



**Njagi & 50 others v Kathi Group Ranch thro' Ivara Cue & 3 others (Environment & Land Petition 1 of 2020) [2023] KEELC 18922 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 18922 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND PETITION 1 OF 2020  
A KANIARU, J  
JANUARY 25, 2023**

**BETWEEN**

**MURIITHI NJAGI & 50 OTHERS ..... PETITIONER**

**AND**

**KATHI GROUP RANCH THRO' IVARA CUE ..... 1<sup>ST</sup> RESPONDENT**

**E KENNETH N WAMAI ..... 2<sup>ND</sup> RESPONDENT**

**JASON NAYAGA ..... 3<sup>RD</sup> RESPONDENT**

**NDARU BARAGU ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. What is for determination before me is a preliminary objection raised vide a notice dated 10/1/2021 filed in court on even date. The objection is hinged on three (3) postulates viz:
  - i. The petitions in the instant matter have failed to disclose to the court that similar proceedings have been brought before this court previously between the same parties and the same subject matter and is therefore Res Judicata.
  - ii. That the petitioners have failed to disclose material particulars.
  - iii. That the petition was brought against respondents including one who was dismissed even at the time of filing.
  - iv. That the petitioners have without disclosing purported to prosecute and obtain orders against a dead respondent who has been condemned unheard and hence all such orders are untenable and ought to be vacated.
2. To give context to the objection, it is necessary to give a brief synopsis of the matter. The petitioners implied the respondents here via a petition dated 12/2/2020 filed in court on even date. In the



petition, the petitioners accuse the respondents of violation of their constitutional rights including the right of property ownership. More specifically, the respondents are alleged to have illegally appropriated to themselves ownership of Land parcel NO. Mbeti/Gachuriri/170 to which the petitioners are also entitled as members of the Kathi Clan.

3. In a response dated 22/11/2021 and filed on 23/11/2021, the respondents denied the petitioners claim and averred, inter alia, that the matter has been litigated upon in the past, thus making the petition Res-judicata; that the petition is faulty for including some dead people as parties; that the petitioners are posing as leaders of Kathi clan while they are not such since, in truth, they are members of only three families within Kathi clan; and that the land is private as opposed to clan or community land as alleged by the petitioners.
4. The objection was canvassed by way of written submissions. The respondents filed their first set of submissions on 23/11/2021. The petitioners filed theirs on 23/3/2022 and this prompted the respondents to file a second set styled “supplementary submissions”, on 15/9/2022. The respondents submitted that the petition is devoid of merits as it is Res Judicata. It was submitted that there has been past proceedings over the same subject matter and between the same parties. According to the respondents, it does not matter that what is before the court is a constitutional petition while the past suits were ordinary ones. The case of John Florence Maritime Services Limited & Another Vs Cabinet Secretary For Transport & Infrastructure & 3 Others [2015] eKLR was cited to drive the point home. In the case, the court emphasized that RES JUDICATA is a doctrine of general application and cases of constitutional nature are not exempt from its use and application.
5. The petitioners were also alleged to have failed to disclose some material particulars. The position, it was submitted, is that such particulars should be disclosed. The case of Corporate Insurance Company Limited Vs Charles John Musee [2018] eKLR was proffered for guidance and/or persuasion.
6. Further, the respondents submitted that the petition has been brought against a deceased party. The inclusion of the deceased party was said to be aimed at evading the doctrine of Res-judicata. For all these reasons, the court was urged to strike out the petition with costs to the respondents.
7. The petitioners on the other hand submitted that the matter is not res judicata. The respondents were said not to have demonstrated the requirements for proof of Res Judicata. They were said to have “presented before this court a half-baked objection.” It was additionally averred that allegations of Res Judicata by the respondents are premised on disputed facts. ELC Petition No. 3 of 2014 – Embu, which is one of the matters cited as a basis of this matter itself being Res Judicata, was set out in the petitioners submissions to show that it had different parties and involved different parcels of land and can not therefore be cited as a basis of proof of Res Judicata. It was also the petitioners position that Res Judicata can not be urged before court by way of a preliminary objection as it requires interrogation of evidence or facts to prove it.
8. On the issue of non-disclosure of material facts, the respondents were faulted for not disclosing to this court what the alleged material particulars are. The petitioners also submitted that it is not for the respondents to decide what the material particulars are as that responsibility belong to the courts.
9. As regards the issue of suing a deceased person, the respondents were accused of failing to identify the deceased party. It was also submitted that the point raised is one of fact and is liable to be contested.
10. Finally, it was submitted that the objection as raised is based on facts, not law, and should therefore be dismissed.
11. I have considered the objection as raised and the submissions filed by both sides. I have also had a look into the entire matter generally. The first port of call when one is dealing with a matter in which a



preliminary objection is raised is usually the celebrated case of Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd: [1969] EA 696. The case captured the essence of a preliminary objection as follows:

Per Law JA:

“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, will dispose of the suit. Examples are objection to jurisdiction of the court, 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”

Per Sir Charles Newbold:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is on the assumption that all the facts pleaded by the other side are correct. It can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

12. It is plain from Mukisa’s case (supra) that a preliminary objection should be based on a pure points of law and the facts on which the points are based should be clear, self-evident, and correct. If the facts require to be ascertained or established, a preliminary objection loose its legal validity.
13. It has become common practice to raise preliminary objections even in matters where facts are contested and/or where the facts upon which the objections are hinged require evidence to prove. Courts of law have always decried this kind of practice. An example can be found in the case of Eunice Karimi Kibunja Vs Mwirigi M’Ringera Kibunja: C.A. No. 103 of 1996 [2013] eKLR where the court was constrained to observe as follows:

“The issue before the court clearly required a full hearing and we reiterate that the practice of raising points, which should be raised in the normal manner, by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. A preliminary objection cannot be raised if any fact has to be ascertained”

14. Further, or in addition to the above, the case of Brownstone Agencies Ltd & Another Vs County Government of Bomet & Another [2022] eKLR is instructive. In that case, the court cited with approval the case of ORARO Vs MBANJA [2005] eKLR where Ojwang J (as he then was) had made the following observation:

“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”.



