



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mandieka v New Design Construction Ltd & 4 others (Civil Suit  
E013 of 2022) [2023] KEHC 20749 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20749 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E013 OF 2022**

**OA SEWE, J  
JULY 18, 2023**

**BETWEEN**

**LYNE KERUBO MANDIEKA ..... PLAINTIFF**

**AND**

**NEW DESIGN CONSTRUCTION LTD ..... 1<sup>ST</sup> DEFENDANT**

**MARIAM ABDIKADIR ..... 2<sup>ND</sup> DEFENDANT**

**IBRAHIM BAYAKAL ..... 3<sup>RD</sup> DEFENDANT**

**SEYFULLAH GURDAL ..... 4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1.

- (1) The plaintiff, Lyne Kerubo Mandieka, filed this suit on March 17, 2022 contending that sometime in the year 2018, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants conspired to fraudulently transfer all the shares held by her deceased husband in the 1<sup>st</sup> defendant company on the ground that he had resigned and relinquished his shares in favour of the 2<sup>nd</sup> defendant. She accordingly prayed for the following reliefs *vide* her Complaint dated March 17, 2022:
  - (a) A declaration that the plaintiff is a shareholder of the 1<sup>st</sup> defendant.
  - (b) An order directing the 5<sup>th</sup> defendant to rectify the register by deleting all the fraudulent entries and registering the plaintiff's shareholding with the 1<sup>st</sup> defendant.
  - (c) An order restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from carrying on business and operations of the 1<sup>st</sup> defendant without the involvement of the plaintiff.



- (d) A permanent order restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants by themselves, their agents, servants, employees and any other person acting on their instructions and/or authority from selling, disposing off, transferring and/or dealing with the property known as Mainland North CR No 17917 situated in Mtwapa in whatsoever manner.
- (e) A permanent order restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, employees and any other person acting on their behalf and/or instructions from transferring, disposing of shares, assets and/or any property of whatsoever nature owned by the 1<sup>st</sup> defendant and/or registered in the name of the 1<sup>st</sup> defendant.
- (f) An order of restitution of a share of all profits for the years 2018 to 2022.
- (g) Costs of this suit.

2.

- (2) Concomitantly, the plaintiff filed a Notice of Motion dated March 17, 2022 under a Certificate of Urgency praying for a temporary injunction restraining the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants from selling, transferring or dealing with the suit property, shares and other assets of the 1<sup>st</sup> defendant pending the hearing and determination of the suit. In response to the application, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a Replying Affidavit sworn by the 2<sup>nd</sup> defendant, Mariam Abdikadir. In addition, they filed a Notice of Preliminary Objection dated May 9, 2022, contending that:
  - (a) The plaintiff lacks *locus standi* to institute this suit.
  - (b) The Court lacks jurisdiction to grant the orders sought in the application and the suit against the defendants.
  - (c) The application and the suit are sub judice to Environment and Land Court Case No 226 of 2019: *New Design Construction Co Ltd v Lyne Kerubo*.
  - (d) The application and the suit are res judicata to the ruling and orders given in Environment and Land Court Case No 226 of 2019: *New Design Construction Co Ltd v Lyne Kerubo*.
  - (e) The deceased voluntarily resigned as a director of the 1<sup>st</sup> defendant and transferred his shares one year before his demise hence the plaintiff is estopped from laying claim on the company's assets as the deceased was not a shareholder at the date of his demise.
  - (f) The suit is incurably defective for reasons that the same does not raise any cause of action against the defendants and therefore ought to be struck out.
  - (g) The application and the suit herein is frivolous, vexatious and an abuse of the court process; and hence should be dismissed with costs.

3.

- (3) The Preliminary Objection was urged by way of written submissions, pursuant to the directions given herein on May 11, 2022. Accordingly, Mr Abdullahi filed his written submissions on June 23, 2022 proposing the following issues for determination:
  - (a) Whether the plaintiff lacks locus standi to institute the suit;
  - (b) Whether the Court has jurisdiction;
  - (c) Whether the Preliminary Objection is merited.



