



**Rimberia v Miriti (Environmental and Land Originating Summons
E016 of 2023) [2024] KEELC 3892 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E016 OF 2023**

CK YANO, J

APRIL 30, 2024

BETWEEN

GERALD MWITI RIMBERIA PLAINTIFF

AND

ELINA KATHAMBI MIRITI DEFENDANT

RULING

1. By an originating summons dated 19th December, 2023, the plaintiff filed suit against the defendant claiming to have acquired land parcel No. Nyayo/sirimon Scheme/540 which measures about 0.742 Ha and registered in the name of the defendant. Simultaneously with the filing of the suit, the plaintiff filed an application under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 and 51 of the *Civil Procedure Rules*, Section 68 of the *Land Registration Act* 2012 Article 40 of *the Constitution* of Kenya 2010 and all other enabling provisions of the law seeking an order for temporary injunction restraining the defendant/respondent from inter alia, interfering with the plaintiff/applicant's use and occupation of the suit property until the suit is heard and determined.
2. The application is supported by the affidavit sworn by the plaintiff/applicant on 19th December, 2023 and is based on the grounds that the applicant was a purchaser for value of the suit land in the year 2006 and was granted actual and physical possession at that time, and has used the said portion of the land peacefully, quietly and undisturbed. That the defendant/respondent has begun threatening the applicant with eviction.
3. In opposing the application, the respondent filed a notice of preliminary objection dated 28th December, 2023 which is the subject of this ruling on the following grounds-;
 1. That this suit is incompetent, incurably defective, res judicata and incompetent as the suit herein is res judicata by virtue of a previously instituted and determined suit in the



Environment and Land Court at Meru Vide ELC Case No. E002 of 2020 (O.S) between the plaintiff herein and the defendant herein over the same subject title.

2. That the claim against the defendant is an abuse of this court's process and the suit has been instituted with the ulterior motive to take away the defendant legally acquired land parcel Number Nyayo/sirimon Scheme/540 thereof from the defendant and which is an illegitimate use of the court process.
3. That the suit herein is bad in law, res judicata, misconceived and discloses no reasonable cause of action as against the defendant thus rendering it fatally incurably defective as it contravenes section 7 of the [Civil Procedure Act](#).
4. The preliminary objection was heard by way of written submissions. The defendant/respondent filed her submissions dated 19th February, 2024 through the firm of Mbaabu M'Inoti & Co. Advocates while the plaintiff/applicant filed his also dated 19th February, 2024 through the firm of Mwangi E.G & Company Advocates.
5. It was submitted on behalf of the defendant that the suit herein is res judicata by dint of section 7 of the [Civil Procedure Act](#). The defendant's counsel cited the provisions of Section 7 of the [Civil Procedure Act](#) which reveals that for a claim of res judicata to be effectively raised and upheld, the following must be proved, that the issue raised in the subsequent suit was directly and substantially in issue in the former suit; that the former suit was between the same parties, that the issue in question was heard and finally determined in the former suit and the competency of the court. It is submitted that the suit is res judicata because of another suit number Meru ELC Case No. E002 of 2020 over the same subject matter. That the pleadings and proceedings in that case have been provided before this Honourable court and it is the duty of the court to go through the same to confirm that the suit is similar to this suit as filed herein. That the applicant in that case was the plaintiff herein while the defendant herein was the defendant/respondent in that suit and in this suit.
6. The defendant's counsel cited the definition of res judicata in the Black's Law Dictionary and argued that a person may not commence more than one action in respect of the same or a substantially similar cause of action and that the court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.
7. The defendant's counsel relied on the case of Njunga Vs Wambugu & another Nairobi Hccc No. 2340 of 1991 (Unreported), Republic V Attorney General and another Exparte James Alfred Koroso, Uhuru Highway Development Ltd Vs Central Bank of Kenya, Exchange Bank Ltd (In Voluntary Liquidation) and Kamlesh Mansukhlal Pattni, and submitted that the decision of the court must be respected as fundamental to any civilized and just Judicial system. That Judicial determinations must be final, binding and conclusive, and that there is injustice if a party is required to litigate afresh matters which have already been determined by the court. That a decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. It is submitted that these principles would be "substantially undermined" if the court were to revisit them every time a party is dissatisfied with an order and goes back to the same court particularly when there is a change of a Judicial Officer in the court station.
8. The defendant's counsel submitted that in the instant case, the Honourable court in conduct of the matter dismissed the suit case number Meru ELC Case No. E002 of 2020 (OS) on 29th November, 2023 between the same parties herein and the applicant filed similar case over the same subject property herein. That to-date, the said dismissal has never been challenged, appealed or reviewed. That the plaintiff has now dragged the defendant again to this court after forging documents with the



intention to take away the defendant's land parcel number NYAYO/SIRIMON SCHEME/540 by false pretense.

