



REPUBLIC OF KENYA



Simeon & 3 others v Mrabu & 4 others (Environment & Land Case 68 of 2021) [2023] KEELC 839 (KLR) (14 February 2023) (Ruling)

Neutral citation: [2023] KEELC 839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 68 OF 2021
MAO ODENY, J
FEBRUARY 14, 2023**

BETWEEN

**FRANCIS GARAMA SIMEON 1ST PLAINTIFF
MACDONALD IDDI SIMEON 2ND PLAINTIFF
BEATRICE MWAKA HARE 3RD PLAINTIFF
AGNES JUMWA SHAKE 4TH PLAINTIFF**

AND

**DOMINIC LEWA MRABU 1ST DEFENDANT
EMMANUEL JONATHAN NYOKA 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Preliminary Objection dated 26th January, 2022 by the 1st Defendant on the following grounds; -
 - a. That the suit herein is a non-starter in law and or fatally defective as it has been brought in contravention of Section 7 of the Civil Procedure Rules;
 - b. That this suit is an abuse of the court process and should be struck out with costs to the Defendant.
2. The Preliminary Objection was canvassed by way of written submissions where both counsel filed their submissions.



3. Counsel for the 1st Defendant submitted that 1st Defendant herein filed a suit ELC No. 134 of 2015 by way of Plaint dated 6th August 2015 seeking inter alia permanent injunction against the 4th Plaintiff who had trespassed onto the suit property known as Kilifi/roka/173 and had refused to give vacant possession of the property whereby he had erected illegal structures.
4. That the case was heard and determined and a Judgment on the same subject matter was delivered on the 22nd day of November, 2020 by this Court in ELC No. 134 of 2015.
5. It was counsel's further submission that the subject matter being ownership of parcel No. Kilifi/Roka/173 was well adjudicated in the previous suit and relied on Section 7 of the *Civil Procedure Act* and the cases of *Diocese of Eldoret Trustees (Registered) vs Attorney General (on behalf of the PS Treasury) & Another (2020) eKLR* and that of *Pangaea Holdings LLC & another v Hacienda Development Ltd & 2 others (2020) eKLR* and urged the court to strike out the suit for being res judicata.
6. Counsel for the Plaintiffs submitted that the Preliminary Objection by the 1st Defendant lacks merit as it is not based purely on a point of law but on facts which must and should be supported by evidence.
7. It was counsel's submission that it is incumbent upon the 1st Defendant to prove by way of evidence that ELC No. 134 of 2015 was between the same parties and that the subject matter was the same and that the case was heard and determined on merit.

Analysis Andetermination

8. The issue for determination in this Preliminary Objection is whether this suit is res judicata.
9. Section 7 of the *Civil Procedure Act* provides for the principle of res judicata in the following terms;

‘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 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.’
10. The ingredients of Preliminary Objections are well settled as per the *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696*. A Preliminary Objection should only be raised on a point of law and not facts which require further evidence to adduced to ascertain the facts.
11. I have considered the pleadings and proceedings in ELC No. 134 of 2015 and notes that the 4th Plaintiff was the Defendant in that suit while the 1st Defendant was the Plaintiff. The 2nd Defendant was a witness for the Plaintiff and duly testified on behalf of the Plaintiff. The subject matter in that suit was Kilifi/ Roka/ 173 which is the same property in dispute in the current case.
12. As I had stated in the case of *Diocese of Eldoret Trustees (Registered) vs Attorney General (on behalf of the PS Treasury) & Another (2020) eKLR*, parties should not try these old tricks of camouflaging themselves in new parties that are added to a suit to make them look fresh. The moment an issue of res judicata is raised and the court finds that the suit is about the same parties, same subject matter which has been litigated in by a competent court or tribunal, the axe will fall on their case as courts are very vigilant to protect their integrity. Courts will not allow litigants who want to try their lack using unorthodox ways to abuse court processes.



13. In the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR the court held as follows: -

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

14. I will therefore not deal with a case which has been litigated and a judgment rendered by a competent court. I find that this suit is res judicata and an abuse of the court process. The Preliminary Objection dated 26th January, 2022 has merit and hence upheld. Plaintiffs’ case is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF FEBRUARY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

