of: -

Mr. Danstan Omari and Ms. Martina Swiga for the Applicants.

No appearance for the 1st Respondent.

Ms. Wadegu for the 2nd Respondent.

Court Assistant: Caroline Nafuna.

E. K. WABWOTO

JUDGE