



**South Eastern University College v Ukamba Agricultural Institute Limited;
County Government of Kitui (Intended Interested Party) (Environment & Land
Case E001 of 2024) [2025] KEELC 853 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E001 OF 2024
LG KIMANI, J
FEBRUARY 27, 2025**

BETWEEN

SOUTH EASTERN UNIVERSITY COLLEGE PLAINTIFF

AND

UKAMBA AGRICULTURAL INSTITUTE LIMITED DEFENDANT

AND

COUNTY GOVERNMENT OF KITUI INTENDED INTERESTED PARTY

RULING

1. The Plaintiff/applicant filed an application dated 31st January 2024 seeking the following orders:
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the main suit, there be a temporary injunction restraining the defendant/respondent whether by themselves, agents, successors, servants or otherwise from evicting, alienating, selling, transferring and/or dealing in any manner whatsoever with all that parcel of land known as L.R. No,13529, LR No.5739 situate in North West of Kitui Town.
 4. That this Honourable Court do suspend the Respondent's Eviction Notice to the Plaintiff/Applicant to vacate the property known as L.R. No,13529, LR No.5739 situate in North West of Kitui Town within 90 days, fated 12th September 2023, pending the hearing and determination of the main suit.
 5. That the costs of this Application be provided for.



2. The affidavit in support of the application was sworn by Prof. Eng. Douglas Shitanda, the Vice-Chancellor of the Applicant University. He deposed that the subject land was donated by the County Council of Kitui, the predecessor of the Interested Party herein to be leased for a term of 99 years from 1st October 1976.
3. The government of Kenya, vide Legal Notice 102 of 2008, of 15th July 2008 and as amended by the attached Corrigenda in the Kenya Gazette special issue of 27th February 2009, established the South Eastern University College, a Constituent College of the University of Nairobi to be the successor of Ukamba Agricultural Institute (UKAI).
4. Following this, the South Eastern University College was upgraded to a fully chartered public University, duly registered under the Universities Act 42 of 2012, through the Charter dated 1st March 2013. Among the assets that the Plaintiff/Applicant inherited was the suit property.

Defendant/Respondent's Preliminary Objection

5. The Defendant/Respondent filed a Notice of Preliminary Objection dated 23rd February 2024, which is the subject of determination by this Court in this ruling, on the points that:
 1. That the suit is res judicata NBI ELC NO.136 of 2009 Ukamba Agricultural Institute Ltd Vs South Eastern University College And County Government of Nairobi, where the Legal Notices No.102 of 2008 dated 15th July 2008 by which the Plaintiff purported to take over ALL the Defendant's properties, including the subject property known as LR 13529, LR 5739 situate in North West of Kitui Town, which was declared illegal and unconstitutional in a judgment delivered on 11th May 2023.
 2. That the judgment dated 11th May 2023 in NBI ELC NO.136 of 2009 applies mutatis mutandis to this present suit, thereby leaving no dispute to be considered or determined by this Honourable Court, hence this Court is precluded by Section 5 of the Civil Procedure Act CAP 21 from hearing this suit.
 3. That the Plaintiff having conceded to receiving the Eviction dated 12th September 2023, its continued stay in the subject property amounts to trespass and the Eviction Notice ought to come into effect pursuant to section 152E of the Land Act 2012.

Defendant/Respondent's Submissions on the Preliminary Objection

6. Counsel for the Respondent submits that Legal Notice No. 102 of 2008 dated 15th July 2008 created South Eastern University College (now South Eastern Kenya University) as a successor to Ukamba Agricultural Institute Limited and, at Paragraph 3(4), vested all of the assets of Ukamba Agricultural Institute upon itself. These assets included the subject property known as L.R No. 13529, I.R No. 5739 situated in North West of Kitui Town.
7. It was submitted that the plaintiff and the 1st defendant were engaged in a land dispute, NBI ELC 136 OF 2009, which was determined on 11th May 2023 in favour of the defendant herein.
8. Counsel for the Defendant/Respondent highlighted several aspects of the above judgment, that at paragraph 78 of the judgement, the Court held that the alleged vesting of the 1st defendant's assets to the plaintiff herein was a takeover equal to compulsory acquisition and that it violated the 1st defendant's Constitutional right to property, then vested under Section 75 of the retired Constitution. In paragraph 79 thereof, the Court also held that the legal notice was illegal as it did not accord to the mandatory provisions of compulsory acquisition set out under section 8 of the Land Acquisition Act



(Repealed). At paragraph 81, the Court concluded that the legal notice was not capable of transferring the suit land which when read wholly, was incapable of vesting any of the 1st defendant's assets upon the plaintiff herein.

9. The defendant/respondent submits that this Court has also been called upon to determine whether or not the plaintiff herein is the lawful owner of the suit property herein, which it acquired vide Legal Notice No. 102 of 2008 above, which is an issue that has already been determined by a Court of competent and concurrent jurisdiction and, there being no reversal by the appellate Courts, still stands. They submit that the issues that were determined are res judicata, and cannot be relitigated as per section 7 of the Civil Procedure Act Cap 21 Laws of Kenya. Consequently, without Legal Notice No. 102 of 2008, the plaintiff herein has no proprietary rights to be protected by this Court in this suit.
10. On the second point of their preliminary objection, counsel for the defendant/respondent asserted that the above judgement can only apply to this suit if the Court is to refrain from making a finding on what has already been decided, i.e. whether the assets held by the plaintiff through LN 102/2008 are lawful or Constitutional, and whether they are a compulsory acquisition of the 1st defendant's assets. That the judgement can only apply mutatis mutandis for symmetry in the Courts' findings.
11. On the 3rd point of their preliminary objection, the defendant/Respondent submitted that its rights to the subject property has crystallised with the notice of eviction dated 12th September 2023 which should be effected and that the plaintiff has no right of occupation or use of the subject property as a consequence.
12. Counsel for the defendant/respondent therefore concluded that their preliminary objection has merit and that the suit and the Notice of Motion dated 31st January 2024 be struck out with costs.