15. The kinds of facts upon which a preliminary objection should be based was made clear in the case of Quick Enterprises Ltd Vs Kenya Railways Corporation Hccc No. 22 Of 1999, Kisumu, where the court expressed itself thus:

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings.”
16. The first point of objection raised by the respondents is that the matter herein is Res Judicata. The petitioners then submitted that the respondents have not met the requisite considerations for proof of Res judicata in law. I have had a look at what the respondents have said in their two sets of submissions in this matter. The first set of submissions mentions Petition No. 3 of 2014. Apart from mentioning it, no effort is made in the submissions to demonstrate the similarities of that matter in terms of issues, parties, or general substance, to relate it to the matter in court now. The high court determination in Petition No. 3 of 2014 was also not made available. Instead, what was made available is a judgement of the court of appeal in respect of the determination in Petition No. 3 of 2014 made by the high court. The judgement was issued in Civil Appeal No. 46 of 2015.
17. In the petitioners submissions reference is made to Petition No. 3 of 2014 and it seems well demonstrated that the parties and the subject matter were different. I really can not tell now whether this is the true position or whether the petitioners have decided to make some cosmetic changes to escape the doctrine of Res-judicata. Either way, the fact that I need to interrogate the matter further to establish what the true position is would seem to suggest that the issue is not one that is suitable for consideration by way of a preliminary objection.
18. The other case mentioned by the respondents in support of Res Judicata is PMCC No. 128 of 1990. This one is in the second set of submissions. The submissions do not bring out the true character or aspects of the case that makes it similar – and therefore Res Judicata – to the matter before the court now. Only a fleeting mention of the case was made in the submissions and the rest seems to have been left to the court to find out for itself. This is not acceptable. Everything should have been made clear.
19. The preliminary objection was prosecuted through submissions. It is in the submissions that the court should be made clearly aware of the similarities of any past cases to this one. The respondents submissions are wanting in this. The court refuses to be drawn in a situation where it has to interrogate the alleged facts at this preliminary stage. Such facts should be made plain or obvious.
20. The respondents also faulted the petitioners for failing to disclose some material particulars. The case of Corporate Insurance Company Limited Vs Charles John Musee [2018] eKLR was cited to emphasize the need to disclose material particulars. The petitioners responded to this issue by submitting that it is the court, and not the parties to a case, which should decide what material particulars are. The cases of Brinks-mat Ltd Vs Elcombe [1988] 3 All Er 188, Bahadurali Ebrahim Shamji Vs Al Noor Jamal & 2 Others: Civil Appeal No. 210 of 1997, and GO Tv Limited Vs Royal Media Services & 2 Others [2015] eKLR were cited to buttress this point.
21. The respondents were also faulted for not disclosing to the court what the material particulars are.
22. On this issue, I am more in agreement with the petitioners than the respondents. The respondents submissions do not disclose what the material particulars are. The court is left to speculate or make enquiries regarding the issue. It is not the courts responsibility to do so. I am also persuaded that it is the court itself that should decide what the material particulars are. It appears to me unconscionable that one side of a case can decide for the other side what particulars should be disclosed. I also note



that the case cited by the respondents in support of the allegation is essentially an insurance case where the doctrine of utmost good faith applies. In insurance law, this doctrine entails, among other things, full disclosure of material particulars. The doctrine does not apply in equal measure in all other areas of law. It only has prominence or pride of place in insurance law. This is not an insurance matter.

23. The matter at hand is a constitutional petition and in terms construction, formulation, and configuration, it is governed by *The Constitution* Of Kenya (protection Of Rights And Fundamental Freedoms) Practice And Procedures Rules, 2013. I expected the respondents to disclose not only the particulars that are not disclosed but also the provision or regulation in the practice directions violated by the petitioners for failing to disclose. This is not what I see in the submissions. There is only a general allegation that some material particulars were not disclosed.
24. Then there was also the issue of dead respondents being sued. It is not disclosed to the court who the dead respondents are. The court would have wished to know who they are. It would also have appreciated if prima facie proof of such deaths was made available in these preliminary stages. Nothing of the sort was done. The submissions of the respondents also mention a dead petitioner – specifically the 42<sup>nd</sup> petitioner – and there is even a copy of death certificate in the file. I note however that the objection as raised is not about a dead petitioner; it is about some dead respondents. I would have expected that the respondents would equally provide prima facie proof of the deaths of the respondents. This was not done.
25. I have pointed out the shortcomings of the respondents approach in their submissions concerning the issues raised in the preliminary objection before me. Some of the issues – Like (ii) (iii) and (iv) – are in my view based on facts that require interrogation and it is also doubtful whether they are pure points of law. The issue of Res Judicata is a point of law in my view but the respondents submissions failed to bring out the true substance or character of the cases which they allege to have conclusively dealt with the matter.
26. The upshot, in light of the foregoing, is that the merits of the preliminary objection before me have not been demonstrated. I therefore dismiss the objection. Costs shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

In the presence of Wandugi for respondents and Mutuma (absent) for petitioners.

Court assistant: Leadys

**A.K. KANIARU**

**JUDGE**

1.2023

