



**Okungi v Adingo (Sued as the Administrator and Heir of the Estate of Kiptarus Arap Arusei)
(Environment & Land Case E023 of 2023) [2024] KEELC 4879 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E023 OF 2023
MN MWANYALE, J
JUNE 24, 2024**

BETWEEN

ELIKAH MBONE OKUNGI APPLICANT

AND

**BATSON MUDAHI ADINGO (SUED AS THE ADMINISTRATOR AND HEIR
OF THE ESTATE OF KIPTARUS ARAP ARUSEI) RESPONDENT**

RULING

1. This ruling relates to the Notice of Preliminary Objection dated 6/4/2024 raised by the Respondents in relation to the Originating summons dated October 12, 2023 premised on the following grounds, inter alia;
 - a. That the suit herein is resjudicata as there is a matter before Kapsabet chief Magistrate's court being ELC No 055 of 2023 between Batson Mudashi Adingo vs William Mudoga and Henry Aswan Agosa which matter related to ownership of Nandi/ Serem /271.
 - b. That the suit herein was filed after William Mudoga application was dismissed in Kapsabet Subordinate Court Succession no 170 of 2016 whose appeal before Kapsabet High Court in Civil Appeal Number 10 of 2016 had settled on the ownership dispute.
 - c. That the pecuniary jurisdiction of the matter fell below Kshs. 20,000,000 and well within the Jurisdiction of the Magistrates Court as provided for under Section 7 and 25 of the Magistrate's Court Act.
 - d. that the Applicant ought to have filed a counterclaim in the Subordinate's court case instead of filing the present suit.



- e. The matter herein is functus officio as the Magistrate's Court had pronounced itself by giving injunctive orders against the Applicants son William Mudoga and the said orders issued in Kapsabet Chief Magistrate's Court ELC No E055 of 2023 were binding on the Applicant.
 - f. That the suit herein does not meet the requirements stipulated under sections 7, 17, 37 and 38 and all other enabling provisions of the Law *Limitation of Actions Act*, chapter 22.
 - g. That the suit herein is an abuse of the Court process and that the same shall be dismissed with costs to the Respondent.
2. When the matter came up for directions on the preliminary objection on 21/5/2024 and the Court having looked at the nature of the Preliminary Objection raised on the grounds set out at paragraph 1 above sought to know from Mr. Matete Learned Counsel for the Respondents whether the Preliminary Objections as filed raised pure points of laws capable of determining the matter in limine and Mr. Matete having answered in the affirmative, the Court directed oral hearing of the preliminary objection on the same day and reserved its ruling for delivery today.

Applicant's Submission on the Preliminary Objection: -

3. The Respondent having filed the preliminary objection shall be deemed for the purposes of this riling and the preliminary objection to be the Applicant and the submission set out hereunder were made by Mr. Okello who appeared together with Mr. Matete at the time of the oral hearing of the Preliminary Objection.
4. It was Counsel's submissions that the suit was *resjudicata* and offending section 7 of the *Civil Procedure Act*. In support of this limb of submissions the Applicant placed reliance on the decision inn ELC Case No 46 of 2020 Between Richard Otieno vs Michael Otieno and another where the Court held interalia that a suit by a family member who had been represented by another family member had been deemed Resjudicata. In this regard the Applicant contended that the existence of the suit before the Chief Magistrates Court at Kapsabet to wit CMELC no 55/2023 rendered this suit Resjudicata as the parties in both suits were related, and that there were injunctive orders which had been issued in the Chief Magistrates Court file and instead of appealing the said decision new family members filed the present case.
5. The Applicant further submits that the pecuniary jurisdiction of the matter is lower than 20 Million and thus ought to be heard by the Chief Magistrates as opposed to this court. That the suit property was also a subject of Succession Cause no 170/2015 and filed at the Kapsabet Chief Magistrates Court whose appeal was pending before the High Court at Kapsabet. Thus, due to previous cases the Applicant herein has had no peaceful enjoyment.

Respondents Submissions: -

6. The Respondent in respect of the Preliminary Objection is the Applicant in the Originating Summons and in his response Mr. Ogotu learned counsel submitted that the issues raised in the Preliminary Objection were factual issues and could not meet the test set out in the Mukhisa Biscuit case. On resjudicata it was the Respondents case that there is no previously determined suit as the suit herein was an adverse possession suit and the other suit had not ben evidenced before this Court.
7. On jurisdiction the Respondents submits placing reliance on the decision in the 'Owners of Motor Vessel MV Lilian' as well as the decision in S.K Macharia vs KCB and another that jurisdiction arises from the *Constitution* and statutes and that under section 38 of the *Limitation of Actions Act* a claim for adverse possession ought to be filed in the High Court and in the context of article 162(2) of



the Constitution thus the Court with the equal status of the High Court would be this Court, the Environment and Land Court, and not the Chief Magistrate's Court and hence then the matter being an adverse possession matter is rightly before me.

8. In a brief rejoinder to the Respondents submission, Mr. Matete for the Applicant in the Preliminary Objection submitted that he relied on the authorities cited in support of the submission.

Issues for Determination: -

9. The Court frames the following sole issue for determination in this application, to wit, whether the preliminary Objection as filed meets the threshold of a preliminary objection capable of determining this suit in limine.

Analysis and Determination: -

10. The Court shall now consider whether the objections as filed met the threshold of preliminary objections as was observed in the decision in the case of *In Mukisa Biscuit Manufacturer Limited vs Westend Distributors Limited*; the Court held in respect of a preliminary objection, that "so far as I am aware, 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 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 acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion...."
11. Similarly in the decision in the case of *Omondi vs National Bank of Kenya Limited and 2 others*; as quoted in the decision of *J. N. and 5 others vs Board of Management St. G. School Nairobi and another* where it was held that; "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.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."
12. The above excerpts from the decision shall guide this Court on whether the Preliminary Objections set out at a paragraph 1 of this ruling meets the criteria Preliminary Objections.
13. It is undoubtedly that the issue of Res judicata as provided for under section 7 of the *Civil procedure Act* is a principle of law capable of being raised as such and the issue of jurisdiction too is on a pure point of law. The Applicant herein pleaded in the preliminary objection that this suit is Resjudicata in view of a similar suit before the Chief Magistrate's Court being case number ELC No 055 of 2023 between Batson Mudashi Adingo vs William Mudoga and Henry Aswan Agosa and the issue of pecuniary jurisdiction being lower than 20 Million as was filed in the Succession cause number Succession cause no 170/2015.
14. Grounds a, b, c, e and f herein above of the preliminary objection have to be ascertained by facts. The Court has to inquire on the pleadings in the matter before the Chief Magistrate's Court as well as the pecuniary jurisdiction disclosed in the succession matter through evidence to be adduced in accordance with the rules of evidence hence while the same are principles of law the same are not pure points of law capable of determining the matter in limine. The same do not meet the threshold of a preliminary objection. The issue of Resjudicata and issue of pecuniary jurisdiction shall now be determined in the main suit as they require evidence to be produced.



15. The upshot is that the preliminary objections are hereby overruled as they require ascertainment of facts by the Court in the normal use of the rules of evidence during trial. The objections are thus overruled and the Preliminary Objection is dismissed with Costs in the cause.

Ruling, Dated and Delivered on this 24th day of June 2024.

Hon. M. N. Mwanyale,

JUDGE

In the presence of; -

PARA 1.

Mr. Ogutu for the Plaintiff

PARA 2.

N/a for Mr. Awiti for the Defendant.

KAPSABET ELC E023 OF 2023 (OS) RULING	5
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