



REPUBLIC OF KENYA



Ringanya & another v Ringanya & 3 others (Environment & Land Case 106 of 2014) [2024] KEELC 6697 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 106 OF 2014
A KANIARU, J
SEPTEMBER 19, 2024**

BETWEEN

KELLEN GICHUKU RINGANYA 1ST PLAINTIFF

MARGARET RWAMBA RINGANYA 2ND PLAINTIFF

AND

PETER MBOGO RINGANYA 1ST DEFENDANT

EUNICE RUGURU KAUGI 2ND DEFENDANT

ROBINSON NJUE NJOKA 3RD DEFENDANT

ANTONY NJERU NGARI 4TH DEFENDANT

RULING

1. Before me for determination is a Preliminary objection dated 25.09.2023 and filed on 26.09.2023. The objection has been raised by the 1st Defendant on the following grounds:
 - i. That the instant suit is *res judicata*
 - ii. That the subject land Ngandori/Kirigi/7465 was subject matter in this Embu court award no. 11/2007 which was adopted by the honorable court as a judgement of the court.
 - iii. In the proceedings before the Embu District Land Tribunal Case no. 66 of 2006, subsequently registered in court as award no. 11 of 2007, the land Ngandori/Kirigi/7465 is the subject matter and now repetitively in the instant suit.
 - iv. That the plaintiff's herein subsequently proceeded to the High Court Embu vide JR No. 35 of 2008 which was struck out by the honorable court.



- v. Then all legally settled about the absolute ownership of land parcel Ngandori/Kirigi/7465, the 1st defendant proceeded to file an application for removal of caution/restrictions themselves lodged by the plaintiff's.
- vi. That six years later the plaintiff's filed this suit on the same subject matter which is repetition of a previous suit aforementioned and amounts to res judicata.
- vii. That this repetition of a process is abusive of the process of court and ought to be discouraged by dismissal of such repetitive suit as the instant one.

He annexed copies of the proceedings of the previous suits and ultimately prayed for the striking of the suit for being res judicata and for costs of the suit to be provided for.

2. The Preliminary objection was canvassed through written submissions. The 1st defendant's submissions were filed on 29.01.2024 and he mainly highlighted the grounds of his objection. He cited the law on res judicata as provided for under section 7 of the civil procedure act. His submission was that the plaintiffs never lodged any appeal against the suits mentioned in his preliminary objection and they could not file the instant suit as the same is *res judicata*. It was urged that the suit be dismissed. The 2nd defendant filed her submissions on 09.02.2024 where she supported the 1st defendant's position that the preliminary objection ought to be upheld. The 3rd and 4th defendants did not file any submissions.
3. The plaintiffs' submissions on the other hand were filed on 29.02.2024. They submitted that the components of a preliminary objection were set out in the case of *Mukhisa Biscuit Co. Ltd v West End Distributors Ltd* [1969] EA 696. That the issue of whether a suit is res judicata would require ascertainment of facts as the court would need to look at the proceedings in the previous suits. That an issue that requires a court to ascertain facts and calling for evidence should not be raised as preliminary objection as an objection ought to be raised on a pure point of law. The case of *Margaret Njeri Gitau v Julius Mburu Gitau & 2 others* [2022] eKLR citing the cases of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Anor* [2014] eKLR, *George Kamau Kimani & 4 others v County Government of Trans Nzoia & Anor* [2014] eKLR was proffered in support of the said position.
4. It was further submitted that, the instant suit is not res judicata to Embu District Land Tribunal case no. 66 of 2006 adopted as award no. 11 of 2007 as the Tribunal did not have jurisdiction to determine the issue of ownership of land. The case of *Joseph Malakwen Lelei & Anor vs Rift Valley Land Disputes Appeals Committee 7 2 others* [2014] eKLR was cited in support of that position. It was submitted further that the tribunals decision having not been rendered by a court of competent jurisdiction, then the instant suit cannot be said to be res judicata to the said decision.
5. That similarly, the present matter is not res judicata to H.C JR no. 35 of 2008 as judicial review proceedings are not concerned with the merits of a decision, hence the issue of ownership of land could not have been the subject of a judicial review application. It was urged that the preliminary objection be dismissed with costs to the plaintiffs. Further authorities proffered in support of plaintiffs' submissions were the cases of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR; *Vincent Kipsongok Rotich v Orphab Jelagat Ngelechei* [2014] eKLR.
6. I have considered the preliminary objection as well as the rival submissions. The issue for determination is whether the preliminary objection has merit.



7. A preliminary objection was described in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969]EA 696 as follows:

“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.”

8. A preliminary objection therefore raises pure points of law and should not deal with disputed facts, nor should it be raised if it calls for ascertainment of facts, probing of evidence or the exercise of judicial discretion. The 1st defendant has raised his objection mainly on the ground that the instant suit is *res judicata* as there have been other proceedings in other levels of court and tribunals regarding the subject land herein. He went ahead to annex copies of the said proceedings to the preliminary objection. The plaintiff's on the other hand dispute that this suit is *res judicata* as they claim that the issue of ownership of the subject land herein was never heard on merit and that the body that finally determined the said issue did not have the jurisdiction to do so.

9. From the parties' arguments, it is evident that there is no agreement as to the facts of the case. It is also apparent that the 1st defendant by annexing the proceedings of the previous suits intends for this court to examine the same in considering whether or not this suit is *res judicata*. The nature of a claim of *res judicata* usually requires examining and probing of evidence and ascertainment of facts to determine it. However were this court to resort to doing so, that would amount to probing of evidence and ascertainment of facts and goes beyond the confines of the scope of preliminary objection. It is also notable that the 1st defendant's objection largely raises issues of fact. It is trite law that a preliminary objection should only raise 'pure points of law' and not facts as has been done by the 1st defendant. It is therefore not in doubt that the objection as presented is not sustainable as it goes beyond the ambit of a preliminary objection.

10. See also the case of *Oraro v Mbaja* [2005] eKLR where the court observed as follows:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

11. For the foregoing reasons, this court finds and holds that what has been raised by the 1st defendant does not amount to a proper preliminary objection and therefore the purported preliminary objection as raised lacks merit.

12. Consequently the so called preliminary objection dated 25.09.2023 is hereby dismissed in its entirety with costs to the plaintiffs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 19TH DAY OF SEPTEMBER, 2024.

In the presence of Gitahi for Ms Muthoni Ndeke for interested party, plaintiffs and 1st, 2nd and 3rd defendants present.

Court Assistant - Leadys



A. K KANIARU
JUDGE -ELC EMBU
19.9.2024