The Plaintiff/Applicant's Submissions on the Preliminary Objection

13. Counsel for the Plaintiff/Applicant submitted that the substantive law on res judicata is found in Section 7 of the Civil Procedure Act CAP 21. They relied on the criteria given in the authority of Kennedy Mokuva Ongiri vs Hohn Nyasende Mosioma & Florence Nyamoita Nyasende(2022)eKLR.
14. Their submission is that whereas the parties in this suit are the same as in Nairobi ELC 136 of 2009, the title and the subject matter and issues for determination are very different from the subject matter and issues determined by the Court in that suit.
15. On the second point of the preliminary objection, the Applicant quoted Section 107(1) and (2) of the Evidence Act on the burden of proof being on the one who desires a Court to give judgment. They submit that the Defendant has failed to demonstrate and prove to this honourable court that the judgment in Nairobi ELC 136 of 2009 declared the Plaintiff's establishing legal instrument illegal and unconstitutional, which they deny.
16. The Applicant avers that the aforesaid judgment was purely on issues of ownership of the property that is situated in Nairobi, and not the legality of the Plaintiff's establishing legal instruments as seen in the determination and orders therein. They therefore submit that the Defendant/Respondent's preliminary objection lacks merit and the same should be dismissed with costs to the Plaintiff.

Analysis and Determination

17. The issue for determination is the Respondent's preliminary objection that the Plaintiff/Applicant's application and entire suit is res judicata.



18. The doctrine of res judicata is laid down by Section 7 of the Civil Procedure Act CAP 21 which provides 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 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 Plaintiff/Applicant relied on the authority of Kennedy Mokuva Ongiri vs Hohn Nyasende Mosioma & Florence Nyamoita Nyasende(2022)eKLR where the Court held that the criteria for determining that a case is res judicata is as follows:

“In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

- i. What issues were really determined in the previous Application;
- ii. whether they are the same in the subsequent Application and were covered by the Decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.”

20. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 to mean: -

“So far as I am aware, 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 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”.

21. Further Sir Charles Nebbold, JA stated that:-

“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”.



22. It is trite law that a preliminary objection should be determined without going into proving contested facts. This was held by the Supreme Court of Kenya in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 others*, Application No. 50 of 2014 (2015) eKLR, which had this to say:

“Thus a preliminary objection may only be raised on a pure question 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.”

23. The above position was restated by Lady Justice Mary Kasango in *Kenya Breweries Limited & another v Keroche Breweries Limited* [2020] eKLR while quoting *Mativo J* in the case of:

“*J.N. & 5 others v Board of Management St G. School Nairobi & another* (2017) eKLR thus.....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...”

24. The parties herein contest the subject matter of the previous suit and the effect of the determination in Nairobi ELC 136 of 2009 dated 11th May 2023. The defendant/respondent insists that the issues in this suit were determined in the previous suit while the Plaintiff/Applicant denies that the issues in the previous suit are the same as the ones in this suit.

25. For this Court to determine whether the instant application and entire suit is res judicata, the Court would have to look into the pleadings in the previous suit vis-a-vis the pleadings in this suit. This is clearly outside the scope of a preliminary objection which must be based on a pure point of law, without requiring an ascertainment of contested facts. This point was made in the case of *Henry Wanyama Khaemba Vs Standard Chartered Bank Ltd & Another* (2014) ECLR, where the Court held that

“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 the jurisdiction on preliminary objections.”

26. Further in the case of *George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another* (2014), eKLR, the Court held that: -

“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 annexed to enable the court to determine whether the current suit is res judicata.

27. The Supreme Court in the case of *Kenya Commercial Bank Limited v Muiiri Cofee Estate Limited & Bidii Kenya Limited* [2016] KESC 6 (KLR) stated as follows on the doctrine of Res Judicata;

“Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether



these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.’

28. Following the findings in the above cited authorities which the Court agrees with, the Court observes that in the present case the Defendant attached to the Preliminary Objection a copy of the judgment in NRB ELC NO. 136 of 2009 between Ukamba Agricultural Institute Ltd Vs South Eastern University College and County Government of Nairobi and a copy of the eviction notice issued to the Plaintiff herein. The court does not have the opportunity to look at the entire pleadings and record of the previous case to compare it with the instant case to ascertain the issues determined in the previous case, and whether these are the same issues raised in the subsequent case. The Court is also required to confirm whether the parties to the two suits are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction.
29. Having considered the preliminary objection herein, the court finds that all the issues raised therein ought to have been argued by way of an application filed in the normal manner where all the documents mentioned above would be attached to a supporting affidavit. The Respondent would then have an opportunity to respond to such an application in the normal way. In the Court’s view, the ground raised in the preliminary objection does not qualify to be raised as Preliminary Points.
30. The final order of the court is as follows;
 1. The Defendant’s Notice of Preliminary Objection dated February 23, 2024 has no merit and the same is hereby dismissed.
 2. Costs are awarded to the Plaintiff.

RULING READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF FEBRUARY 2025.

In the presence of:

Ombwayo for the 1st Defendant.

No appearance for the Plaintiff.

Court assistant: Kendi.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

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