9. The defendant's counsel submitted that Article 159 (2)(d) of *the constitution* mandates that justice ought not to be delayed and relied on the case of ET VS Attorney General & another [2012] eKLR, and asked the court to be guided by the parties pleadings and submissions herein and proceed to find that the plaintiff's suit as filed is devoid of merit, incurably defective, frivolous, bad in law and an abuse of this court's process, and the same ought to be dismissed with costs to the defendant.
10. The plaintiff's counsel also cited Section 7 of the *Civil Procedure Act* and relied on the Court of Appeal case of Caneland Ltd and others Vs Delphis Bank Civil Appeal No. 20 of 2000 and Zephania Gichure Ndungu Vs Rwaikamba Rwathia Trading Co. Ltd & another [2014] eKLR. It is the plaintiff's submission that the issues raised in the former suit were not heard and determined on merit. The plaintiff's counsel also cited the Black's Law Dictionary 10th Edition on what constitutes a hearing and determination.
11. The plaintiff's counsel also cited Section 19 (1) of the *Environment and Land Court Act* as read with Article 159 (2) (d) as well as Article 50 (1) of *the Constitution* which discourage the determination of disputes on procedural technicalities. It is submitted on behalf of the plaintiff that the preliminary objection is unmerited as the issues raised herein were never heard and determined and relied on the case of the *Tee Gee Electrical & Plastic Co. V Kenya Industrial Estate Ltd* (A Civil Appeal No. 333 of 2001 (2005 2KLR 97), *Cosmas Mrombo Moka Vs Cooperative Bank Limited & another* [2018] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR. That the suit was dismissed by failure to comply with Order 11 and as such had not been heard and determined on merit. The court was urged to dismiss the preliminary objection with costs.
12. I have considered the preliminary objection raised and the rival submissions together with the authorities relied on. The issue for determination is whether the preliminary objection has merit.
13. The law on Preliminary Objection is now settled. In the case of *Mukisa Biscuits Manufacturing co. Ltd Vs West End Distributors Ltd* (1969) EA 696 the Court of Appeal held that-;

“A preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implications out of pleadings and which if argued as a preliminary objection may dispose of the suit. Examples are on 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... 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.”

14. In the case of *Independent Electoral and Boundaries Commission V. Jane Cheperenger & 2 others* [2015] eKLR, the Supreme Court of Kenya stated thus-;

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against deployment of time and other resources. And Secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving of cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially and on merits.”



15. In the case of *Aviation & Allied Workers Union V Kenya Airways Ltd & 3 others*, Application No. 50 of 2014 [2015] eKLR, the Supreme Court 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 to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

16. Being guided by the above decisions, the question that emerges is what points of law is the defendant raising in his preliminary objection and are they settled? The defendant has submitted that the suit is res judicata because there was a similar suit being MERU ELC case no. E002 of 2020 over the same subject matter and between the same parties which was dismissed in favour of the defendant. In my view, there are so many facts which are not clear and which need to be established. The court will have to peruse the pleadings and proceedings in Meru ELC case No. E002 of 2020 to determine whether the same involved the same parties herein and over the same subject matter and whether the same was heard and concluded so as to determine if this matter is res judicata. Once a court relies on evidence to ascertain the claim, it is no longer a pure point of law and it fails. As already stated, a preliminary objection should raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and it cannot be raised if any fact has to be ascertained. I find that the objection in that regard cannot be sustained and must fail.

17. I therefore find that the notice of preliminary objection dated 26th December, 2023 by the defendant is devoid of merit and I disallow it. The same is dismissed with costs to the plaintiff.

18. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL 2024

In the presence of

Court Assistant – Tupet

Muthamia holding brief for Karanja for plaintiff/applicant

No appearance for defendant/respondent

C.K YANO

JUDGE

