



Kivumbu (Suing as the Legal Representative of the Estate of Kivumbu Ndwiwa (Deceased)) v Mwau & 2 others (Environment & Land Case E008 of 2023) [2024] KEELC 7156 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E008 OF 2023
TW MURIGI, J
OCTOBER 30, 2024**

BETWEEN

**HALLAN MUTUA KIVUMBU PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIVUMBU
NDWIWA (DECEASED)**

AND

**FRANCIS KIMILU MWAU 1ST DEFENDANT
CHIEF LAND REGISTRAR MAKUENI COUNTY 2ND DEFENDANT
CHIEF LAND SURVEYOR MAKUENI COUNTY 3RD DEFENDANT**

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 2nd February 2024 raised by the 1st Defendant on the following grounds:-
 1. That this court lacks jurisdiction to entertain this suit as this matter has substantially and directly been in issue in Makueni ELC Case No. E005 of 2022 Francis Kimilu Mwau vs Hallan Mutua Kivumbu and Land Registrar Makueni, Makueni ELC No. 13 of 2017 Hallan Mutua Kivumbu vs Francis Kimilu Mwau, Machakos HCCA No. 80 of 1992, Machakos RMCC No. 43 of 1991 Francis Kimilu Mwau v Kivumbu Ndwiwa and the same offends Section 7 of the *Civil Procedure Act*,
 2. That the application and the suit is brought under the wrong provisions of law and the same offends Section 86(1) of the *Land Registration Act* and Order 53 of the Civil Procedure Rules 2010.



3. That the instant suit offends Section 12 of the [Government Proceedings Act](#) as far as the Attorney General is not joined as a party to the suit.
 4. That the jurisdiction of this court to entertain the boundaries dispute is ousted by the provisions of Section 18(2) of the [Land Registration Act](#).
 5. That the suit and application is an infraction of the judicial doctrine of Exhaustion espoused under the [Land Registration Act](#) in relation to and/or in connection with alteration or fixing of boundaries and rectification of title.
 6. That the said suit and accompanying applications(s) thereof constitute an abuse of court process and ought to be dismissed with costs to the Defendant.
2. The parties were directed to canvass the preliminary objection by way of written submissions.

The Plaintiff's Submissions

3. The Plaintiff filed his submissions dated 22nd May 2024.
4. On his behalf, Counsel submitted that the preliminary objection is misconceived and ought to be dismissed with costs. Counsel relied on Section 7 of the [Civil Procedure Act](#) to submit on the doctrine of Res judicata. Counsel submitted that although the parties are litigating under the same title, the cause of action in the instant suit is distinct as it relates to the rectification of the land register. Counsel submitted that the cause of action in the suit herein arose on 18/4/2023 after the other cases had been heard and determined.
5. Counsel argued that the cause of action in the suit herein being fraudulent rectification of the land register was not substantially in issue in the suits cited in the preliminary objection.
6. Counsel submitted that the Defendants fraudulently transferred 4.6 hectares from land parcel No. Nzai/Kalamba/638 to land parcel Nzai/Kalamba/594 on or about 18/4/2023 and that no court has heard and determined the matter.
7. Counsel further submitted that Section 86(1) of the [Land Registration Act](#) is inapplicable in the present suit since the cause of action arose from the fraudulent transfer of 4.6 hectares from land parcel No. Nzai/Kalamba/638 to land Parcel No. Nzai/Kalamba/594.
8. Counsel contended that the instant suit is brought under Section 26 of the [Land Registration Act](#) which allows a party to challenge a certificate of title on the grounds of fraud or misrepresentation to which the person is proved to be a party thereto. Counsel submitted that the 1st Defendant illegally acquired the title on 18/4/2023 through a corrupt scheme.
9. Counsel submitted that the court has jurisdiction to hear and determine this suit as the same is brought under the correct provisions of the law.
10. It was further submitted that the Plaintiff had issued a Notice to the Attorney General pursuant to the provisions of Section 13A of the [Government Proceedings Act](#) and added that the AG can be joined as a party through amendment of the Plaintiff.
11. Although Counsel admitted that this court lacks jurisdiction to determine a boundary dispute, she insisted that the Plaintiff's claim is for rectification of the land register, hence the court has jurisdiction under Section 80 of the [Land Registration Act](#) to hear and determine this suit.



12. Counsel further submitted that the acts of the Land Registrar violates the provisions of Section 79(1) of the [Land Registration Act](#) and the only remedy for the Plaintiff was to come to court. Counsel submitted that Section 80 of the [Land Registration Act](#) confers powers upon the court to rectify the land register where it is shown that the title was acquired fraudulently.
13. Concluding her submissions, Counsel submitted that the suit is not an abuse of the court process as the Plaintiff is pursuing a legal right on behalf of the estate of Kivumbu deceased. Counsel insisted that the suit is meant to preserve the property of the deceased from intermeddling.
14. To buttress her submissions, Counsel relied on the list of authorities dated 26th September 2024.

