



Mwinzi & 217 others v Tana & Athi Rivers Development Authority & another (Environment & Land Petition 18 of 2021) [2024] KEELC 3530 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 3530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND PETITION 18 OF 2021
A KANIARU, J
JANUARY 25, 2024**

BETWEEN

MBWESE MWINZI & 217 OTHERS & 217 OTHERS PETITIONER

AND

TANA & ATHI RIVERS DEVELOPMENT AUTHORITY 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. What is before me for determination is a Preliminary Objection dated 27.10.2021 and filed on 01.11.2021. It is brought by the 1st Respondent – Tana & Athi Rivers Development Authority - on the grounds that:
 1. That this court has no jurisdiction to issue conservatory orders to stay further execution of the judgement dated 12th March, 2020 and the decree dated 19th August 2020 of this court sitting at Embu in ELC Suit No. 148 of 2017: TARDA V Joseph Muli Mukuluta & 26 Others.
 2. The Petition and application herein are incurably defective by dint of Sections 7, 8, 34 and 63 of the Civil Procedure Act and Order 22 of the Rules thereunder concerning the execution of decrees.
 3. The petition and application herein amounts to gross abuse of the court process.
 4. This court is functus officio as all the matters in dispute concerning the ownership and occupancy of the suit properties namely L.R No. 24670, 28671



and 12621 were conclusively adjudicated upon and settled in the judgement dated 12th March 2020.

2. It was agreed that the objection be disposed of by way of written submissions. The 1st Respondents submissions were filed on 09.02.2023. It started by giving a brief background to the objection. It then submitted that; the place of filing the petition herein is irregular in so far as it seeks to stay further execution of the judgement and decree dated 12th March 2020 by a court of competent jurisdiction, being Environment and Land Court Embu; that the parties were at liberty to join the suit in Embu ELC Suit No. 148 of 2017 - TARDA v Joseph Muli Mukuluta & 26 others - because they admit they were aware of the judgement dated 12.03.2020; that the fact that they were not party to the suit is immaterial and does not give them the licence to file a fresh suit parallel to the suit in Embu; and that the Petitioners were at liberty to file an appeal or seek review on the judgement but unfortunately they allowed time to lapse. It submitted further that the suit herein is Res Judicata as the issues raised in ELC Petition 18 of 2021 are issues emanating from the judgement delivered in Embu ELC No. 148 of 2017 - TARDA v Joseph Muli Mukuluta & 26 Others; that the Petitioner's petition filed on 03.05.2021 and the application therein are defective, lack merit, and are void ab initio and amount to abuse of the court process.
3. To support its submissions, it cited several authorities including Samwel Cheboi & 3 Others v Paul Kanda & 4 Others (2022) Eklr, Yiapas Ole Seese & 4 others v Sakita Ole Narok & 2 others (2008) Eklr, Invesco Assurance Company Ltd & 2 others V Auctioneers Licensing Board & Anor; Kinyanjui Njuguna & Company Advocates & Anor (Interested parties) (2020) Eklr, Ibrahim Mungara Mwangi V Francis Ndegwa Mwangi (2014) Eklr among others.
4. The 2nd Respondent on the other hand filed his submissions 31.05. 2023. He also gave a background to the objection and submitted that; in this case, the ownership and occupancy of the suit parcels L.R No. 24670, 28671 and 12621 was conclusively adjudicated upon and settled in the judgement dated 12.03.2020 and decree of 19.08.2019 in Embu ELC No. 148 of 2017; that the Petitioners in this matter filed an application dated 07.04.2020 seeking to stay the judgment in ELC Suit 148 of 2017 before instituting this petition, which makes it res judicata. He prayed for the preliminary objection to be allowed with costs.
5. He cited the cases of owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) KLR 1, Jamal Salim v Yusuf Abdulahi Abdi & Anor Civil Appeal No. 103 of 2016 (2018) Eklr, The IEBC v Maina Kiai & 5 Others CA (2017), Fortis Tower Management Ltd & Anor v Trendmark Computers Ltd (2018) Eklr, among others, to support his submissions.
6. The Petitioners filed their submissions on 29.06.2022. They also gave a background to the objection and submitted that the doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act* which ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit, involving the same parties or parties, and litigating under the same title; that contrary to the 1st Respondents submission that this matter offends the said section of law, this matter was not determined by another court; that none of the Petitioners in this matter were defendants in Embu ELC case No. 148 of 2017; that this court is not functus officio as claimed by the 1st Respondent; and that the petition and application herein are properly before this court as this court has jurisdiction by virtue of Article 162(2)(b) of the Kenyan Constitution and Section 13(3) of the *Environment and Land Court Act*. They urge that the Preliminary objection be dismissed.
7. They have cited the cases of owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya Ltd) 1989, Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) Eklr, Invesco Assurance Company



Ltd & 2 others v Auctioneers Licensing Board & Anor; Kinyanjui Njuguna & Co Advocates & Anor (Interested Parties)(2020) Eklr to support their submissions.

