



M Dalmar Trading Company Limited v Wambui & 2 others (Environment & Land Case E001 of 2023) [2023] KEELC 15676 (KLR) (16 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E001 OF 2023
EK WABWOTO, J
FEBRUARY 16, 2023**

BETWEEN

M DALMAR TRADING COMPANY LIMITED PLAINTIFF

AND

MARY GAKIBE WAMBUI 1ST DEFENDANT

SAMUEL KIBE NDUNGU 2ND DEFENDANT

RAAS RESIDENCE LIMITED 3RD DEFENDANT

RULING

1. The 1st and 2nd Defendants raised a Preliminary Objection dated January 13, 2023 in the following terms:
 - i. That the Court lacks jurisdiction and the entire suit is fatally and incurably defective and is incompetent in law and ought to be struck out or dismissed with costs to the Defendants for reasons that:
 - a. The suit and application herein fall short on the doctrine of “*Res subjudice*” and are barred by operation of Section 6 of the [Civil Procedure Act](#), as the Applicants herein have levied the same claims in the same facts between the same parties which are pending determination in: Criminal Case Number 120A of 2022 and BPRT E799 of 2021
 - b. The suit and application herein are *res judicata* as the matters before this Court have already been determined in High Court Revision Case Number E170 of 2022 and BPRT E734 of 2022.
 - c. The Applicant herein is a vexatious litigant who is abusing the court process and this application is yet another of the several application including ELC Case no E263 of 2022 filed by the Applicant is a clear abuse of the court process.



2. Pursuant to the directions of this Court issued on January 16, 2023, the Court directed the preliminary objection to be canvassed through written submissions. The 1st and 2nd Defendants filed submissions dated February 10, 2023, in which it was submitted that the subject matter, parties and facts are the same as indicated in the three concluded matters and in two other pending matters. It was also reiterated that the suit was also *res judicata* and therefore ought to be struck out.
3. The 3rd Defendant also in support of the Preliminary Objection highlighted that there exists no legitimate reason why the Plaintiff abandoned its previous suits and opted to file the present suit.
4. The Plaintiff filed written submissions dated February 15, 2023 wherein it was contended that the suit was neither *res judicata* nor *sub judice* for the reasons that the current suit seeks for the injunction orders against the Defendants pending the appointment of an Arbitrator, commencement of arbitration and finalization of the intended arbitration. In view of this contention, the Plaintiff urged the court to dismiss the preliminary objection with costs.
5. I have carefully considered the preliminary objection, the written submissions filed by the parties and the authorities cited and the main issue for determination is whether the preliminary objection filed herein 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 6 of the *Civil Procedure Act* lays out that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
9. 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.
10. Paragraph 22 of the Plaint dated August 8, 2022 in respect to ELC E263 *M Dalmar Trading Co Limited vs Mary Wambui Gakibe and Samuel Ndungu Gakibe* states as follows:
- “The Plaintiff avers that there is no other suit pending neither have there been previous proceedings in any other court between the Plaintiff and the Defendants over the subject matter of this suit save for BPRT Case No E799 of 2021 at Nairobi between the Plaintiff and the 1st Defendant”
11. Similarly, the Notice of Motion application filed in ELC E263 of 2022 *M Dalmar Trading Co Limited vs Mary Wambui Gakibe and Samuel Ndungu Gakibe* dated August 8, 2022 seeks injunctive remedies similar to the prayers sought in this instant suit.
12. The court has also considered the Plaintiff’s contention that the current suit is not *sub judice* nor *res judicate* owing to the fact that it seeks for injunctive orders against the Defendants pending the appointment of an Arbitrator, commencement of arbitration and finalization of the intended arbitration. However the said contention cannot be upheld for the reasons that the suit still relates to the same suit property and the same parties who have been engaged in previous litigation upon themselves. The Plaintiff has not produced evidence of withdrawal of the previous pending suit which therefore confirms the duplicitous occurrence to which this Court must pronounce itself. The action of filing a fresh suit, seeking similar prayers on the same cause of action is an imprudent use of precious judicial time and resources.
13. A perusal of the of Ruling delivered by Ogembo J in High Court Criminal Rev E170 of 2022 on October 4, 2022 confirms that the Court took cognizance of the multiple suits involving the parties with regard to the suit property-LR no 36/VII/435 situated in Eastleigh, Nairobi. Moreover, the case titles in BPRT E734 of 2022, Revision Case Number E170 of 2022 and Criminal Case Number 120A of 2022 confirms that the Parties have been involved in prior suits with regard to the suit property.
14. The basic purpose and the underlying object of subjudice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.
15. I also wish to add that the practice of filing new and separate cases despite the existence of a similar case relating to the same subject matter amounts to an abuse of the court process. Courts usually frown on this practice since it leads to unnecessary backlog of cases and a waste of the precious judicial time.
16. In conclusion, I find that the preliminary objection dated January 13, 2023 is merited and the same is upheld consequences of which is that the entire suit is hereby struck out with costs to the 1st, 2nd and 3rd Defendants who have borne the brunt of a seemingly endless litigation cycle.
17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF FEBRUARY 2023.

E. K. WABWOTO

JUDGE



In the presence of: -

Mr. Lakicha for the Plaintiff

Ms. Ndungu for the 1st and 2nd Defendant

Ms. Mohamed h/b for Mr. Muchoki for the 3rd Defendant

Court Assistants; Caroline Nafuna and Philomena Mwangi

E. K. WABWOTO

JUDGE