The Defendants Submissions.

15. The 1st Defendant filed his submissions dated 16th May 2024.
16. On his behalf, Counsel identified the following issues for the court's determination:-
 1. Whether the Plaintiff's suit is res judicata the various previous suits appearing at ground 1 of the preliminary objection.
 2. Whether the Plaintiff's suit is brought under the wrong provisions of law.
 3. Whether the failure to join the Attorney General is fatal to the Plaintiff's suit by virtue of Section 12 of [Government Proceedings Act](#).
 4. Whether the jurisdiction of this court to hear and determine boundary disputes is statute ousted by provisions of Section 18(2) of the [Land Registration Act](#).
 5. Whether the Plaintiff ought to have exhausted statutory set mechanisms to settle the dispute before approaching the court.
17. On the first issue, Counsel relied on the provisions of Section 7 of the [Civil Procedure Act](#) to submit on the doctrine of res judicata.
18. Counsel submitted that the parties in the present suit and in Makueni ELC No. E005 of 2022, Makueni ELC No. 13 of 2017, Machakos HCCA No. 80 of 1992 and Machakos RMCC No. 43 of 1992 are the same and were litigating under the same title over the same issues.
19. Counsel submitted that in Machakos RMCC No. 43 of 1992, the issue for determination was a boundary dispute which the court determined by adopting the Surveyor's report. That being aggrieved, the Plaintiff's father appealed against the decision in Machakos HCCA No. 80 of 1992 which was eventually dismissed for want of prosecution.
20. Counsel further submitted that Makueni ELC 13 of 2017 and Makueni ELC E005 of 2022 was dismissed on account of being re judicata. Counsel submitted that the instant suit is similar to the other suits for the reason that :-
 1. The parties are the same.
 2. The parties are litigating under the same title land parcel No Nzai/Kalamba/594 and parcel No. Nzai/Kalamba/638.
 3. The common thread is that the dispute is related to fixing boundaries between the two parcels.
 4. The issue of 4.6 hectares was determined in Machakos RMCC No. 43 of 1991 and boundaries fixed in favour of the 1st Defendant.



5. Similar issue of 4.6 was raised in Makueni ELC No. 13 of 2017 which was heard and finally determined with the court affirming the finality of Machakos RMCC No. 43 of 1991.
 6. The issue of 4.6 hectares was determined in Makueni ELC E005 of 2022 where the court affirmed the finality of Machakos RMCC No. 43 of 1991.
 7. Both Land Registrar Makueni and County Surveyor Makueni have been parties in Makueni ELC No. 13 of 2017 and Makueni ELC E005 of 2022.
 8. The issues have been heard and determined in the previous suits.
 9. The issues in the previous suits were heard and determined by courts of competent jurisdictions.
21. With regards to the second issue, Counsel submitted that the instant suit has been brought under the wrong provisions of the law. Counsel argued that the Plaintiff ought to have instituted judicial review proceedings under Section 86(1) of the [Land Registration Act](#) since he is seeking to challenge an administrative decision.
 22. On the third issue Counsel submitted that the proceedings herein are against the Chief Land Registrar and County Surveyor which are government offices are civil in nature and hence the Attorney General ought to have been joined as a party herein.
 23. On the fourth issue, Counsel submitted that the court lacks jurisdiction to hear and determine this suit as it involves a boundary dispute which falls within the jurisdiction of the Land Registrar. Counsel contended that the instant suit is premature since the Plaintiff has not exhausted the dispute resolution mechanism provided under Section 18 and 19 of the [Land Registration Act](#).

Analysis and Determination

24. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
25. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
26. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”



27. In *Oraro Vs Mbaja* (2005) eKLR Ojwang J (as he then was), described it 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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

28. The Court of Appeal in *Nitin Properties Ltd Vs Singh Kalsi & Another* (1995) eKLR also captured the legal principle when its stated as follows;

“A preliminary objection 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.”

29. Having considered the preliminary objection and the rival submissions, the following issues fall for determination:-

- i. Whether this suit is res judicata on account of the cases cited in the preliminary objection.
- ii. Whether this court has jurisdiction to hear and determine this suit.

30. The issue of res judicata and jurisdiction can dispose of the matter preliminarily without having to ascertain the facts. The preliminary objection raised by the Defendants fits the description of a preliminary objection stated in the *Mukisa Biscuits* case supra.

31. The Defendants contended that the instant suit is res judicata as the issues herein have been determined in previous suits involving the same parties. The doctrine of res judicata is anchored in Section 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides as follows:-

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it...

Explanation. - (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit...

Explanation. -(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

32. The doctrine of res judicata has been defined in the *Black’s Law Dictionary*, 9th Edition at page 1425 as follows:

“a thing adjudicated” 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same



claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit.”

33. The elements which must be present to succeed on a defence of res judicata were enunciated in Independent Electoral & Boundaries Commission Vs Maina Kiai & 5 Others [2017] eKLR where the Court of Appeal held that: -

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

34. From the foregoing, it is clear that for res judicata to suffice, a Court should look at all the four elements set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the Court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the Court in the former suit.

35. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru Vs the Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR. The essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause. That was the holding in Omondi Vs National Bank of Kenya Ltd and Others (2001) EA 177.

36. It is the 1st Defendant’s case that the suit herein is res judicata on account of the cases cited in the preliminary objection. Counsel submitted tht the parties, the subject matter and the title is the same. The Plaintiff admitted that parties were litigating under the same title and stated that the cause of action is distinct from the other suits. The 1st Defendant did not produce the pleadings and decision in the said suits to enable the court to make a determination whether this suit is res judicata that is to say, that the matter in issue is directly and substantially the same as in the former suits, the former suits have been between the same parties or parties under whom they claim and the parties must have litigated under the same title. I therefore find that the 1st Defendant has not demonstrated to the satisfaction of this court that the suit herein is res judicata.

37. The 1st Defendant contended that this court lacks jurisdiction to entertain this suit as it involves a boundary dispute which falls within the jurisdiction of the Land Registrar. Counsel contended that the Plaintiff has not exhausted the dispute resolution mechanisms set out under the [Land Registration Act](#) before approaching this court. Counsel further contended that the suit offends the provisions of Section 86(1) of the [Land Registration Act](#).



38. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case.

39. The question of jurisdiction was discussed in the celebrated case of Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi held as follows;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

40. Similarly, the Supreme Court in the case of Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR pronounced itself thus;

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

41. A court derives its jurisdiction from *the Constitution* or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. Article 162(2) (b) of *the Constitution* provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.

42. To give effect to Article 162 (2) (b) of *the Constitution*, Parliament enacted the Environment & Land Court Act. Section 13(1) and (2) of the said Act provides as follows:-

“ 13. Jurisdiction of the Court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;



- d. Relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
Any other dispute relating to environment and land.”

43. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 31st October 2023 seeking the following orders: -

1. A permanent order of injunction restraining the Defendants from trespassing, alienating, subdividing, surveying, putting beacons, fencing, selling, constructing, cutting down trees, farming, grazing, clearing bushes, plating and/or otherwise dealing with the parcel of land measuring 4.6 hectares, originally contained in parcel Nzai/Kalamba/638 in any manner that offends the peaceful possession by the beneficiaries of the estate of Kivumbu Ndwiwa.
2. A permanent order of injunction restraining the Defendants from demolishing structures and/or evicting the occupants and possessors of the parcel of land measuring 4.6 hectares, originally contained in parcel Nzai/Kalamba/638 which form part of the suit property. A declaration that the actions of the Defendants or removing 4.6 hectares from parcel Nzai/Kalamba/638 and adding them to parcel Nzai/Kalamba/594 was fraudulent, unlawful and unjustified.
3. A cancellation of the title deed issued on 18th April, 2023 for parcel Nzai/Kalamba/594 in favour of the 1st Defendant and one Kakwasi Mwau Kitiku (deceased), with acreage of 11.2 hectares and a cancellation of any subsequent changes done to its respective green card.
4. Re-issuance of new title deed for parcel Nzai/Kalamba/638 in the name of estate of Kivumbu Ndwiwa with the correct acreage of 11.4, as it was in the year 1995 and the same entry to be added to its respective green card.
5. Re-issuance of a new title deed for parcel Nzai/Kalamba/594 with the correct acreage of 5.6 hectares and the same entry to be added to its respective green card.
6. General damages for trespass by the Defendant.
7. Cost of the suit.

44. It is not in dispute that the court has no jurisdiction to hear and determine boundary disputes. Counsel for the Plaintiff moved the court because the acts of Land Registrar are contrary to the provisions of Section 79(1) of the [Land Registration Act](#). The 1st Defendant on the other hand submitted that the Plaintiff ought to have filed judicial review proceedings to challenge the administrative decision of the Land Registrar. From the foregoing it is evident that the issues raised herein are matters of fact which ought to be proved or ascertained by way of evidence. A preliminary objection cannot be raised on disputed facts or facts which should be ascertained by way of evidence.

45. Be that as it may, the record shows that the Defendant has not filed a defence to the Plaintiff’s suit. The instant preliminary objection does not refer to a defence.

46. In the case of Avtar Singh Bhamra & Another vs Oriental Commercial Bank HCCC No. 53 of 2004 the court held that:-

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained”.



47. From the foregoing, a proper preliminary objection should arise from the pleadings and on a pure point of law which is argued on the assumption that all the facts pleaded by all the parties are not contested. In the absence of the defence it is presumed that the Plaintiff's assertions have not been controverted and hence the facts are not yet established.
48. The upshot of the foregoing is that the preliminary objection is devoid of merit and the same is hereby dismissed with costs.

.....

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF OCTOBER, 2024.

In the presence of:

Mbati for the Defendant.

Saisi holding brief for Ms. Singi for the Plaintiff.

Court assistant Steve

