



**Kamau v Gatonye & another (Environment & Land Case
E516 of 2024) [2025] KEELC 997 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E516 OF 2024
JG KEMEI, J
FEBRUARY 28, 2025**

BETWEEN

JENNIFER WANGARI KAMAU PLAINTIFF

AND

JOSEPH GATONYE 1ST DEFENDANT

DAVID MUCHIRI GIKONYO 2ND DEFENDANT

RULING

(In respect of the Defendants' Preliminary Objection dated 15/1/25)

1. This ruling is in respect of a Preliminary Objection raised by the Defendants dated the 15/1/25.
2. The Plaintiff commenced this suit vide the Plaint dated 9/12/24. The Plaintiff avers that she is the registered and lawful proprietor of the property known as Plot Number B-01 Komarock Shopping Centre "B". She avers that she has been in continuous and peaceful possession since acquiring ownership. The Plaintiff accuses the Defendants of unlawfully trespassing onto the suit property hence interfering with her proprietary rights causing her anguish and emotional distress.
3. The Plaintiff therefore seeks for orders of: a permanent injunction restraining the Defendants and their agents from entering, trespassing, or in any way interfering with the Plaintiff's quiet possession and enjoyment of the suit property. The Plaintiff also prays for an eviction order to issue against the Defendants as well as General damages for trespass and emotional distress caused by the Defendants' unlawful actions.
4. Alongside the Plaint, the Plaintiff filed an application dated 9/12/24, seeking the same orders sought in the Plaint. However, on 23/1/25 the application was dismissed for non-attendance and/or want of prosecution.



5. In the meantime, the Defendants had raised a Notice of Preliminary Objection dated the 15/1/25 seeking that the Plaint and the accompanying documents dated 9/12/24 be dismissed with costs on the grounds that;
 - a. The Plaintiff's suit and Application dated 9/12/24 is Res Judicata therefore incompetent, fatally defective, and does not lie and the same ought to be struck out or dismissed with costs.
 - b. The suit and the Application are, therefore, frivolous, vexatious, an abuse of the court process, incompetent, fatally defective, and do not lie , and they ought to be struck out or dismissed with costs.

Courts Directions

6. On 3/2/25, the Court directed that the Preliminary Objection be disposed of by way of written submissions. Parties were directed to comply within 7 days. However, none of the parties complied with the said orders despite the lapse of the said period.

Analysis and Determination

7. The only issue for determination is therefore whether the preliminary objection is competently before this court.
8. The starting point is to evaluate what constitutes a preliminary objection. In the case of *Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 Others* SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case *Mukhisa Biscuit Manufacturers Ltd v West End Distributors Ltd* (1969) EA where the Court stated that:

“...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 ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”
9. The test to be applied in determining a proper preliminary objection can be deduced as follows; -
 - i) A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
 - ii) A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.
 - iii) A Preliminary Objection cannot be entertained where;
 - a. The facts are disputed/contested.
 - b. The facts are liable to be contested.
 - c. Facts are to be proved through process of evidence.
 - d. What is sought is an exercise of judicial discretion.



10. The Preliminary Objection herein is based on Section 7 Civil Procedure Act which provides for the doctrine of res judicata and 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 can 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.”

11. The doctrine of res judicata is founded on sound public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal in Nicholas Njeru v the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.

12. To determine whether the matters raised in the instant suit have been already determined by a court of competent jurisdiction, material evidence has to be examined and interrogated. That puts the matter outside the ambit of a Preliminary Objection.

13. In the case of Oraro v Mbaja (2005) eKLR, the Court held that: -

“.....Any assertion which claims to be a 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.”

14. I agree with the decision in Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another (2014) eKLR, where the court pronounced itself as follows: -

“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 jurisdiction on Preliminary Objections.”

15. I am further persuaded by the court’s holding in George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another (2014) eKLR, where it was stated 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 amended to enable the court to determine whether the current suit is res judicata.”

16. In the end the objection is unmerited.

17. Final orders for disposal

- a. The Preliminary Objection dated 15/12/25 is incompetently before the court.
- b. It is hereby struck out with costs payable by the Defendants

18. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.



J. G. KEMEI

JUDGE

Coram

Ms Mugenya HB for Mr Mabonga for the Plaintiff

Mr. Kangogo for the Defendants

CA – Ms Yvette