8. I have considered the Preliminary Objection and the rival submissions. The issue for determination is whether the Preliminary Objection has merit.
9. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, as follows:

“ 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.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a pure point 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. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

10. The Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR as cited in the case of DJC v BKL (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling) made the following observation as relates to Preliminary Objections:

“ ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

11. In this case, the 1st Respondent has raised its preliminary objection on the three grounds which I will deal with hereunder. The first ground is that this court has no jurisdiction to issue conservatory orders to stay further execution of the judgement dated 12th March, 2020 and the decree dated 19th August 2020 of this court sitting at Embu in ELC Suit No. 148 of 2017: TARDA V Joseph Muli Mukuluta & 26 Others. However, the 1st respondent did not attach the said judgement or decree for the court to read and consider.
12. Similarly, the 1st respondent raised an objection on the ground that the Petition and application herein are incurably defective by dint of Sections 7, 8, 34 and 63 of the *Civil Procedure Act* and Order 22 of the Rules thereunder concerning the execution of decrees.

Section 7 of the *Civil Procedure Act* provides for the doctrine of res judicata which bars the court from trying any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

Section 8 of the same act bars the institution of further suit where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action.

Section 32 of the same Act provides that questions arising between the parties to a suit in which a decree was passed shall be determined by the court executing the decree and not by a separate suit.



Section 63 equally of the same Act provides;

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—

- (a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;
- (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
- (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
- (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
- (e) make such other interlocutory orders as may appear to the court to be just and convenient”

Order 22 of the Civil procedure Rules on the other hand provides for execution of decrees and orders.

13. The 1st Respondents also failed to attach the judgment or decree or the proceedings in ELC Suit No. 148 of 2017 which it says makes the suit herein res judicata. This therefore makes it difficult for this court to make a determination on the issues as raised. The court observed in the case of *Beach Villas Limited v Mogeni & 4 others* (Environment & Land Case 6 of 2020) [2022] KEELC 2547 (KLR) (18 July 2022) which observations I wish to associate myself with that;

“Res judicata is one of the issues that can be raised as a Preliminary Objection but the Applicant must place the documents in respect of the previous suits and show clearly that the suit falls on all fours on the doctrine of res judicata. Where there is scanty information which forces the court to look outside the pleadings before it can make a determination, then it would be proper to deal with the issue at the hearing.”

14. The third ground is that the petition and application herein amount to gross abuse of the court process. It is not in doubt that for the Court to ascertain whether the petition and application herein amount to gross abuse of the court process, it will have to ascertain and probe evidence, more so as the parties are disputing various contentious issues. This goes beyond the confines of a preliminary objection because of the limited scope of the jurisdiction on preliminary objections. The Court therefore finds and holds that this ground is not a pure point of law as it is not capable of disposing of the matter preliminarily without calling for evidence, probing it, and ascertaining facts from elsewhere. The same is not properly raised as a Preliminary Objection.
15. On the last ground that this court is functus officio as all the matters in dispute concerning the ownership and occupancy of the suit properties, namely L.R No. 24670, 28671 and 12621, were conclusively adjudicated upon and settled in the judgement dated 12th March 2020, I am inclined to find as above that the 1st Respondents did not accord this court an opportunity to examine the pleadings or the judgement in the case mentioned. This court cannot blindly make a determination on issues as it is being called to do. To capacitate the court, the 1st respondent should have made available



the proceedings and judgment of ELC No 148 of 2017. Otherwise, the court is now being invited to act blindly.

16. As a whole, I find that the 1st Respondent has given this court very limited resources to enable it make a determination on the issues raised in their preliminary objection.
17. I am therefore inclined to find that the preliminary objection dated 27.10.2021 lacks merit and I hereby dismiss the same with costs to the Petitioners.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF JANUARY, 2024.

In the presence of;

Ms Keru for Kibe for Mungai for 1st respondent, Mutua for Kiongo for 2nd respondent.

Court Assistant - Leadys

A.K. KANIARU

JUDGE

25. 01.2024

