



**Walunywa v Muthoni (Environment and Land Appeal E44 of 2019)
[2024] KEELC 1652 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E44 OF 2019
EC CHERONO, J
MARCH 14, 2024**

BETWEEN

CYPRIAN WALUNYWA APPELLANT

AND

MARY K MUTHONI RESPONDENT

*(Being an appeal arising from the ruling of Hon.G.ADHLAMBO (PM)
dated 29TH November, 2019 in Kimilili CM ELC Case no. 20 of 2018)*

JUDGMENT

1. This appeal arises from the ruling of the Principal Magistrate Hon. Hon. G.Adhiambo (PM) delivered on 29th November 2019 in Kimilili Chief Magistrate Court ELC Case No 20 of 2018.
2. The brief background of the case is that vide a plaint dated 14th September, 2013 the appellant sued the respondent for the following orders;
 - a. Permanent injunction restraining the defendant whether by herself, servants and or agents and or any other person claiming and or acting through them from interfering with the plaintiff's construction, peaceful and quite possession of kiosk space No 5 Kimilili bus pack.
 - b. Costs of this suit
 - c. Interests at courts rates.
3. It was the appellants case that he is the leaseholder of Kiosk No 5 Kimilili bus pack wherein the respondent without any colour of right, express or implied permission of the appellant unlawfully interfered with his peaceful, construction and quite possession of the said kiosk.
4. Upon being served with Summons, the respondent/defendant entered appearance and filed defence dated 21st July, 2015. In her defence, the respondent/defendant denied the appellant's/plaintiff's claim



and averred that on the 13th July, 2011 she purchased and took possession of Council leasehold No Kimilili/D/233 situated at Kimilili bus pack and this issue was the subject matter in Bungoma CMCC No 501 of 2011 Mary K. Muthoni v Nicodemus W. Wekanywa & 3 others and Bungoma High Court Civil Appeal No 52 of 2013 Ann Wanjala v Mary K. Muthoni. The defendant sought to have the appellants'/plaintiff's suit dismissed with costs.

5. The former suit had initially been filed in this court but was later transferred to the Chief Magistrate's Court at Kimilili for hearing and determination. The respondent/defendant the hearing date referred to his notice of preliminary objection dated 28th August, 2019 and asked the court to be canvassed first. The said Notice of Preliminary Objection stated as follows;

'this matter violates the provisions of Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya.'

6. The trial court directed that the said notice of preliminary objection was to be argued orally on 31st October, 2019. In his submissions, the respondent argued that there was a suit being Bungoma CMCC No 501 of 2011 where the subject matter in issue is similar to the subject matter in the current suit. He submitted that the former suit was heard and determined and a decree issued. He further submitted that the appellant purchased the subject property from one Ann Nekesa Wanjala who was a party in Bungoma CMCC No 501 of 2011. The respondent's argument is that this matter goes against the doctrine of res judicata and therefore sought to have it struck out with costs.
7. The appellant on the other hand submitted that he was not a party in Bungoma CMCC No 501 of 2011. It was his contention that he was issued with an allotment letter for plot No 5 Kimilili bus park on 19th December, 2012 after the letter of allotment issued to Ann Nekesa Wanjala was revoked and as such, that suit did not involve the said Ann Nekesa Wanjala and the same is therefore not res judicata.
8. In a brief response, the respondent reiterated his arguments submitted earlier and relied on the statement of Ann Nekesa Wanjala where she stated that she obtained the plot from the Unity of churches and she sold the plot to the Appellant. He maintained his prayer that this suit cannot be maintained for being res judicata.
9. In a Ruling delivered on 29/11/2019, the trial Magistrate upheld the said Preliminary Objection and struck out the plaintiff's/Appellant's former suit with costs. The appellant was aggrieved and preferred the present appeal on the following grounds;
10. Upon considering the defendant and the rival arguments by the plaintiff, the court retired to write its ruling which was delivered on 29th November, 2019. The trial court in allowing the preliminary objection struck out the suit with costs to the respondent.
11. Being aggrieved by the court's judgment, the Appellants preferred the current appeal vide a memorandum of appeal dated 22nd March, 2023 on the following grounds;
 - a. That the Honourable Magistrate erred in law and fact in holding that the Appellants suit was res judicata when the appellant was never a party to the suit on which the finding of res judicata was made.
 - b. The trial magistrate did not fully and critically analyze all the elements of Section 7 of the Civil Procedure Act and hence her decision to strike out the Appellants suit was a miscarriage of justice.



