



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION No. E003 OF 2021

BETWEEN

KENNETH SHITSUGANE OLEMBO PETITIONER

AND

THE COUNTY GOVERNMENT OF KAKAMEGA..... 1ST RESPONDENT

KAKAMEGA COUNTY LAND APPLICATION

EXTENSION OF LEASES AND LAND

ADMINSTRATION TRIBUNAL 2ND RESPONDENT

RULING

1. The petitioner commenced proceedings in this matter through petition filed on 21st April 2021. He averred in the petition that he is the heir and the administrator of the estate of the late Reuben James Olembo who was the registered owner of the parcel of land known as Kakamega/Town/Block 111/34. That the first respondent formed the second respondent with the intention of repossessing undeveloped plots within Kakamega County and that the second respondent has earmarked the suit property for repossession. That the second respondent is unconstitutional and offends his right to property as well as right to a fair hearing.

2. The therefore prayed for judgment for:

a) A declaration that The continued pursuit of the proceedings in Kakamega County Land Application Tribunal is unconstitutional and infringes on the Petitioners right to fair hearing and right to own property.

b) A declaration that the 2nd Respondent herein has no mandate to investigate, question and/or repossess private property being Land Title No. Kakamega/Town/Block 111/34.

c) A permanent injunction restraining the respondents from repossessing Land Title No. Kakamega/Town/Block 111/34.

d) Costs of this Petition.

e) Such other order(s) as this Honourable Court shall deem just.

3. Simultaneously with the petition, the petitioner filed Notice of Motion dated 20th April 2021 seeking the following orders:

a) [Spent]

b) [Spent]

c) That there be stay of proceedings in Kakamega County Land Application Tribunal in respect of Land Title No. Kakamega/Town/Block 111/34 pending the hearing and determination of the Petition herein.

d) Costs to be in the cause.

4. The respondents reacted to both the petition and the application by filing Notice of Preliminary Objection dated 14th June 2021. This

ruling is in respect of the said objection.

5. The respondents contend that this court lacks jurisdiction to entertain this matter and seek striking out of the petition on the following grounds as listed on the face of the notice of preliminary objection:

1. *THAT the matter is res judicata as the constitution of an Appeals Panel of the Kakamega County Land Application, Extension of Leases and Land Administration Committee has been adjudicated before in **Eunice Khalwali Miima v County Government of Kakamega [2021] eKLR.***

2. *THAT the 2nd Respondent is not a body that has the capacity to sue or be sued.*

3. *THAT the suit is premature, misplaced and a blatant abuse of court process.*

6. The court ordered that the objection be canvassed through written submissions. The respondents filed submissions but the petitioner did not file any.

7. The respondents cited **Section 7** of the **Civil Procedure Act** and argued that the court pronounced itself in **Eunice Khalwali Miima v County Government of Kakamega [2021] eKLR** on the standing of the committee formed by the first respondent to hear appeals in regard to its intention to repossess land within Kakamega Municipality. It further argued that the second respondent has no capacity to be sued.

8. I have considered the objection and the submissions. Two issues arise for determination: whether the objection is a valid preliminary objection and if so, whether the petition offends the doctrine of *res judicata*.

9. The law relating to preliminary objections was succinctly summed up in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** by Law JA as follows:

So far as I'm aware, 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.

10. It follows that for a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. If it is upheld, a valid preliminary objection should result in summarily terminating the suit or application against which it is raised.

11. Not every objection amounts to a valid preliminary objection. Litigants must weigh carefully, with the help of their counsel, whether what they seek to raise as a preliminary objection will in fact be better addressed through a substantive application or in the ordinary course of defending a given matter. Sir Charles Newbold (P) lamented the common practice in his day, and which persists even now, of raising what really does not amount to a valid preliminary objection in **Mukisa Biscuit Manufacturing Co. Ltd** (supra) as follows:

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.

12. Does the present preliminary objection measure up to the above parameters? The objection raised is simply that this petition offends the doctrine of *res judicata* since the issue of the constitution of the second respondent has been heard and determined in **Eunice Khalwali Miima v County Government of Kakamega [2021] eKLR**. The respondents further contend that the second respondent has no capacity to be sued.

13. A perusal of the petition and the accompanying documents shows that the petitioner did not anywhere refer to the case of **Eunice Khalwali Miima v County Government of Kakamega [2021] eKLR**. It is the first respondent who introduced the said case into this matter. It follows therefore that existence of the case, the parties thereto and the issues determined by the court in that case are all matters that need to be established through evidence. Generally, *res judicata* should be raised through a substantive application to which the pleadings and decision of the case referred to are annexed, unless the party against whom it is raised had availed the pleadings and decision prior to the preliminary objection being raised.

14. Equally, the respondents' claim that the second respondent has no capacity to be sued will need to be verified by way of evidence. An objection that needs to be propped up by evidence cannot be a valid preliminary objection. I find that the present objection is not a valid preliminary objection. If the respondents still wish to pursue the issues that they have raised in the preliminary objection, they should consider filing a substantive application. In view of the answer to the first issue for determination, I need not consider the second issue for determination.

15. In the end, I dismiss Notice of Preliminary Objection dated 14th June 2021. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF DECEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Petitioner

Mr Lwabuko holding brief for Mr Mmbaka for the Respondents

Court Assistant: E. Juma