



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. PETITION CASE NO.1127 OF 2015

**IN THE MATTER OF ARTICLES 10.62.159.227 & 258 (S)(C) OF THE CONSTITUTION OF
KENYA (2010)**

AND

**IN THE MATTER OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT AND THE
PROCUREMENT DISPOSAL REGULATIONS 2011**

AND

**IN THE MATTER OF THE CONTRAVENTION OF ARTICLE 62(2) AND 227 OF THE
CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

BETWEEN

BENEDICT KABUGI NDUNGU.....1ST PETITIONER

ELIAS MWANGI MUGWE.....2ND PETITIONER

VERSUS

BENEDICT KABUGI NDUNGU.....1ST RESPONDENT

FARAH MOHAMED BARROW & ALI SHEIKH MOHAMED T/A

ALPHA TRADERS.....2ND RESPONDENT

RULING

Coming up before me for determination is the Preliminary Objection dated 16th December 2015 raised by the 2nd Respondent to the following effect:

1. That this court has no jurisdiction to entertain the Petition as the issues raised therein have already been exhaustively litigated over, adjudged and concluded in Judicial Review **Miscellaneous Application No. 808 of 2008**, thus this matter is *res judicata*.
2. That there is an aspect of the case that is still pending before the Court of Appeal in **Civil Appeal No. 129 of 2013** and it would therefore be against the basic principles of law to allow the Petitioners to bring before this court issues that are pending before another forum.
3. That the Petitioners have no *locus standi* to raise a public action on private property. Hence the Petitioners cannot enforce what is considered to be a public right in respect of private property.
4. That the suit property is private land registered to a private entity and the Petitioners cannot by any legal provision have an interest in private property owned by the 2nd Respondent.

A preliminary objection is a point of law which when taken could dispose of the suit. A preliminary objection was defined in the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd -vs.- West End Distributors Ltd (1969) E.A. 696** as follows:-

"...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... 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..."

In the Court of Appeal case of **George Oraro -vs. - Barak Mbaja [2005] 1 KLR 141** Ojwang, J. (as he then was) held that,

"The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a 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 a preliminary objection, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

Is this suit *res judicata*? The spirit and object of the doctrine of *res judicata* is succinctly expressed in a well-known common law maxim "*debet bis vexari pro una etadem causa* (no one ought to be twice vexed for one and the same cause)". The law pertaining to the doctrine of *res judicata* is captured under **Section 7 of the Civil Procedure Act** which provides as follows-

"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."

With this background, can this suit be said to be *res judicata*? The 2nd Respondent claims that it is owing to the assertion that the issues raised in the Petition have already been exhaustively litigated over, adjudged and concluded in **Judicial Review Miscellaneous Application No. 808 of 2008**. In answering that question, I will rely on the decision in **Welamondi versus The Chairman, Electoral Commission of Kenya (2002) 1 KLR 486** where Ringera, J. (as he then was) stated as follows:

“1. Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either criminal or civil proceedings.

2. In exercising powers under Order 53, the court is exercising neither civil nor criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction sui generis. It therefore follows that it is incompetent to invoke the provision of section 3A and Order 1 rule 8 of the Civil Procedure Act and Rules and section 42, 79 and 80 of the Constitution of Kenya.”

Going by the foregoing, it is clear that this suit cannot be said to be *res judicata* for the reason that the other matter cited by the 2nd Respondent was a Judicial Review matter.

The argument that there is an aspect of this case that is still pending before the Court of Appeal in **Civil Appeal No. 129 of 2013** and that it would therefore be against the basic principles of law to allow the Petitioners to bring before this court issues that are pending before another forum does not hold water for the reason that peradventure that this assertion is true, the Court of Appeal has not issued any order to stay the proceedings herein. That being the position, it cannot be successfully urged that this suit should not proceed. To the contrary, I find that this suit should proceed for hearing and determination.

The assertion that the Petitioners have no *locus standi* to raise a public action on private property and that the Petitioners cannot enforce what is considered to be a public right in respect of private property cannot be admitted in the category of a Preliminary Objection. This also goes for the assertion that the suit property is private land registered to a private entity and the Petitioners cannot by any legal provision have an interest in private property owned by the 2nd Respondent. The very issue of ownership of the suit property is the main issue for determination in this suit. **Article 258 of the Constitution** states as follows:

1. “Every person has the right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

a. A person acting on behalf of another person who cannot act in their own name;

b. A person acting as a member of, or in the interest of, a group or class of persons;

c. A person acting in the public interest; or,

d. An association acting in the interest of one or more of its members.”

Apart from this constitutional provision clearly stipulating that the Petitioners do have a right to institute these proceedings even if they are doing it in the public interest, the issue whether or not the suit property is private or public property is the main issue for determination in this suit. The 2nd Respondent cannot therefore authoritatively claim that the suit property is private property in respect of which the Petitioners have no claim until this suit is heard and determined.

The upshot of the foregoing is that the 2nd Respondent has not succeeded in its Preliminary Objection and the same is hereby dismissed. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF OCTOBER 2016.

MARY M. GITUMBI

JUDGE