



Njihia v Gathemia (Sued as the Administrator of the Estate of Julius Gathemia Kihara) & another (Environment & Land Case E013 of 2022) [2023] KEELC 16926 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E013 OF 2022**

**EK WABWOTO, J
MARCH 27, 2023**

**IN THE MATTER OF ORDER 37 RULE 1, ORDER 52 RULE 7 (1) (B) OF
THE CIVIL PROCEDURE RULES AND RULE 41(3) OF THE PROBATE AND
ADMINISTRATION RULES AND SECTION 45 OF THE ADVOCATES ACT.**

BETWEEN

SAMUEL NJONGORO NJIHIA APPLICANT

AND

**CHRISTINE NJOKI GATHEMIA (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF JULIUS GATHEMIA KIHARA) 1ST RESPONDENT**

**DILIPSINH P MAIDA AND WANGAI MAINA T/A MAHIDA & MAINA CO.
ADVOCATES 2ND RESPONDENT**

RULING

1. The 2nd respondent raised a preliminary objection dated August 24, 2022 in the following terms:
 - i. The application dated March 18, 2022 is premature, bad in law, incomplete and an abuse of the court process as payment of Kenya shillings two million (Ksh 2,000,000) under the terms of the undertaking dated April 6, 2021, was to be paid within fourteen (14) days of completion of the sale and receipt from the purchase price which events are yet to take place.
 - ii. The application dated March 18, 2022 is bad in law, incompetent and an abuse of the court process as it offends the mandatory provisions of section 7 of the *Civil Procedure Act* chapter 21 for the reason that:
 - a. Prayer 2 was heard and determined *vide* the applicant's application dated June 24, 2013 and an order issued on May 17, 2017 delivered by Hon Justice Muchelule to the effect that Kenya shillings two million (Ksh 2,000,000) being the debt amount was to be paid



by the 1st respondent from the proceeds of sale upon the sale of 0.25 acres of land parcel Dagoretti/Mutuini/640.

- b. Prayer number 3 & 4 were heard and determined in the 1st respondent's application dated December 18, 2018 and an order dated September 23, 2019 issued to the effect that the refund for Ksh 2,000,000 to the applicant shall not carry any interest. Further, the court in its ruling held that the only remedy available to a purchaser when a transaction is voided for lack of a land control board consent was only a refund of the purchase price.
 - iii. The claimant's application dated March 18, 2022 offends the provisions of order 45 rule 6 of the *Civil Procedure Rules 2010* for the reason that it seeks to review the orders dated September 23, 2019 by Hon Justice Muchelule.
 - iv. The claimant's application dated March 18, 2022 offends the provisions of order 52 rule 7 of the *Civil Procedure Rules 2010* which provides that applications for an order for the enforcement of an undertaking given by an advocate in a suit in the High Court shall be made by summons in chambers in that suit. The undertaking dated April 6, 2022 was issued pursuant to a consent of even date filed in ELC E007 of 2021 therefore the applicant dated March 18, 2022 is not properly before this court.
2. On September 22, 2022, the court issued directions for the matter to be canvassed by way of written submissions. Respondents were granted 7 days to file a response while plaintiff/applicant was granted 21 days to file written submissions.
 3. In a replying affidavit dated September 20, 2022 and sworn by Christine Njoki Gathemia, it was deposed that the 1st respondent had at all times employed her best efforts to ensure compliance of the orders in the succession cause. Her efforts included filing miscellaneous application E007 of 2021 where the 1st respondent sought removal of the cautions and restrictions so as enable sub-division and consequent sale for the purpose of refunding the applicant. Furthermore, it was averred that the purchase price had not been paid therefore the 2nd respondent was not in breach of the undertaking.
 4. Having considered the preliminary objection, respective submissions and evidence adduced. The issue for determination is whether the preliminary objection is merited.
 5. It is trite law that a preliminary objection must be raised on a point of law as well established in the *Mukhisa Biscuits* case. In *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR the Court of Appeal reiterated 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...”
 6. In *Oraro v Mbajja* (2005) eKLR, the following was stated regarding a 'preliminary objection'.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the 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.”
 7. The preliminary objection is anchored on a specific provision of the law therefore it is rightly filed and within the jurisdiction of this court.



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. I have perused the applicant's originating summons dated March 18, 2022 and pleadings in succession cause No 209 of 2013. The suits involve the same parties and the same subject matter; Land parcel Dagoretti/Mutuini/640. I further confirmed that subject to the orders by Hon Justice Muchelule on May 17, 2018 and September 23, 2019, the refund of Kshs 2,000,000 was to be paid to the applicant without interest.
10. Although this court remains cognizant of the applicant's suffering and seemingly long wait for the said refund, it is unfortunate that for the reasons advanced above, the said application cannot be entertained by this court. 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.
11. I find that the issues raised under prayer 1, 2, 3 and 4 in respect to the application dated March 18, 2022 with regard to the suit property have been dispensed with and therefore the court cannot allow a disguised review to pass as has been crafted within the said originating summons.
12. For this reason, I find the preliminary objection is merited and the same is upheld. There shall be no orders as to costs.
13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF MARCH 2023.

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Applicant.

Ms. Ndungu h/b for Ms. Kamande for the Respondents.

Court Assistant; Caroline Nafuna.

