



Ruto & another v Keino (Being Sued as the Administrator of the Estate of John Maritim Ruto - Deceased) & 3 others (Environment & Land Case E015 of 2023) [2024] KEELC 4778 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E015 OF 2023**

**MC OUNDO, J
JUNE 20, 2024**

BETWEEN

ROSEMARY CHEPKEMOI RUTO 1ST PLAINTIFF

PAULINE CHEBET RUTO 2ND PLAINTIFF

AND

JOSEPH KIPSANG KEINO (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF JOHN MARITIM RUTO - DECEASED) 1ST DEFENDANT

LINNER CHEBWOGEN 2ND DEFENDANT

LAND REGISTRAR KERICHO COUNTY 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. Vide a Complaint dated 20th April, 2023, the Plaintiffs herein sought for the following orders;
 - i. A declaration that the property being land title number Kericho Municipality Block 2/146 measuring 0.2759 hectares is a jointly owned matrimonial property thus does not form part of the estate of the deceased.
 - ii. An order compelling the Land Registrar Kericho County to register 0.2253 hectares of the suit parcel in the name of the 1st Plaintiff.
 - iii. An order compelling the Land Registrar Kericho County to register 0.0506 hectares of the suit land in the name of the 2nd Plaintiff.
 - iv. A permanent injunction restraining the 1st and 2nd Defendants by themselves, their servants, agents, employees and or anyone acting in their authority from interfering with the Plaintiffs'



legal ownership and quiet possession of their respective parcels constituting title number Kericho Municipality Block 2/146 measuring 0.2759 hectares.

- v. Costs of the suit
 - vi. Any further or other relief the court may deem just to grant.
2. The 1st and 2nd Defendants filed their Defence and Counterclaim alongside a Preliminary Objection dated 29th November, 2023 wherein they sought that the Plaintiff's suit be struck out on the ground that judgment had been delivered on the 14th October, 2022 in Kericho High Court Succession Cause No. 39 of 2016 in the Estate of the late John Maritim Ruto. That the instant suit was bad in law and an abuse of the court's process for being res judicata which was contrary to the provisions of Section 7 of the [Civil Procedure Act](#). That the same therefore ought to be struck out with costs.
 3. In Response and in opposition to the 1st and 2nd Defendants' Preliminary Objection, the Plaintiff filed their Grounds of Opposition dated 24th January, 2024 on the ground that the Preliminary Objection offended the principles governing such Preliminary Objection as was laid down in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited (1969) E.A 696 for reason that the same was anchored on matters of fact that were in dispute that would therefore require the probing of evidence including reviewing and examination in order for the court to reach a determination. That the Preliminary Objection was misconceived, incurably defective, bad in law, an abuse of the court process and legally untenable. Their conviction was that the court had the requisite jurisdiction to hear and determine the present case.
 4. The 3rd and 4th Defendants sought for and were excused from participating in the instant Preliminary Objection.
 5. The court directed that the said Preliminary Objection be disposed of in the first instance through Written Submissions.

1st and 2nd Defendants' Submissions.

6. The 1st and 2nd Defendants vide their submissions dated 5th February, 2024 framed two issues for determination to wit; -
 - i. Whether or not the Preliminary Objection is proper.
 - ii. Whether or not the Preliminary Objection is merited.
7. On the first issue for determination as to whether the instant Preliminary Objection was proper, their reliance was placed in the decided case of Mukisa Biscuit (Supra) to submit that the first ingredient of the Preliminary Objection was that it must be based on pure point of law. That whereas the Plaintiff had opposed the instant preliminary objection, it was not in doubt that the ground raised therein amounted to a pure point of law. That secondly, the Preliminary Objection must arise out of the matters pleaded in the Plaintiff and the Defence. That in the instant case, the pleadings under consideration were the Plaintiffs' Plaintiff dated 20th April, 2023 and the 1st and 2nd Defendants joint Statement of Defence and Counterclaim dated 29th November, 2023.
8. They reiterated their assertions under paragraphs 11, 12, 18 and 19 of the said Joint Statement of Defence and Counterclaim and placed reliance on the provisions of Section 7 of the [Civil Procedure Act](#) to submit that the instant suit was res judicator. Further reliance was placed in the decided case of Benard Mugo Ndegwa v James Nderitu Githae & 2 others [2010] eKLR which spoke on the ingredients of res judicata that is, where the matter in issue was identical in both suits, the parties



in the suits were the same, sameness of the title/claim concurrence of jurisdiction and finality of the previous decision, to submit that the 1st and 2nd Defendants had satisfied the said ingredients as had been demonstrated in their joint statement of Defence and Counterclaim as well as other documents that had been filed in support of the defence case.

