



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nchebere v M'akwalu & 4 others (Environment and Land Appeal  
E001 of 2023) [2024] KEELC 4098 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4098 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**CK NZILI, J**

**MAY 15, 2024**

**BETWEEN**

**PETER NCHEBERE ..... APPELLANT**

**AND**

**M'INANGA M'AKWALU ..... 1<sup>ST</sup> RESPONDENT**

**KUNGA M'AKWALU ..... 2<sup>ND</sup> RESPONDENT**

**SILAS GITONGA ..... 3<sup>RD</sup> RESPONDENT**

**STEPHEN MUGAMBI ..... 4<sup>TH</sup> RESPONDENT**

**WILLIAM KABWE LAIBUTA ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of F.K Munyi – PM in  
Tigania ELC No. E030 of 2022 delivered on 9.12.2022)*

**JUDGMENT**

1. The appellant moved the court by a plaint dated 5.3.2022 at the lower court, claiming that the respondents had fraudulently and using corrupt schemes registered themselves as owners of L.R No's Meru North/Athinga/Athanja/3543, 1664, 1504, and 5930 despite him having gathered, taken possession, occupied and developed the suit parcels of land with full knowledge of the respondents since time immemorial. He sought for the cancellation of the title deed.
2. Through a defense and counterclaim dated 10.5.2022 and a preliminary objection dated 4.7.2022, the respondents denied the contents of the plaint, alleging that they were bona fide first registered absolute owners of the suit parcels of land, whose rights were indefeasible. Further, the respondents averred by way of a counterclaim that they were in occupation and utilization of the suit parcels of land.



3. Additionally, the respondents averred that it was the appellant who was interfering with the boundary marks and their peaceful occupation which actions they termed as illegal. They also termed the suit as bad in law, res judicata and filed in a court without jurisdiction. The respondents sought a permanent injunction against the appellant for such interference.
4. In reply to the defense and defense to counterclaim dated 28.6.2022, the appellant termed the registration of the suit parcels of land in favor of the respondents as fraudulent since none of them had ever set foot on the suit lands, which was in one block with no boundary marks as alleged or at all, having been set on the ground by any land surveyor.
5. Following directions issued on 5.8.2022, parties were directed to canvass the preliminary objection dated 4.7.2022 by way of written submissions. By a ruling dated 16.12.2022, the trial court upheld the preliminary objection and dismissed the appellant's suit.
6. The appellant faults the trial court for it :
  - i. Failed to find that he was not challenging the adjudication process but the corrupt scheme that denied him the right to own land.
  - ii. Failed to appreciate the fact that he had exhausted the internal mechanism and was challenging the registration of titles to the land on account of fraud.
  - iii. Failed to find that the suit parcels of land were already registered in favor of the respondents yet he was the one in actual occupation and control.
  - iv. Assumed that one of the grounds of fraud was the abuse of the adjudication process, allegedly non-exhausted by him.
  - v. Decided the preliminary objection against the law.
7. The appellant relied on written submissions to canvass the appeal dated 10.1.2024. It is submitted that the suit parcels of land and the matter generally fell under registered land and not land undergoing an adjudication process.
8. Further, the appellant submitted that the suit was challenging the issued title deeds to the respondents on account of fraud and corrupt scheme, yet the trial court appeared to have misconstrued the claim, hence declining jurisdiction. Lastly, the appellant submitted that the trial court erred in law and, in fact, in holding the suit as res judicata, yet the previous suit had not been determined on merits and with finality.
9. The respondents relied on written submissions dated 30.1.2024, that the trial court was in order to find the preliminary objection well grounded on account of res judicata and for lack of jurisdiction. Reliance was placed on *Mukhisa Biscuit Manufacturing Ltd vs West End Distributors (1969) E.A 696*, *IEBC & others vs Maina Kiai & others (2017) eKLR*, *C.K Bett Traders Ltd & others vs Kennedy Mwangi & another (2021) eKLR*.
10. Section 78 of the *Civil Procedure Act* provides that a court of appeal of the first instance has to re-analyze and re-appraise the lower court record and come up with independent findings as to facts and the law. See *Peters vs Sunday Post Ltd (1958) E.A 424* and *Selle & another vs Associated Motor Boat Ltd & another (1968) E. A 123*, where the court said an appellate court has jurisdiction to review the evidence in order to determine whether the conclusion initially reached by the trial court should stand. The court does so by applying its mind to the issues, facts, and the law, for a litigant is entitled to a fair, just, and independent consideration of the evidence at the appellate stage.



11. In this appeal, what is complained of is the upholding by the trial court of the respondent's preliminary objection dated 4.7.2022. The grounds were that:
  - i. The suit offended Section 7 of the *Civil Procedure Act*.
  - ii. It was res judicata in view of Tigania ELC No. 80 of 2017.
  - iii. It was incompetent and bad in law and
  - iv. The court had no jurisdiction to hear and determine the suit.
  
12. A preliminary objection, as defined in Mukhisa Manufacturing (supra), is a pure point of law pleaded and which, if argued, may dispose of a suit. It includes a plea of lack of jurisdiction or limitation of time. Jurisdiction refers to the power to hear and adjudicate a matter. It flows from either *the Constitution* or a statute. It is everything. Without it, a court has to down its tools as held in Owners of the Motor Vessel "Lillian "S" vs Caltex Oil (K) Ltd (1989) eKLR and Equity Bank Ltd vs Bruce Mutie t/a Diani Tour Travel (2016) eKLR, that it cannot be conferred by consent of parties or through a court's craftsmanship.
  