- c. That the Honourable Magistrate erred in law and fact in striking out the Appellants suit on a preliminary point of law when the said preliminary point of law did not meet the threshold in law and hence denied the Appellant a chance to be heard on the merits of the case.
 - d. That the Honourable Magistrate erred in law and fact in proceeding to hear the proceeding to hear the preliminary objection in the absence of counsel for the Appellant and without giving the Appellant an opportunity to engage another counsel thereby literally denying the Appellant legal representation and occasioning grave prejudice and injustice.
 - e. That the ruling of the learned trial magistrate is unsupportable both in law and fact.
 - f. That the ruling of the learned trial magistrate runs counter to the latter and spirit of Article 159 (2) and (e) of the Constitution of Kenya 2010.
12. Being a first appeal, this court has a primary duty to reconsider the evidence adduced in the lower court, re-evaluate and analyze it so as to make its own independent conclusions and thus determine whether the trial court's findings and conclusions are consistent with the evidence adduced and the applicable law. See case of Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212.
 13. The Notice of preliminary objection raised before the trial court was based on a point of law on the ground that this matter is res judicata. The issue for determination in this appeal is whether the former suit falls on all fours of section 7 of the Civil Procedure Act which stipulates 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.”
 14. During the hearing of the Notice of Preliminary Objection before the trial court, the Counsel for the respondent submitted that the former suit was res judicata as there was another suit in Bungoma Chief Magistrate CMCC No 501 of 2011. He referred the trial court to a decree contained in the respondent's further list of documents dated 26/07/2019. He submitted that the said decree showed that the subject matter in that suit was the subject of another suit before Bungoma Chief Magistrate court. He also referred to the respondent's further list of witnesses dated 23/8/2015 where one Anne Nekesa Nanjala recorded a statement. He referred to paragraph 3 of the said witness statement and submitted that the witness actually confirmed that plot No 5 is the same as plot No D233 Kimilili. The advocate further submitted that the said Anne was actually enjoined in proceedings in Bungoma CMC-ELC No 501 of 2011 where she was claiming that the subject matter in Bungoma 501 of 2011 was her property. He submitted that Anne actually went to the suit property in contempt of court and was cited and committed to civil jail. The learned counsel further submitted that the said Anne preferred an appeal as can be seen from the appellant's list of documents as well as the defendant's/ Respondent's list of documents No 8. He submitted that the plaintiff/appellant has information that Anne was sold the same property and the same plaintiff has filed a suit arising from the same cause of action. He argued that if this court has to go on with the case, it will contravene the provisions of Section 7 of the Civil procedure Act, the suit having been determined, judgment entered and no appeal preferred. He submitted that what was challenged was a conviction. It was further submitted that the plaintiff/appellant is an agent of Anne and that the rules of Res judicata are clear that the same subject matter before a court of law between similar or parties claiming for other parties cannot be brought to court twice.



15. On his part, the plaintiff/appellant in person submitted that he was not a party to case file No 501 of 2011. The appellant/plaintiff also submitted that he was issued with a letter of allotment for plot No 5 Kimilili Bus Park on 19/12/2012 after the letter of allotment issued to one Anne Nekesa Wanjala was revoked. He submitted that the real owner of the plot was the Municipal Council of Kimilili. The plaintiff/appellant denied that the case had been heard and determined in Bungoma court.

The respondent referred to a list of documents dated 26th July, 2017 where the first item is a copy of a decree issued in Bungoma CMCC No 501 of 2011. I have perused the extract of the record of appeal and the lower court file but I cannot find the decree the respondent mentioned in his submissions. What has been availed in the list of documents are various orders which clearly are not a court decree.