9. That the 1st Plaintiff and the 1st Defendant had been named as Objector and Petitioner respectively in the concluded proceedings in Kericho High Court Succession Cause No. 39 of 2016 the matter of the estate of the late John Maritim Ruto. That it was not in doubt that among the issues that had been raised for determination by the High Court therein was whether the will dated 9th April, 2012 was a forgery, which was the same issue that had been raised for determination in the Plaintiffs' Plaint dated 20th April, 2023.
10. That further, the prayers sought in the Plaint against the Defendants were in relation to land parcel No. Kericho Municipality Block 2/146, which property constituted the estate properties of the late John Maritim Ruto in Kericho High Court Succession Cause No. 39 of 2016. That subsequently, the matter having been heard and determined by the Family Division of the High Court which was a court of concurrent jurisdiction with the Environment and Land Court, the same was not open for litigation before this court.
11. On the 2nd issue for determination as to whether the Preliminary Objection was merited, they urged the court to find merit in the same in view of the fact that they had demonstrated by way of pleadings and the documents filed in their joint defence against the Plaintiffs there had been sameness in the present matter as the matter that had been previously finalized which was in accordance with the principles as laid down in the celebrated case of Mukisa Biscuit (supra). They thus urged the court to dismiss the instant suit with costs.

Plaintiffs' Submissions

12. The Plaintiffs vide their submissions dated 29th December, 2023, framed their issues for determination as follows:
 - i. Whether the Preliminary Objection is tenable
 - ii. Who should bear the costs of the instant preliminary objection?
13. On the first issue for determination as to whether the instant Preliminary Objection was tenable, the Plaintiffs submitted in the negative to the effect that whereas the same had raised a point of law being section 7 of the Civil Procedure Act, yet this point could not be raised if any facts had to be ascertained from elsewhere or if the court was called upon to exercise its judicial discretion. They placed reliance in the Mukisa Biscuit case (supra) to submit that preliminary objections were by their very nature a bar to any further proceedings in a matter without filtering any disputes.
14. They also placed reliance in a combination of decisions in the decided case of Margaret Njeri Gitau v Julius Mburu Gitau & 2 others [2022] eKLR and George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014] eKLR to submit that the issue of res judicata was in itself a dispute that could not be raised by way of preliminary objection. That the 1st and 2nd Defendants herein had attached a litany of documents that would require examination and reviewing as evidence of their Preliminary Objection against the laid down procedure and the true meaning of a preliminary objection. That subsequently, the instant Preliminary Objection lacked merit and should be dismissed with costs to the Plaintiffs.



15. Regarding who should bear the costs of the instant preliminary objection, reliance was placed on the provisions of Section 27(1) of the [Civil Procedure Act](#) to submit that since costs follows the cause, they should be awarded the costs.

Determination

16. From the submissions and pleadings herein filed by the parties, it is clear that the 1st and 2nd Defendants are challenging the court's jurisdiction to hear and determine the Plaintiff's suit on their Plaint dated the 20th April, 2023 for reasons that the same was Res Judicata Kericho High Court Succession Cause No. 39 of 2016- In the matter of the estate of the late John Maritim Ruto where 1st Plaintiff and the 1st Defendant had been named as Objector and Petitioner respectively, in relation to the same subject property herein being land parcel No. Kericho Municipality Block 2/146, which property constituted the estate of the late John Maritim, and which matter had been heard and determined.

17. I thus find the issues that stand out for determination as being;

- i. Whether the Plaintiff's suit is Res Judicata.
- ii. Whether the Preliminary Objection raised is sustainable.

18. The all-important case decided by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA. 696 was clear as to what comprised a Preliminary Objection in that the court had held thus:-

“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.”

19. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of Quick Enterprises Ltd. vs. Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

20. The Supreme Court in the case of John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ) 6 August 2021 (Judgement) at paragraph 59 held as follows:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and



- d) There must be between the first and the second action identical parties, subject matter and cause of action.”
21. The purpose of a Preliminary Objection according to the decision by Supreme Court was elaborated in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR at Paragraph 21 as follows:
- ”... The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate 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 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 the merits.”
22. Thus in order therefore to decide as to whether this case is res judicata, a court of law should always look at the decision claimed to have been settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. What issues were really determined in the previous case;
 - ii. Whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. Whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
23. From the holdings in the above captioned authorities, it is clear that a preliminary objection on the ground of res judicata cannot be raised as a Notice of Preliminary objection but rather by way of Notice of Motion where pleadings are annexed to enable the court to look at the decision claimed to have settled, the issues in question and the entire pleadings of the previous case and the instant case to ascertain whether the current suit is res judicata or not. In this case, although the 1st and 2nd Defendants raised the objection via a Notice of Preliminary Objection, yet they attached the Judgment in respect of the impugned case in the Kericho High Court Succession Cause No. 39 of 2016 Estate of the late John Maritim Ruto (deceased) which Judgment I have read.
24. I note that whereas the 1st Plaintiff and the 1st Defendant had been named as Objector and Petitioner respectively in the previous matter, the subject suit land in the previous matter was different from the subject suit land in the present matter for which there need be ascertainment of facts by way of evidence.
25. I thus find that the Notice of Preliminary Objection dated the 29th November 2023, by the 1st and 2nd Defendants herein is unsustainable having failed the test as is stipulated under Section 7 of the [Civil Procedure Act](#) and the above captioned authorities. The same is herein dismissed out with costs to the Plaintiffs.

Dated and delivered via Teams Microsoft at Naivasha this 20th day of June 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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