



**Pangaea Development Holdings Ltd v Hacienda Development Ltd & 2 others  
(Civil Appeal E10 of 2020) [2023] KECA 938 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 938 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E10 OF 2020  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
JULY 28, 2023**

**BETWEEN**

**PANGAEA DEVELOPMENT HOLDINGS LTD ..... APPELLANT**

**AND**

**HACIENDA DEVELOPMENT LTD ..... 1<sup>ST</sup> RESPONDENT**

**ADAM TULLER ..... 2<sup>ND</sup> RESPONDENT**

**THE REGISTRAR OF LANDS MOMBASA CENTRAL**

**REGISTRY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of the Environment and Land Court at  
Mombasa dated 22nd July, 2020 by C. Yano, J. in ELC Civil Suit No 160 of 2019)*

**JUDGMENT**

1. This is a first appeal that challenges the ruling rendered by C. Yano, J. on a preliminary objection and a Notice of Motion application filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the Environment and Land Court at Mombasa (ELC), in *ELC Civil Suit No 160 of 2019* dated 8<sup>th</sup> October 2019 and 9<sup>th</sup> October 2019 respectively. Being a first appeal on a Preliminary Objection, our duty is to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. See *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212.
2. The preliminary objection of 21 paragraphs, filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents challenged the appellant's suit filed by the appellant in the ELC of being time-barred, *res judicata*, and incompetent. In addition, it was contended that the appellant had no capacity to sue, and the court had no capacity to hear the suit.
3. The notice of motion application on the other hand prayed for three orders. One, the appellant's suit be dismissed with costs to be paid by the appellants and their advocate Kiptiness & Odhiambo Associates



jointly and severally. Two, the appellant's suit be struck out with costs to be paid by the appellant and their advocate Kiptiness & Odhiambo Associates jointly and severally. Three, in the event the suit is not dismissed or struck out, the court be pleased to order the appellants to provide security of Kshs. 68, 385, 866/-. The application was supported by the affidavit sworn by the 2<sup>nd</sup> respondent dated 9<sup>th</sup> October 2019. The affidavit had 30 paragraphs and 6 annexures.

4. The appellant's Director, Bruce Bouchard swore a replying affidavit to the notice of motion application, dated 3<sup>rd</sup> December 2019 and a second one in answer to the preliminary objection of even date. He also filed Grounds of Opposition dated 7<sup>th</sup> November 2019 and 15<sup>th</sup> November 2019. Both affidavits oppose the PO and the Motion, and contested the facts upon which the application was based.
5. The appellant's suit before the ELC ([\*ELC Civil Suit No 160 of 2019\*](#)) concerned a sale of Land Reference No MN/II/10279 (original MN/II/4887) hereinafter the suit property. The appellant's case was that the appellant company and the 1<sup>st</sup> respondent purchased the suit property from Bokin Holdings Ltd, not a party to the proceedings. The purpose of the purchase was carrying out a joint venture, of developing a small-town on the property. It was their intention that the suit property be transferred to a joint venture company to be nominated by the purchasers. That the appellant and the 1<sup>st</sup> respondent acquired a 'shelf company' called Quadco Eleven Ltd.

The intention was to form a joint venture company to be known as Hacienda Development Holdings Limited (hereinafter HDHL) for the purpose of purchasing property and undertaking a substantial housing project development in Mombasa.

6. Soon, a dispute arose between the appellant company and the 1<sup>st</sup> respondent over the management and control of HDHL, and the allotment and increase of the 1<sup>st</sup> respondent authorized share capital against their Shareholders Agreement dated 3<sup>rd</sup> August 2006. It was the appellant's case that the suit property, the main asset in HDHL was fraudulently transferred from HDHL to the 1<sup>st</sup> respondent. As a result, various suits were filed, which suits were the subject matter of the PO and the Notice of Motion filed before the ELC judge.
7. After hearing the parties on both the preliminary objection and the Motion, the learned Judge struck out the appellant's suit for being res judicata Nairobi HCCC No. 800 of 2009, Winding Up Cause No. 23 of 2011, the Arbitration Reference between Pangaea Development Holdings Ltd and Hacienda Development Limited & Mr. Adam Tuller, Milimani HCCC Misc. 230 of 2017 and Mombasa ELC Case No. 105 of 2018.
8. The appellant, aggrieved by the ruling filed this appeal. The memorandum of appeal raises 18 grounds of appeal. The learned Judge is faulted for misinterpretation of the doctrine of *res judicata* and the provisions of sections 7 and 28 of the [\*Civil Procedure Act\*](#) and the [\*Environment and Land Court Act\*](#) and in so doing found the cases cited by the respondents as res judicata their suit before the learned Judge, which fact was not proved. The learned Judge was faulted for driving the appellant from the seat of justice and divesting the appellant of its right to have the dispute resolved on its merit. The learned Judge was faulted for failing to dismiss the preliminary objection as the issues raised in support thereof were not pure points of law, but ones that required interrogation of evidence.
9. The appellant sought this Court to allow the appeal, set aside the impugned decision of 22<sup>nd</sup> July 2020 and be substituted with this Court's finding that the appellant's course of action and issue are not res judicata on account of previous litigation.



