



**Samchi Telecommunications Limited v Abdalla & 5 others (Environment & Land Case 29 of 2023) [2024] KEELC 3781 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 3781 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 29 OF 2023**

**AE DENA, J**

**MARCH 7, 2024**

**BETWEEN**

**SAMCHI TELECOMMUNICATIONS LIMITED ..... PLAINTIFF**

**AND**

**ABDALLA KOMBO ABDALLA & 5 OTHERS ..... DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> to 6<sup>th</sup> Defendants have raised a Preliminary Objection on the ground that the suit herein is Res Judicata. The same is captured in detail as follows;
  1. That the present suit as taken out drawn and filed is incompetent, fatally defective and unsustainable in law or at all.
  2. That the Honourable court lacks jurisdiction to hear this matter as the suit is res judicata as envisaged under Order 9 of the Civil Procedure Code in that the issues in this suit were directly and substantially in issue in ELC Kwale No 4 of 2021 [formerly MSA ELC 25 of 2015] Socaf & Company Versus John Maina Njoroge between the same parties and which matter has been heard and finally decided by the said court.
  3. That in the circumstances the Plaintiff's suit should be struck off for contravening both law and equity.
  4. That in the whole the Plaintiff herein is a vexatious and frivolous litigant and the proceedings herein an abuse of the court process.
2. In the circumstance the suit herein ought to be struck out with costs.
3. On 4/7/2023 the court issued orders to have the preliminary objection be heard by way of written submissions. The Plaintiff's submissions were filed before the court on 9/11/2023 while the



Defendants/Applicants submissions were filed before court on 8/9/2023. The court has familiarized itself with the contents thereof.

### Determination

4. The court will first determine if the Preliminary objection is properly raised.
5. The Supreme Court in Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR outlined the test to be applied in determining a proper preliminary objection as follows; -
  - (i) A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
  - ii) A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.
  - iii) A Preliminary Objection cannot be entertained where;
    - a. The facts are disputed/contested.
    - b. The facts are liable to be contested.
    - c. Facts are to be proved through process of evidence.
    - d. What is sought is an exercise of judicial discretion.
6. The Plaintiff's case as captured in the plaint instituting this suit and which is dated 4/4/2023 is that vide a sale agreement dated 28/3/2013 he purchased the suit property Kwale/Msambweni A/2927 from the 1<sup>st</sup> Defendant with the belief that the suit property belonged to the said party. It is averred that the Plaintiff carried out due diligence before the said purchase and confirmed that the suit property was registered in the names of the 1<sup>st</sup> Defendant as evidenced by a copy of the official search dated 4/1/2013. Later, the suit property was sold to other parties and which illegality was orchestrated with the help of the rest of the Defendants. The subsequent sale is termed as a fraudulent transaction with particulars outlined in the plaint. The Plaintiff seeks interalia for payment of Kshs 51,451,560.00/- as the total expenditure in acquiring the suit property.
7. The main issue therefore is whether the issues as raised from the above summary of the Plaintiff's case have been heard and determined by another court and hence amounting to resjudicata. But first, can the doctrine of res judicata be raised in a preliminary objection?
8. 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.”

BLACK'S LAW DICTIONARY 10TH EDITION defines the terms “heard and determined” as follows: -

Of a case, having been presented to a Court that rendered Judgment”.

The term “hearing” is defined in the same dictionary as follows: -



A judicial session usually open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”

9. Arising from the above provisions it is clear that it would be necessary for the court to look at the facts, pleadings and proceedings in the former suit being ELC Kwale No 4 of 2021 [formerly MSA ELC 25 of 2015] Socaf & Company Versus John Maina Njoroge. Evidence has to be adduced by the Defendants in proof of the allegation that the issues raised in the present suit have been finally determined. This is the only way the court will effectually make conclusive determination on the matter. Accordingly, the objection will then cease to be on a pure point of law.
10. The court is persuaded and guided by the dictum in *George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another* (2014), eKLR cited by the Plaintiff, where 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. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”. (Emphasis mine)
11. It is my finding that the preliminary objection herein is not on a pure point of law. The doctrine of res judicata cannot be raised by way of a preliminary objection.
12. Consequently, the preliminary objection dated 22/5/2023 is hereby dismissed with costs to the Plaintiff.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

**A.E DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mbogo for the Plaintiff/Respondent

Ms. Lenjo for 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Defendants

No appearance for the 1<sup>st</sup> Defendant

Mr. Disii - Court Assistant

