



**Turitu Service Station Limited v Housing Finance Company of Kenya Limited & 2 others;
Lazinor Hotel & Restaurant Limited & another (Interested Parties) (Commercial Case
342 of 2018) [2024] KEHC 14006 (KLR) (Commercial and Tax) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 342 OF 2018
MN MWANGI, J
NOVEMBER 8, 2024**

BETWEEN

TURITU SERVICE STATION LIMITED PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED 1ST RESPONDENT

GARAM INVESTMENTS AUCTIONEERS 2ND RESPONDENT

PURPLE ROYAL AUCTIONEERS 3RD RESPONDENT

AND

LAZINOR HOTEL & RESTAURANT LIMITED INTERESTED PARTY

LAIBON VILLA & GUEST HOUSE INTERESTED PARTY

RULING

1. This ruling is in respect to two Notices of Preliminary Objection. For context and background information, the plaintiff/applicant filed a Notice of Motion application dated 20th November 2023 pursuant to the provisions of Sections 1A, 1B, 3A, 59, 63(e) & 80 of the *Civil Procedure Act*, Order 40, Rules 1(a), 2, 4 & 10, Order 45 Rules 1(a) & (b), and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 82, 84, 90(2) & (3), 96, 97, 98, 103, 104(3), 105 & 106 of the Lands Act, and Sections 56, 68, 69, 70, 106 & 107 of the *Land Registration Act* seeking for inter alia, conservatory orders restraining the 1st defendant from advertising, selling, leasing, or interfering with the plaintiff's ownership of the property known as L.R. No. 209/178/29 along Limuru Road, pending the hearing and determination of this suit. The plaintiff also seeks an order under the doctrine of lis pendens and Section 106 of the *Land Registration Act*, to prohibit any changes in registration or ownership



- concerning L.R. No. 209/178/29 situated along Limuru Road and L.R. No. 37/254/31 in Nairobi West, pending the determination of this suit.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by David Njuguna Ngoi the plaintiff's Director. In opposition thereto, the 1st defendant filed a Notice of Preliminary Objection dated 13th December 2023 raising the following grounds –
 - i. The plaintiff/applicant's application dated 20th November 2023, amounts to res judicata;
 - ii. This Honourable Court is functus officio. The substance of the plaintiff/applicant's application dated 20th November 2023, was already heard and determined via the plaintiff/applicant's application dated 13th October 2022, in Nairobi in the Court of Appeal Civil Application No. E371 of 2022 and the Court of Appeal's ruling delivered on 14th April 2023, over the same;
 - iii. The plaintiff/applicant's application dated 20th November 2023, is misconceived, lacks merit and constitutes a gross abuse of the Court Process; and
 - iv. Therefore, the 1st defendant/respondent prays that the plaintiff/applicant's application is dismissed with costs to the 1st defendant/respondent.
 3. Subsequently, the plaintiff filed another Notice of Motion application dated 22nd April 2024 under the provisions of Sections 1A, 1B, 3A, 59 & 63(e) of the *Civil Procedure Act*, Order 40, Rules 1(a), 2, 4 & 10, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 82, 84, 90(2) & (3), 96, 97, 98, 103, 104(3), 105 & 106 of the Lands Act, and Sections 56, 68, 69, 70, 106 & 107 of the *Land Registration Act* seeking for inter alia, an order of injunction restraining the 1st defendant from advertising, selling, leasing, or interfering with the plaintiff's ownership of the property known as L.R. No. 209/178/29 along Limuru Road pending the hearing and determination of this suit. The plaintiff also seeks an order under the doctrine of lis pendens and Section 106 of the *Land Registration Act*, to prohibit any changes in registration or ownership concerning L.R. No. 209/178/29 situated along Limuru Road and L.R. No. 37/254/31 in Nairobi West, pending the determination of this suit, and an order for taking of accounts of the loan account by the 1st defendant.
 4. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by David Njuguna Ngoi, the plaintiff's Director. In opposition thereto, the 1st defendant filed a replying affidavit sworn on 29th April 2024 by Belinda Ng'ang'a, the 1st defendant's Head of Legal Department. The 1st defendant also filed a Notice of Preliminary Objection dated 29th April 2024 raising the following grounds -
 - i. Pursuant to Section 6 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, the plaintiff/applicant's application dated 22nd April 2024, is inherently bad in law, as a similar application dated 20th November 2023, under the same title, with similar parties, prayers, facts, and issues is currently being heard by this Honourable Court;
 - ii. The plaintiff/applicant's application dated 22nd April 2024, is also misconceived, lacks merit and constitutes a gross abuse of the Court process; and
 - iii. Therefore, the 1st defendant/respondent prays that the plaintiff/ applicant's application dated 22nd April 2024 be struck out with costs to the 1st defendant/respondent.
 5. Directions were given that the 1st defendant's Notices of Preliminary Objection dated 13th December 2023 and 29th April 2024 would be canvassed first, by way of written submissions. The 1st defendant's



submissions dated 12th February 2024 and 8th June 2024 were filed by the law firm of J. Louis Onguto Advocates, while the plaintiff's submissions were filed by the law firm of Gichuki King'ara & Co. Advocates on 3rd June 2024.