13. Regarding res judicata, the parameters to apply were set out in IEBC & another vs Maina Kiai & others (supra) that the issues must have been the same between the parties litigating under the same title and where the issue was determined entirely to finality. In C.K Bett Traders & others vs. Kennedy Mwangi & another (supra), the court observed that a plea of res-judicata is pleaded where the legal rights and obligations of the parties have been decided by an earlier judgment which may have determined the question of law as well as of facts between the parties.
  
14. In *Bhaijee & another vs. Nondi & another (Civil Appeal No. 139 of 2019)* (2022) KECA 119 (KLR) (18<sup>th</sup> February 2022 (Judgment)), at issue was the jurisdiction of an Environment and Land Court on land subject to the land adjudication process. The court held a consent was a condition precedent to a valid suit concerning disputes of land in an adjudication section, since it affects the power and jurisdiction of the court to hear and determine such disputes, whose rationale is that the land adjudication process has an elaborate internal dispute mechanism which must be employed first before resorting to courts.
  
15. In Tobias Achola Osidi & others vs Cyprianus Otieno Ogalo & others (2013) eKLR, the court held its role over land under the adjudication process is supposed to be supervisory only over the adjudication process so as to ensure that the process is carried out in accordance with the law to interpret and determine any point or issues of law that may arise in the course of the adjudication process and that the court may not usurp the functions and powers of the internal dispute organs or bodies set under the Act.
  
16. In Julia Kaburia vs Kabeera & others Nyeri Civil Appeal No. 340 of 2002, the court observed that under Section 30 (1) (2) of the *Land Adjudication Act* Cap 284, the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final. In Lepore Ole Maito vs Letwat Kortom & others (2016) eKLR, the court observed that the minister was the apex body under Cap 284. Regarding illegalities to title registration committed during an adjudication process in *Mugambi & others vs Rutere & others (Environment and Land Case No. 27 of 2018)* (2022) KEELC 15358 (KLR) (14<sup>th</sup> December 2022) (Judgment), the court cited Mary Wangui Muthoga vs Samuel Ndugu Chege & another (2016) eKLR, that a land title mistakenly or fraudulently registered could be canceled.



17. In *Bandi vs. Dzomo & 76 others* Civil Appeal 16 of 2020 (2022) KECA 584 (KLR) (24<sup>th</sup> June 2022) Judgment, the court reiterated that under Section 26 of the [Land Registration Act](#), a title deed could be challenged on account of fraud, illegality, unprocedural acquisition or through corrupt scheme. Further, in *Munyuu Maina vs Hiram Gathiha Maina* (2013) eKLR, the court held that where a root of the title was under challenge, the registered owner must go beyond the instrument and prove the legality of how he acquired it and show the acquisition was legal, formal and free from any encumbrances.
18. Applying the preceding case law to the instant appeal, was the trial court's right to uphold the preliminary objection based on res judicata and lack of jurisdiction? It is trite law that parties are bound by their pleadings, and issues flow from the pleadings. The appellant's case related to L.R No. Meru North/Athinga/Athanja/3543, 1664, 1504, and 5930 allegedly registered and title deeds obtained in favor of the respondents fraudulently and through a corrupt scheme. The appellant had sought the cancellation of the title deeds. Attached to the plaint dated 5.3.2022 were official letters of search for L.R No. Athinga/Athanja/1504, 1664, 3543, and 5930 were registered on 19.1.2015, and a title deed issued to the respondents.
19. In paragraphs 3, 5 & 10 of the defense and counterclaim by the respondents, there was an admission that the subject parcels of land fell under the [Land Registration Act](#) as a first registration. The respondents had filed a list of documents dated 10.5.2022, attaching copies of official searches for L.R No. Meru North Athinga/Athanja/3543, 1664, 1504 and 5930 which confirmed that the suit parcels of land were no longer falling under the adjudication process.
20. On that account alone, my finding is that the trial court had jurisdiction under Sections 26 & 80 of the [Land Registration Act](#) to hear and determine the suit based on an alleged fraud and registration of land titles through a corrupt scheme.
21. The second preliminary objection was on res judicata. Paragraphs 6, 7 & 12 of the defence and counterclaim raised such a plea as regards High Court Misc Application No. 18 of 2008. There was no mention of Tigania ELC No. 80 of 2017. The pleadings, judgments, and decrees in the previous or pending suits were not included in the respondents' list of documents.
22. In *IEBC & others vs Jane Chepenger & others* (2015) eKLR, the Supreme Court of Kenya held that a preliminary objection should be founded upon a settled and crisp point of law and should not be raised where facts are contested or likely to call for proof through evidence and where the discretion of the court is invoked.
23. In this appeal, material by way of evidence was required to prove res judicata. There was no conclusive decree that had previously determined the rights of the parties with regard to fraud, illegality, or corrupt scheme on the issuance of the title deeds to the respondents, see *Suleiman Said Shabhal vs IEBC & others* (2014) eKLR. None of the parties herein had pleaded non-exhaustion doctrine on account of the suit parcels of land being under the adjudication process. Title deeds had been issued to the respondents way back in 2015.
24. Both parties had displayed official copies of search certificates. Had the trial court keenly looked at the pleadings and the documents accompanying the respective pleadings, it would have been evident that the suit parcels of land were already titled and falling under the [Land Registration Act](#), as opposed to the [Land Adjudication Act](#). More curiously, once the court found it had no jurisdiction over the primary suit it left it open whether the counterclaim was also before it without jurisdiction could stand. The preliminary objection lacked merits and was improperly raised by the respondents.
25. The upshot is that I find the appeal with merits. The same is allowed with costs to the appellant.



Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON  
THIS 15<sup>TH</sup> DAY OF MAY, 2024**

In presence of

C.A Kananu

Mugambi holding brief for Kimahiti Kiara for appellant

Muthamia for respondent

**HON. C K NZILI**

**JUDGE**