16. The court was also referred to the appellant's list of documents dated 23rd August, 2015 where the plaintiff/appellant's witness Ann Wekesa is said to have stated that she sold plot No 5 to the appellant herein. On this point, the respondent argued that the appellant was therefore an agent of the said Ann Wekesa and since Ann Wekesa was a party in the other suit, he (the appellant) cannot bring in a fresh suit under his name over the same subject matter.
17. This being a first appeal, it is my duty to re-consider, re-evaluate and re-analyze the evidence and documents produced before the trial court and by way of a re-trial come up with my own conclusion, giving allowance to the fact that I neither saw nor heard the witnesses themselves. (see *Peters v Sunday Post Ltd* (1958)E.A 424, [*Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*](#) (2013) KLR).
18. Section 7 of the [*Civil Procedure Act*](#) states 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.”

19. The respondent had raised a Notice of Preliminary Objection before the trial court dated 28th August, 2019 alleging that the suit violates the provisions of section 7 of the [*Civil Procedure Act*](#) arguing that there was a former suit being Bungoma CMCC No 501 of 2011. She referred to a witness statement by one Anne Nekesa Nanjala dated 23/8/2015 at paragraph 3 and submitted that the author stated that Plot No 5 is the same as Plots No D233 Kimilili.
20. The issue that arise for determination in this appeal is whether the issue raised before the trial court as a preliminary objection was really a pure point of law. A preliminary objection has been a subject of numerous decisions by the superior courts. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* 91969)EA 696, the court defined what constitutes Preliminary objection as follows;

“---a preliminary objection consists of a point of law which has been pleaded or which arise 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 a contract giving rise to the suit to refer the dispute to arbitration.”

In that case, sir, Sir Charles Newbold P. stated;

“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 improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”

While submitting on the said preliminary objection, the respondent referred to a witness statement by one Anne Nekesa Wanjala at paragraph 3 thereof where the witness allegedly stated that plot No 5 is the same as plot No 23 D Kimilili and that Anne was actually enjoined in proceedings in Bungoma 501 of 2011 where she claimed that the property in Bungoma 501 of 2011 was her property. The said Anne Nekesa Wanjala was yet to testify and her testimony subjected to rigorous cross examination.

The respondent did not also produce a certified copy of pleadings, judgment and decree in the former suit in Bungoma civil suit No 501 of 2011 showing that the issue in the said case No Bungoma CMCC-ELC 501 of 2011 was directly and substantially the same in the former suit. Looking at the order referred by the respondent, it clearly shows that the appellant was not a party in the alleged Bungoma CMCC No 501 of 2011. The respondent did not also demonstrate that Anne Nekesa Wanjala was a party in Bungoma Civil Case No 501 of 2011 and that she was claiming under the same title as the appellant herein. There is equally no pleadings, e.g a plaint or defence produced by the respondent showing that the issues in controversy in Bungoma Civil Case No 501 of 2011 were the same as the former suit Kimilili No 20 of 2018 and those issues were heard and finally determined.

It is my finding that what was raised by the respondent as a preliminary objection was improper and should not have been entertained by the trial court since such improper points of law increase costs and bring confusion to the issues.

The upshot of my finding is that this appeal is merited and the same is allowed as follows;

1. The Ruling of Hon. G. Adhiambo, Principal Magistrate delivered on 29th November 2019 in Kimilili PM-ELC No 20 of 2018 be and is hereby set aside and substituted with an order overruling the preliminary objection dated 28th August, 2019
2. The original court file No Kimilili PM-ELC No 20 of 2018 is hereby remitted back to Kimilili law courts for hearing and determination on merit.
3. Mention before Kimilili Senior Principal for directions on 26/3/2024

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 14TH DAY of MARCH, 2024

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wangila H/B Masengeli for appellant
2. Mr. Were H/B Mr. Bwonchiri for Respondent
3. Bett C/A