It also sought the Court do set aside the Superior Court's decision to uphold the PO and substitute it with the Court's finding that the PO offends established precedence on the threshold of PO's. It prayed that the case before the ELC be set down for hearing at the earliest instance.

10. The appeal was heard through this Court's virtual platform on the 6<sup>th</sup> February 2023. Present for the appellant was learned counsel Mr. Allan Muturi holding brief for Mr. Odhiambo for the appellant; learned counsel Mr. Kinyua Kamunde for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and learned counsel Ms. Janet Langat for the 3<sup>rd</sup> respondent. Ms. Langat did not file any submissions and did not wish to submit, stating that no substantive orders were sought against the 3<sup>rd</sup> respondent.
11. The issue in this appeal is whether the preliminary objection by the 1<sup>st</sup> and 2<sup>nd</sup> respondent raised a pure point of law sufficient to dispose of the suit. That is was the appellant's suit in [ELC Civil Suit No. 160 of 2019](#) *res judicata* Nairobi HCCC NO. 800 of 2009, Winding Up Cause No. 23 of 2011, Milimani HCCC Misc. 230 of 2017 and Mombasa ELC Case No. 105 of 2018.
12. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v 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 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.”
13. Further Sir Charles Newbold, JA in the same judgment 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
14. In the case of [George Oraro v Barak Eston Mbaja](#) (2005) 1 KLR 141, the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”
15. The appellant's suit was struck out for being *res judicata*. The [Black's Law Dictionary](#) 10th Edition defines “*res judicata*” as:

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
16. Section 7 of the [Civil Procedure Act](#) (hereafter referred to as the CPA) stipulates as follows:



7. Res judicata

“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. The scheme of Section 7 of the [CPA](#) contemplates five conditions which when co-existent, will bar a subsequent suit. The conditions are:
- i. The matter directly and substantially in the subsequent suit must have been directly and substantially in issue in the former suit;
  - ii. The former suit must have been between the same parties or privies claiming under them;
  - iii. The parties must have litigated under the same title in the former suit;
  - iv. The court which decided the former suit must have been competent to try the subsequent suit; and
  - v. The matter in issue must have been heard and finally decided in the former suit.
17. The issue is whether the suits cited by the Court meet the criteria set under Section 7 of the [CPA](#) and in the conditions, we have set out above.
18. Mr. Muturi for the appellant relied on the record of appeal the supplementary replying affidavit dated 15<sup>th</sup> September 2020, submissions dated 21<sup>st</sup> October 2022 and the list of authorities of even date. He highlighted his submissions and urged that the grounds for finding the cause of action in [ELC Civil Suit No.160 of 2019](#) (from which this appeal arises) was *res judicata*, Pangea Development Ltd v Hacienda Development Ltd & 3 others HCC 800 of 2009 could not render the suit *res judicata* as the latter case was referred to Arbitration for determination. That in Arbitration the Arbitrator eschewed the issue of illegal transfer of the suit property and stated that that aspect of the dispute was not capable of determination through arbitration.
19. That Milimani HC Misc. 230 of 2017 was an application for setting aside of the Arbitral Award issued in the Arbitration that had been filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That the Winding Up Cause No 23 of 2011 was an insolvency cause whereby the reliefs sought were for the Court to appoint an investigator into the affairs of the joint venture company, Hacienda Development Holdings Ltd (hereafter referred to as HDHL). And Mombasa ELC 105 of 2018 in which the appellant was a party but was seeking derivative reliefs to sue and claim, not for itself, but on behalf of the joint venture company, HDHL, which had been deprived of the suit property by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That Omollo, J. struck out the suit at a preliminary point for want of jurisdiction.
20. Mr. Muturi relied on several authorities namely, the Supreme Court of Kenya case of [Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others](#) [2015] eKLR for the proposition that a preliminary objection may only raise a pure point of law; and the decision in *Mukbisa Biscuit Manufacturing Ltd v West End Distributors* [1969] EA 696, for the proposition that a preliminary objection cannot be raised if any fact has to be ascertained.