6. Mr. Kamwami, learned Counsel for the 1st defendant relied on the Court of Appeal case of William Kiprono Towett & 1597 others v Farmland Aviation & 2 others [2016] KECA 301 (KLR), and submitted that the 1st defendant's Notices of Preliminary Objection are valid. He referred to the provisions of Section 7 of the [Civil Procedure Act](#) and stated that it prohibits Courts from trying any issue that has been substantially and directly raised between the same parties, claiming under the same title, and determined with finality by a Court of competent jurisdiction.
7. He then cited the case of Aswa Developers & Contractors Limited v Compact Freight Systems Limited [2022] KEHC 17069 (KLR), and submitted that the plaintiff's Notice of Motion application dated 20th November 2023 is res judicata the Notice of Motion application dated 13th October 2022 filed at the Court of Appeal in Civil Application No. E371 of 2022 - Turitu Service Station Limited v Housing Finance Company of Kenya Limited & 4 others, thus this Court should uphold the 1st defendant's Notice of Preliminary Objection dated 13th December 2023 with costs to the 1st defendant.
8. Counsel also referred to the provisions of Section 6 of the [Civil Procedure Act](#) and submitted that it prohibits Courts from entertaining proceedings which are directly and substantially in issue in a previously instituted suit before a Court of competent jurisdiction and between the same parties, claiming under the same title. He relied on the case of Francolin Limited v Abdalla Swaleh & 5 others [2019] KEELC 533 (KLR), and contended that the Notice of Motion application dated 22nd April 2024 is sub judice the Notice of Motion application dated 20th November 2023. He urged this Court to uphold the 1st defendant's Notice of Preliminary Objection dated 29th April 2024 with costs to the 1st defendant.
9. Mr. King'ara, learned Counsel for the plaintiff relied on the decisions in Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, and Henry Wanyama Khaemba v Standard Chartered Bank Ltd & another [2014] eKLR, and submitted that the 1st defendant's Notices of Preliminary Objection dated 13th December 2023 and 29th April 2024 do not meet the threshold of a valid Preliminary Objection. He referred to the provisions of Section 7 of the [Civil Procedure Act](#) and the Court of Appeal case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, and stated that the plaintiff had not litigated on the impending sale that was to be conducted on 28th November 2023 to recover Kshs.204,779,943.31 claimed to be arrears. Thus, in view of the change in circumstances, the Notice of Motion application dated 20th November 2023 is not res judicata the Notice of Motion application dated 13th October 2022 filed at the Court of Appeal in Civil Application No. E371 of 2022.

Analysis and Determination.

10. Upon perusal of the 1st defendant's Notices of Preliminary Objection dated 13th December 2023 and 29th April 2024, as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether the 1st defendant's Notices of Preliminary Objection should be sustained.

Whether the 1st defendant's Notices of Preliminary Objection should be sustained.

11. In order for a Preliminary Objection to succeed, it should raise a pure point of law, it should be 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.



12. The validity of a Preliminary Objection was discussed by the Court in *John Musakali v Speaker County of Bungoma & 4 others* [2015] eKLR, as follows –

... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law...

13. The Supreme Court weighed in, on the issue in *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 Others* [2015] eKLR, and stated as follows -

... 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.

14. The 1st defendant has filed two Notices of Preliminary Objection in opposition to the plaintiff's applications dated 20th November 2023 and 22nd April 2024. The Preliminary Objection dated 13th December 2023 is anchored on two major grounds being that the application dated 20th November 2023 is res judicata the application dated 13th October 2022 filed in the Court of Appeal in Civil Application No. E371 of 2022, and that this Court is functus officio in view of the ruling delivered in the said application. The Preliminary Objection dated 29th April 2024 on the other hand is anchored on the ground that the application dated 22nd April 2024, is sub judice the application dated 20th November 2023.

15. The doctrine of Res Judicata is provided for under the provisions of Section 7 of the *Civil Procedure Act* Cap 21, laws of Kenya which 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 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.

16. The doctrine of Sub Judice on the other hand, is provided for under Section 6 of the *Civil Procedure Act* which states as hereunder -

No court shall proceed with the trial of any suit or proceeding 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.

17. Functus officio can be described as the doctrine of finality. The said doctrine prohibits a Court from determining issues that it has already determined to finality. This means that a Court can only determine a particular issue once, and it is not permitted to re-determine the issue once it has issued a determination on it. From the foregoing, this Court is of the considered view that in order to aptly determine the aforesaid issues, it will have to not only ascertain facts, but also to interrogate the evidence adduced. The Court in the case of *George Kamau Kimani & 4 others v County Government of Trans*



Nzoia & Another [2014] eKLR, in dismissing a Preliminary Objection on a plea of res judicata held that –

I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.

18. Further, in the case of Henry Wanyama Khaemba v Standard Chartered Bank Ltd & another [2014] eKLR, the Court held that -

That re-statement of the limited scope of a preliminary objection brings me to the point where I hold that the preliminary objection by the 1st defendant is not a true preliminary objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st defendant. They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly.

19. In view of the above cited authorities and the applicable provisions of the law cited herebefore, this Court finds and holds that the grounds raised by the 1st defendant in its Notices of Preliminary Objection do not qualify as such, in the true sense of the law, as the grounds therein can only be argued in the normal manner, and determined after the Court has probed the evidence adduced and ascertained facts.
20. The upshot is that the 1st defendant's Notices of Preliminary Objection dated 13th December 2023 and 29th April 2024 are not merited. They are dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF NOVEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Kamwami for the 1st defendant/applicant

Mr. Wachira h/b for Mr. King'ara for the plaintiff/respondent

Ms B. Wokabi - Court Assistant.

