



REPUBLIC OF KENYA



**Muhoro & another v Ndwaru & another (Environment and Land Miscellaneous Application E153 of 2022) [2023] KEELC 118 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 118 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E153 OF 2022  
EK WABWOTO, J  
JANUARY 19, 2023**

**BETWEEN**

**CHARLES GATHEE MUHORO ..... 1<sup>ST</sup> APPLICANT**

**PAUL MUHORO MURITHII ..... 2<sup>ND</sup> APPLICANT**

**AND**

**WANJIKU NDWARU ..... 1<sup>ST</sup> RESPONDENT**

**CITY COUNCIL OF NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 2<sup>nd</sup> respondent raised a preliminary objection dated October 18, 2022 in the following terms:-
  - i. That the court lacks jurisdiction to entertain the application
  - ii. That the court is functus officio as the matter was already heard and determined by this honourable court and a ruling delivered on the July 14, 2022, at the Court of Appeal
  - iii. That the application dated August 26, 2022 is res judicata
  - iv. That the application is incompetent, misconceived, lacks merit and constitutes a gross abuse of the court process
  - v. That the court is being asked to issue orders which are superfluous, therefore the application dated August 26, 2022 ought to be dismissed with costs to the 2<sup>nd</sup> respondent.
2. In a replying affidavit dated October 17, 2022 and sworn by Wanjiku Ndwaru, it was highlighted that the 1<sup>st</sup> respondent was the rightful owner of Nairobi/block/63/455(suit property). It was further



asserted that issues arising in the applicant's application had been dealt with in Milimani Commercial Court Chief Magistrate's Court Civil Case No 2323 of 2011, Wanjiki Ndwaru vs Peter Kiboi Githu & 3 others before Hon Murage SRM.

3. The 2<sup>nd</sup> respondent filed submissions in which it was emphasized that the applicants acted contrary to the orders of Hon Justice Okongo in the ruling dated October 21, 2021- ELC Misc No 31 of 2020.
4. In opposition to the preliminary objection, the applicants equally filed a replying affidavit sworn by Paul Muhoro Muriithi dated December 6, 2022. It was submitted that the applicant was ready to comply with orders given in Justice Okongo's ruling and for this reason should be accorded a fair hearing.
5. I have considered the preliminary objection, the written submissions filed by the 2nd respondent and the authorities cited. The issue for determination is whether the preliminary objection is merited.
6. It is trite law that a preliminary objection must be raised on a point of law as reiterated in the case of *Mukhisa Biscuits Manufacturing Co Ltd V West-End Distributors Limited (1969) EA 696*. Having raised the objection on a specific provision of the law, the preliminary objection would be alive and within the jurisdiction of this court.
7. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR* highlighted the principle when it stated:

' 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.'
8. Section 7 of the *Civil Procedure Act*, reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated as follows: -
  - i) ) The suit or issue raised was directly and substantially in issue in the former suit.
  - ii) That the former suit was between the same party or parties under whom they or any of them claim.
  - iii) That those parties were litigating under the same title.
  - iv) That the issue in question was heard and finally determined in the former suit
  - v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
9. A perusal of the of applicants' notice of motion confirms that the applicants are seeking to revive prayers that had lapsed when they failed to comply with orders previously granted. The issues raised by the applicant are res judicata having been previously litigated upon and a determination made. The applicants have had their day in court and have been unable to comply with previous orders issued by this court. They are authors of their own misfortune.
10. In light of this, it is untenable for this Court to proceed with the application since ultimately litigation must come to an end. Having discharged its duty, this court is therefore functus officio, defined in *Black's Law Dictionary, Ninth Edition* as '[having performed his or her office] (of an officer or official body) without further authority or legal competence because the duties and functions of the original



commission have been fully accomplished.' In the circumstances, the court is wary of the applicant's invitation to re-engage with this dispute between the parties. An invitation that cannot be heeded.

11. In view of the foregoing, I find the preliminary objection is merited and the same is hereby upheld with costs payable to the respondents.

12. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY 2023**

**EK WABWOTO**

**JUDGE**

In the presence of: -

Mr Kamwami for the Applicants

Mr.Odhiambo for the 1<sup>st</sup> Respondent

Mr Otieno for the 2<sup>nd</sup> Respondent

Court Assistant; Caroline Nafuna.