He urged us to allow the appeal and remit the case to the ELC for hearing.



21. Mr. Kinyua relied on his written submissions dated 23<sup>rd</sup> November 2022 and urged that the suit was *res judicata*. He highlighted his submissions and urged that the appellant was not a party to the agreement of the sale. That the appellant was never the owner of the land and that the appellant is less than 7% owner of the shares in that company known as Hacienda Development Holdings Ltd, [HDHL], not party to these proceedings while the 1<sup>st</sup> respondent was 93% owner. We also read his written submissions in which he has given a background of the appeal before us, and a chronology of the various suits between the parties. He urged that in the suit Nairobi HCCC No. 800 of 2009 the appellant successfully sought the reference of the suit to arbitration. He urged that the Arbitrator declined to deal with the issue of transfer of the suit property. That the appellant filed Mombasa ELC 105 of 2018 suing the 1<sup>st</sup> and 2<sup>nd</sup> respondent, which suit was struck out by the ELC for lack of jurisdiction. That the appellant then filed Milimani 230 of 2017 to enforce arbitration award.  
That it then filed Mombasa [ELC 160 of 2019](#) from which this appeal arises.
22. We have considered this appeal and the submissions by counsel. What is clear from the submissions of both counsel to the parties and from the record of appeal is [ELC Civil Suit No. 160 of 2019](#), out of which this appeal arises, was filed by the appellant and another that was struck out from the record as against the respondents. The suit was challenging the transfer of the suit property from a joint venture company, HDHL, to the 1<sup>st</sup> respondent.
23. As for Nairobi HCCC No. 800 of 2009, it is not in dispute that the case was referred to arbitration before it was heard by the High Court. Further, the Arbitrator declined to determine the issue of the propriety of the transfer of the suit property because of lack of jurisdiction. The matter does not meet the conditions set under Section 7 of the [CPA](#) since the case has not been heard and determined on the merits.
24. As for Winding Up Cause No. 23 of 2011, the same was an insolvency cause and the reliefs sought from the court was to appoint an investigator into the affairs of the joint venture company. The subject matter of this cause, even if it was heard, had no relation with the issue of the propriety of the transfer of the suit property. It does not meet the criteria of being a matter that could render [ELC Civil Suit No.160 of 2019](#) *res judicata*.
25. As for Milimani HCCC Misc. 230 of 2017, the same was an application filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent against the appellant, and sought the setting aside of the arbitral award. The Arbitrator did not determine the issue of the propriety of the transfer of the suit property between HDHL and the 1<sup>st</sup> respondent. The subject matter of the case was different from the subject matter of ELC Civil Suit No. 160 of 2019, and for that reason, even if it were determined on the merits it would not render the ELC suit *res judicator*.
26. As for the Mombasa ELC Case No. 105 of 2018, the appellant was seeking derivative reliefs to sue and claim on behalf of HDHL company. The suit was struck out at the preliminary stage for lack of jurisdiction. It too does not meet the conditions that could render [ELC Civil Suit No.160 of 2019](#) *res judicata*.
27. For the reasons we have explained above, we find that the appellant's suit in [ELC Civil Suit No.160 of 2019](#) was not *res judicata* Nairobi HCCC No. 800 of 2009, Winding Up Cause No. 23 of 2011, Milimani HCCC Misc. 230 of 2017 and Mombasa ELC Case No. 105 of 2018.

The causes of action and the reliefs sought in each were different from the present case. None of the cases were heard and determined on merit except for Milimani HCCC Misc. 230 of 2017, which was an application seeking the setting aside of an arbitral award and which was filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The learned ELC judge fell into error, by failing to apply the principles on *res judicata* to



the case, especially the one that requires that the issue in the case under consideration had been fully heard and determined on merit in a former suit between the parties or privies claiming under them.

28. We therefore find merit in the appellant's appeal and issue the following orders:

1. The ruling of the learned Judge delivered on the 22<sup>nd</sup> July 2020 in *Mombasa ELC Civil Suit No. 160 of 2019* be and is hereby set aside.
2. The Appellant's suit in *Mombasa ELC Civil Suit No. 160 of 2019* be and is hereby reinstated for hearing and determination on the merits by a Judge other than C. Yano, J.
3. The Deputy Registrar of this Court shall send this judgment forthwith to the Presiding Judge, ELC Mombasa for the appropriate directions to be made in *Mombasa ELC Civil Suit No. 160 of 2019*.
4. The 1st and 2nd respondents will meet the appellant's costs of this appeal.

29. Those are our orders.

**DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