4. According to Mr Abdullahi, since it is not disputed that the plaintiff's husband is now deceased, it was expected that the plaintiff would apply for and obtain Grant of Letters of Administration to file this suit on behalf of the estate of the deceased. He relied on *Hassan A Dera v Soni Fuel Injection Co Ltd* [2002] eKLR and *Isaya Masira Momanyi v Daniel Omwoyo & Another* [2017] eKLR for the proposition that a substantive Grant of Letters of Administration is a prerequisite to the filing of a suit such as the instant one on behalf of the estate of the deceased.
5. Mr Abdullahi further submitted that this is a matter falling within the jurisdiction of the Environment and Land Court since one of the prayers is an injunction in connection with the property known as LR No 223, Mainland North. He referred to Article 165(5) of the *Constitution* which specifically bars the High Court from exercising jurisdiction in respect of matters reserved for the Environment and Land Court. He further pointed out that there is already in existence a pending matter between the parties before the Environment and Land Court, being Mombasa ELC No 226 of 2019: *New Design Construction Company Ltd v Lyne Kerubo* where the plaintiff sought similar orders and the application was declined. Accordingly, counsel urged the Court to find that the instant application is res judicata, while the suit is sub judice.
6. Mr Abdullahi cited *John Mundia Njoroge and 9 others v Cecilia Muthoni Njoroge and Another* [2016] and *Nitin Properties Ltd v Jagit S Kalsi & Another* [1995] eKLR as to what amounts to a preliminary objection. He submitted that the defendant had demonstrated that the matter ought to be dismissed for want of jurisdiction.
7. In response, Mr Mkan for the plaintiff made reference to *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA as to what amounts to a preliminary objection. On that basis, he submitted that the arguments that the application and the suit are sub judice or res judicata are not proper points for argument by way of Preliminary Objection. According to him, such points can at best be raised by way of Notice of Motion, supported by an affidavit with a view of exhibiting the documents in support of the previous suits and rulings. Mr Mkan added that, in any event, the issues in contest in this case and in Mombasa Environment and Land Court Case No 226 of 2019: *New Design Construction Co Ltd v Lyne Kerubo* are different in the sense that this matter is wholly in connection with shares in the 1<sup>st</sup> defendant company.
8. He accordingly submitted that it would be draconian to uphold the Preliminary Objection and deny the plaintiff an opportunity of presenting her case for a determination on merits. He relied on *George Kamau Kimani and 4 Others v County Government of Trans Nzoia and Another* [2014] eKLR, *Michael Bett Siror v Jackson Koech* [2019] eKLR and *Wilmot Mwadilo and Others v Eliud Timothy Mwamunge & Sagalla Ranchers Ltd* [2017] eKLR, among others, to buttress his submissions.
9. I have given careful consideration to the defendants' Preliminary Objection in the light of the averments set out in the plaintiff's suit. I have also paid attention to the written submissions filed herein by learned counsel on behalf of the parties; and the first point to consider is whether the points raised by the issues of *res judicata* and sub judice are proper subjects of a preliminary objection. In the case of *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* [1969] EA 696, it was well-stated that a preliminary objection consists of:

“...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”



10. Further to the foregoing, Section 6 of the *Civil Procedure Act* is explicit that:

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

11. Similarly, Section 7 of the *Civil Procedure Act* states that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue 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.”

12. I note that, in paragraph 8 of the plaintiff’s written submission, the argument was raised that it is impermissible to raise both sub-judice and res judicata in the same vein because they are mutually exclusive. According to counsel, the provisions of Sections 6 and 7 of the *Civil Procedure Act* provide for different criteria in each case; and therefore to raise both issues in the same application amounts to a misapprehension of the law. I however find no merit in that argument. It would have been attractive had the two points of res judicata and sub judice been targeted at the same object. In this instance, it is manifest at Ground 1 of the Notice of Preliminary Objection dated September 17, 2019 that the res judicata point has been raised in respect of the application dated 10 April 2018. It is for that reason that reliance was placed on the ruling in Nakuru ELC No 363 of 2015. The sub judice point, on the other hand, was raised in respect of the suit itself. To my mind, there is a distinction there.

13. It is instructive that, for the purposes of the *Civil Procedure Act*, a “suit” is defined in Section 2 to mean “all civil proceedings commenced in any manner prescribed.” Needless to say, therefore, that the doctrine of res judicata applies not only to substantive suits but also to applications. This was made clear by the Court of Appeal in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others*, Civil Appeal No 36 of 1996, thus:

“There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our *Civil Procedure Act*. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation...”

14. In the instant matter, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have filed their Defence; and the issue of the pendency of Mombasa Environment and Land Court Case No 226 of 2019 (the ELC matter) was pleaded at paragraph 14. However, as regards its current status or the nature and effect of the ruling delivered therein, an investigation would be requisite; for which reason, the words of Sir Newbold, P. in the Mukisa Biscuits Case are apt:

“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.”

15. Similar expressions were made in *Oraro v Mbaja* [2005] 1 KLR 141 by Hon Ojwang, J (as he then was) thus:

“...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 principle, 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 point...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...”

16. Thus, of the 7 grounds set out in the defendants’ Notice of Preliminary Objection date May 9, 2022, the only valid issue raised as such is Ground 2, namely, that the Court lacks jurisdiction to entertain the suit. The centrality of jurisdiction was well articulated in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, in which it was held:

“...Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...”

17. Hence, in <http://kenyalaw.org/caselaw/cases/view/82994> *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held that:

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power on Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



18. Needless to mention therefore that, from the standpoint of Article 165(5)(b) of the Constitution, the High Court no jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). Article 162(2)(b) of the Constitution stipulates that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

...

(b) the environment and the use and occupation of, and title to, land.

19. And, Section 13 of the Environment and Land Court Act, provides thus with regard to the jurisdiction of the Environment and Land Court:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land

20. With the foregoing in mind, I have sought to ascertain the nature of the plaintiff’s action. It is plain at paragraphs 7, 9, 10, 13 and 14 that her cause of action is in connection with the alleged fraudulent transfer of her deceased husband’s shares in the 1<sup>st</sup> defendant company. She claims a stake in the assets of the 1<sup>st</sup> defendant, including the suit property. There is therefore a sense in which there may be an overlap between this case and the ELC matter, but the exact details are yet unclear. That notwithstanding, there can be no doubt that plaintiff’s suit against the defendants is predominantly of a commercial character, and is therefore before the right forum.

21. I accordingly agree with the expressions of Hon Ngugi J in Suzanne Achieng Bulter & 7 Others v Redbill Heights Investment & Others, High Court Commercial Case No 2 of 2016 that:

“...it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to



technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.

22. In the result therefore, it is my considered finding that the defendants' preliminary objection is entirely misconceived. The same is hereby dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY 2023**

**OLGA SEWE**

**JUDGE**

