



Mwekangi Holdings Limited v Woburn Estate Limited & another (Environment & Land Case E089 of 2024) [2024] KEELC 14168 (KLR) (19 November 2024) (Ruling)

Neutral citation: [2024] KEELC 14168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E089 OF 2024
FM NJOROGE, J
NOVEMBER 19, 2024**

BETWEEN

MWEKANGI HOLDINGS LIMITED PLAINTIFF

AND

WOBURN ESTATE LIMITED 1ST DEFENDANT

WOBURN MANAGEMENT LIMITED 2ND DEFENDANT

RULING

1. For determination is the Preliminary Objection dated 18th September, 2024 on the following grounds:
 1. That the Plaintiff's suit is a total abuse of the Court process;
 2. That the Plaintiff's suit offends the mandatory provisions of Section 7 of the *Civil Procedure Act* as the same Res-judicata Malindi ELC No. 289 o 2016 and subsequently Civil Appeal No. 33 of 2020 Mwekangi Holdings Limited versus Woburn Estate Limited & Woburn Management Limited;
 3. That this court lacks jurisdiction to hear and determine this suit under clause 2.5-part B the lease agreement which provides for an alternative dispute Resolution mechanism;
 4. That the issue of jurisdiction of this court has already been defined in Civil Appeal No. 33 of 2023 between Woburn Estate Limited & Another versus Mwekangi Holdings Limited whereupon the Court has already made it clear that the ELC Court lacks jurisdiction to hear matters dealing with service charge;
 5. That the Plaintiff is taking the Defendants round and round in circles with multiplicity of suits;
 6. That service charge payable has already been determined by one PAUL WAMBUA in accordance with clause 2.5 of part B of the lease agreement.



2. In response to the preliminary objection, the Plaintiff filed a Replying Affidavit sworn by Diana Ngungi Kilonzo on the 23rd September, 2024 where she deponed and attached a report by one Paul Wambua in reference to Ground 6 of the Notice of Preliminary Objection.

Submissions.

3. The Defendants through the firm of Richard O. & Co. Advocates filed submissions dated 18th September, 2024. Counsel submitted that the suit herein by the Plaintiff as against the Defendant is on the issue of enforcement of service charge payable by the Plaintiff.
4. He also submitted that on the same issue there were other suits filed by other parties including the plaintiff herein against the defendants all centered on service charge payable to the Plaintiffs herein. That among those suits filed include; Malindi ELC No. 51 of 2014 Dysara Investment Limited & others vs Woburn Estate Limited & Another, Malindi ELC No. 289 of 2016 Mwekangi Holdings Limited vs Woburn Estate Limited & Another and Malindi HCC No. 45 of 2011 Michael Carnell vs Woburn Estate Limited & Another.
5. He also submitted that among the terms and conditions set out by the lease includes the internal mechanisms on solving any dispute centered on service charge which term was contained within clause 2.5 of part B of the lease agreement. According to him, according to clause 2.5, the matter was referred to the chairman of the institute of surveyors who in turn appointed one Paul Wambua; that the matter was resolved in accordance with that clause and that the appointed expert did a report which became final and binding upon all parties.
6. Counsel relied on the case of Filippo Fedrini versus Ibrahim Mohamed Omar (2018) eKLR and National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Limited & Another (2001) eKLR.
7. It was his submission that the instant case is res-judicata Malindi ELC case Number 289 of 2016 as concluded through Civil Appeal Number 33 of 2020 within the meaning of Section 7 of the Civil Procedure Act as and that the suit as filed is an abuse of the Court process.
8. The Plaintiff on the other hand filed submissions through the firm of E.K. Mutua dated 25th September, 2024. Counsel submitted that though the plaintiff's case is that in compliance with the provisions of the Lease document, the monthly service charge payable has been determined by an expert and fully paid, on the other hand, the defendant's position is that the issue of the monthly service charge payable had earlier on been determined by a different expert and that there has been previous litigation over the same issue.
9. He submitted that a determination of a question of res judicata is an issue of fact given that the court must interrogate pleadings in a former suit and compare the same with the latter suit. He relied on the cases of Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another (2014) eKLR and George Kamau Kimani & 4 Others vs County Government of Trans Nzoia & Another (2014) eKLR.
10. According to him, even if the court were to be persuaded or tempted to deal with the issue of res judicata as a preliminary objection, the same is not merited for the reason that there is no evidence of the pleadings in respect of Malindi ELC No. 289 of 2016 nor a Memorandum of Appeal in Court of Appeal Civil Appeal No. 33 of 2020 and further, in the Plaintiff, the Plaintiff has disclosed and pleaded that Civil Suit Malindi ELC 289 of 2016 was struck out on account of a preliminary objection.
11. He relied on the case of Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (2014) eKLR where the Supreme Court stated that the concept of res judicata operates to prevent causes of action or issues from being relitigated once they have been determined



on merit. He also relied on the case of Uhuru Highway Development Ltd vs Central Bank of Kenya (1999) eKLR.

Analysis and Determination.

12. I have considered the objection by the defendant, the response thereto and the submissions by counsels and in my view, the only issue arising for determination is whether the preliminary objection can succeed.

13. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 to mean:-

“... 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.”

14. It was further stated in the Mukisa case (supra) 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 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

15. In determining whether the issue of res judicata can be raised as a preliminary Objection, I am guided by the case of George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR, where the Court held that: -

“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. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

16. The defendant contends that there were other suits filed by other parties including the plaintiff herein against the defendants all centered on service charge payable to the Plaintiffs herein; that among those suits filed include; Malindi ELC No. 51 of 2014 Dysara Investment Limited & others vs Woburn Estate Limited & Another, Malindi ELC No. 289 of 2016 Mwekangi Holdings Limited vs Woburn Estate Limited & Another and Malindi HCC No. 45 of 2011 Michael Carnell vs Woburn Estate Limited & Another.

17. The Plaintiff on the other hand suggests that the same is not merited for reason that there is no evidence of the pleadings in respect of Malindi ELC No. 289 of 2016 nor a Memorandum of Appeal in Court of Appeal Civil Appeal No. 33 of 2020 and further, in the Plaint, the Plaintiff has disclosed and pleaded that Civil Suit Malindi ELC 289 of 2016 was struck out on account of a preliminary objection.



18. In my view, in order for this court to determine the preliminary objection, the defendant would be required to tender evidence in support thereof. That can not be allowed in a preliminary objection as it would be an abuse of the court process and in my opinion, that exercise will be outside the scope of what constitutes a preliminary objection. For this reason, the preliminary objection fails and it is hereby dismissed with costs. parties shall file skeleton submissions on the notice of motion dated 3/9/2024 within 10 days hereof and the application shall be heard inter partes by way of highlighting those submissions on 10/12/2024.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 19TH DAY OF NOVEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

