



**Damah Alliance Limited v Muthee & another (Environment & Land Case E204 of 2023) [2024] KEELC 477 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 477 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E204 OF 2023  
EK WABWOTO, J  
JANUARY 31, 2024**

**BETWEEN**

**DAMAH ALLIANCE LIMITED ..... PLAINTIFF**

**AND**

**DAVID MUTHAMI MUTHEE ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN NGIGE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the preliminary objections dated September 15, 2023 and 22<sup>nd</sup> September 2023. The 5<sup>th</sup> and 6<sup>th</sup> defendant's preliminary objection dated September 15, 2023 was raised on the grounds that there are no applications and/or defence and counterclaim properly filed before this court because the suit in general is *res judicata* and offends the provisions of section 7 of the [Civil Procedure Act](#). Moreover, it was also stated that the issues of fraud and adverse possession had been heard and determined in Nairobi ELC 1234 of 2016, and that there exists an ongoing appeal at the Court of Appeal.
2. The 2<sup>nd</sup> defendant raised a preliminary objection dated September 22, 2023, on the grounds that this court equally lacks jurisdiction pursuant to the provisions of section 10 of the [Valuation for Rating Act](#), article 47(3) of the [Constitution](#) and section 9(2) and (3) of the [Fair Administrative Action Act](#) 2015.
3. The preliminary objections were canvassed by way of written submissions pursuant to the directions issued by this court. In the submissions dated 18<sup>th</sup> December 2023, the Plaintiff in the Counterclaim outlined four reasons why the Defence and Counterclaim are not *res judicata*. These included the following:
  - a. The former suit did not conclusively determine the issues and the court granted liberty to the parties to file appropriate proceedings.



- b. The issues raised in the Defence and Counterclaim are post the judgement delivered on May 26, 2022.
  - c. There are two pending Appeals challenging the decision of the Learned judge delivered on May 26, 2020 and the 5<sup>th</sup> and 6<sup>th</sup> Defendants have challenged the said decision hence they are estopped from pleading or hiding under the doctrine of *res judicata*.
  - d. The said Appeal in the Court of Appeal is yet to be heard and determined and hence it is premature for the objection raised by the 5<sup>th</sup> and 6<sup>th</sup> Defendants.
4. The 2<sup>nd</sup> Defendant supported the objection and filed submissions dated 30th October 2023 in which it was submitted that the most suitable and appropriate recourse was to lodge an objection with the town clerk and then before the valuation court. Additionally, the 5<sup>th</sup> and 6<sup>th</sup> Defendants filed submissions seeking to the Defence and Counterclaim be struck out for offending provisions of section 7 of the [Civil Procedure Act](#).
  5. I have considered the respective written submissions and the authorities cited. The issues for determination are:
    - i. Whether the Defence and Counterclaim are res judicata?
    - ii. Whether the parties have fully exhausted the remedies available?
  6. In [Nitin Properties Ltd v Singh Kalsi & another](#) [1995] eKLR the Court of Appeal highlighted that:
 

“...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...”
  7. With regards to the issue of res judicata, section 7 of the [Civil Procedure Act](#), 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 as follows: -
    - 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.
    - 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.
  8. My perusal of judgement in ELC 1234 of 2016 confirms that Mogeni J. left a window of opportunity for parties to revive their cause when she held as follows;
 

“ ... I can neither make any order in favour of or against the plaintiff or defendant over rights in relation to the suit property. The parties will need to assess their positions and bring to court appropriate pleadings through which the Court can properly pronounce itself....”
  9. Moreover, I take note that some of the parties in the instant suit for instance the 7<sup>th</sup> and 8<sup>th</sup> Defendants were not involved in ELC 1234 of 2016. In the foregoing, the claim for res judicata fails.



10. On the issue of exhaustion of remedies, it was argued that under the *Valuation Rating Act* (VRA), the Plaintiff ought to have sought at the onset for the relief provided under the *Valuation and Rating Act*. In specific, this remedy would speak to the prayers seeking amendment of the valuation register. Reliance was made to the case of *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR the Court held as follows;
- “The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency’s action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”[Emphasis Mine]
11. The *VRA* dictates that where parties have disputed the valuation roll, they should raise a complaint twenty-eight (28) days after the notice is put up by the Town Clerk. In this instance, it is unclear exactly when that would have been done. Additionally, seeing that the matter stretches over several decades, it is most likely that the given compliant window has since lapsed.
12. While the court’s jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute, the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. See also the decision of the Supreme Court in the case of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) In the instant case, the proposed alternative forum is inaccessible to the parties owing to lapse of time.
13. In conclusion, this Court finds that both the preliminary objections dated September 15, 2023 and September 22, 2023 are unmerited and hereby proceeds to dismiss the same. Each party to bear own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**E. K. WABWOTO**

**JUDGE**

