REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 28 OF 2021

GEORGE MWACHIRU MWANGO & 57 OTHERS.....PLAINTIFFS

VERSUS

DANIEL KATUMO NYAMAI.....DEFENDANT

RULING

The defendant raised a preliminary objection dated 6th May 2021 on the grounds that;

1. That court has no jurisdiction to hear and determine the present suit.

2. The present suit as filed is res judicata

3. Thus, this suit is frivolous, misconceived, bad in law and an egregious abuse of the court process.

The plaintiffs submit that the facts in this case are peculiar and that the cause of action herein is different. That plaintiff parties herein are not in any of the matters claimed to be re judicata. That the plaintiffs have not been heard with regards to this and that this issue has never been presented in any court forum before this suit. They relied inter alia on the case of Ali K Amed t/a Sky Club Resturant vs Kabundu Holdings Ltd (2005) eKLR.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

> "…….. *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*"

In the same case, Sir Charles Newbold said:

> "*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".*

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

> "*I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the 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 preliminary objection, and 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. I am in agreement ……. that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point.".*

The issue as to whether or not this suit is subjudice or res judicata is properly raised as a Preliminary Objection and the court will consider the same. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

> Section 6.
>
> "*No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in*

issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"

Section 7.

"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."

Expounding further on the essence of the doctrine the Court in *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR* pronounced itself as follows:

"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under **section 7** of the **Civil Procedure Act**. In **Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR,** the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

"(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."

In a similar case of Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & Another (2020) eKLR the court held that;

"Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection".

In the case before us, I have perused the pleadings referred to in the preliminary objection that is Daniel Katumo Nyamai vs Gilbert Knungu Mwaganda & 6 Others (2020) eKLR which was consolidated together with Malindi ELC Case No. 155 of 2013 and note that the subject matter is the same. It is not in dispute that the subject matter is the same however the plaintiffs now appear different and the current suit is one against eviction. The previous suit the court determined the issue of ownership of the suit land and the parties now have metamorphosized and seek for the determination of the same issue among others. I find this suit is an abuse of the court process and is res judicata. I find this preliminary objection on this issue is merited and I strike out the suit with costs to the defendant.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 8TH DECEMBER 2021.

N.A. MATHEKA

JUDGE