



**Kariobangi North Light Industries Jua Kali Association v Nairobi
City County Government & 2 others (Environment & Land Case
E219 of 2024) [2025] KEELC 3573 (KLR) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 3573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E219 OF 2024**

JG KEMEL, J

FEBRUARY 13, 2025

BETWEEN

**KARIOBANGI NORTH LIGHT INDUSTRIES JUA KALI
ASSOCIATION PLAINTIFF**

AND

NAIROBI CITY COUNTY GOVERNMENT 1ST DEFENDANT

KARIOBANGI SEWERAGE FARMERS 2ND DEFENDANT

**NAIROBI CITY WATER & SEWERAGE SERVICES COMPANY
LIMITED 3RD DEFENDANT**

*(In respect of the 2nd Defendant's Preliminary
Objection dated 2/8/24 that the suit is Resjudicata)*

RULING

1. This ruling is in respect of a Preliminary Objection raised by the 2nd Defendant dated 2/8/24 on the grounds that; -
 - a. The suit filed by the Plaintiff in court offends the provisions of section 7 of the [Civil Procedure Act](#) as the matter is Res Judicata.
 - b. That the suit be dismissed in its entirety with costs to the Defendants.
 - c. That costs of the suit be awarded to the 2nd Defendant.



Directions

2. On 20/1/25, the Court directed that the Preliminary Objection be disposed of by way of written submissions. Whilst the Plaintiff and the 1st Defendant failed to comply with the said directions, the 2nd and 3rd Defendants filed submissions dated 31/1/25 and 27/1/25 respectively.

The 2nd Defendant's Submissions

3. The 2nd Defendant in the background of its submissions avers that the parties have had several cases filed in court over the suit property. That the oldest case dates back to 1999 when the 2nd Defendant moved the court to be allocated the parcel of land in issue which they had occupied way back in 1960. The second suit was HCCC No 1026 of 2003 involving the very parties herein. The said suit was stayed by Justice Muchelule (as he then was) pending the outcome of the Originating Summons in HCCC No 1680 of 1999 (OS), which was concluded last year before Justice Komingoi. In 2020, after the demolition of the 2nd Defendant's houses, a Petition namely ELC PET NO 11 of 2010 was filed involving the same parties. The Defendants also filed a suit challenging the demolition. However, the suit was later withdrawn to pave way for the hearing of the Petition.
4. The 2nd Defendant submits that the threshold for Res Judicata has been met. That the court has delivered its judgement after considering the merits of the case. Counsel avers that there is a valid judgement delivered in the case involving all the parties in the instant suit. Further, that the matter relates to the same cause of action and the property being litigated is the same. The issues raised are also similar.
5. It is further submitted that a judgement in favour of the 2nd Defendant was issued by a court of competent jurisdiction. That having proved that the suit herein is res judicata, the objection herein be allowed and the Plaintiff's suit be dismissed with costs to the 2nd Defendant.

The 3rd Defendant's Submissions

6. The 3rd Defendant submits that the only issue for determination herein is whether the Preliminary Objection on Res judicata is sustainable. It is argued that Preliminary Objection hinges on the claim that the suit is Res Judicata by virtue of two prior judgments in Petition 11 of 2020 and ELC Case No. 1680 of 1999(OS), which the 2nd Defendant avers that the issues raised in the instant suit are similar to those raised and canvassed in the above-stated suits.
7. The 3rd Defendant cites the decision of the court in *Oraro vs. Mbaja* (2005) eKLR where it was held that if facts must be proved using the rules of evidence, then this is not a true preliminary objection based on a point of law. The 3rd Defendant submits that to determine whether the issues herein were directly and substantially in issue in the said cases, the court will have to ascertain facts by having to call for an examination of the pleadings filed in the instant suit vis a vis those filed in the determined cases.
8. It is further contended that the instant Preliminary Point of law as raised does not stem from the pleadings, but it requires the court to call for ascertainment of facts. It is submitted that res judicata cannot be properly argued as a Preliminary Objection as the court will have to probe issues raised in the previous case to confirm if they are similar to the current suit. Reliance is based on the case of *George Kamau Kimani & 4 Others -vs- County Government of Trans-Nzoia & Another* [2014] eKLR, where it was held that the best way to raise an issue of Res judicata is by way of a Notice of Motion where pleadings would be annexed to allow the court to consider if the issues in the previous suits are similar to the issues in the instant suit.



Analysis and Determination

9. I have considered the rival submissions. The 2nd Defendant objects to the jurisdiction of the court to hear and determine this matter on the basis that the instant suit is res judicata on account of previous suits already determined by the Court.
10. What constitutes a Preliminary Objection was discussed in the case of Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 Others SCK Petition No. 12013[2014] eKLR, where the Supreme Court restated the definition in the case Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A where the Court of Appeal said that:

...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 need to be ascertained or if what is sought is the exercise of judicial discretion.”

11. The Preliminary Objection is based on Section 7 *Civil Procedure Act* which provides for the doctrine of res judicata 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 can 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.”

12. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“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. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

13. In essence, therefore, the doctrine expressly states that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The 3rd Defendant agrees with this proposition.

14. To determine whether the matters raised in the instant suit have already been determined by a court of competent jurisdiction, material evidence has to be examined and interrogated. That puts the matter outside the ambit of a Preliminary Objection. In the case of Oraro -vs- Mbaja (2005) eKLR, the Court held that: -

“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. 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.”

15. In the case of Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another (2014) eKLR, where the court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

16. I am further persuaded by the court’s holding in George Kamau Kimani & 4 Others –vs- County Government of Trans Nzoia & Another (2014) eKLR, cited by the 3rd Defendant herein where the court stated: -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata.”

17. Guided by the dicta in the case of George Kamau Kimani above and to the extent that the objection is raised in the current manner, it is incompetently before the court. It is hereby struck out. The objector is at liberty to raise the objection in an ordinary notice of motion to accord the court the opportunity to consider the pleadings and the judgement rendered therein.

Disposal orders

18. Consequently, I make the following orders;
- a. The Preliminary Objection dated the 2/8/24 is incompetently brought before the court. It is struck out.
 - b. Costs are payable by the objector to the 3rd Defendant.
19. It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

