



**Kibera v Kangethe & another (Environment & Land Case
E383 of 2022) [2023] KEELC 17194 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E383 OF 2022**

MD MWANGI, J

APRIL 25, 2023

BETWEEN

JEREMIAH MUTEKA KIBERA PLAINTIFF

AND

EDWARD NJUGUNA KANGETHE 1ST DEFENDANT

HAJI OMARI 2ND DEFENDANT

RULING

(In respect of a Preliminary Objection by the 2nd Defendant to the effect that the court lacks jurisdiction on the basis that the matter is subjudice and that it does not disclose a cause of action against the 2nd Defendant)

Background

1. The Plaintiff in this matter filed suit by way of the Plaint dated 17th November 2022. Alongside the Plaint, was a Notice of Motion application dated 17th November 2022 seeking for an order of interlocutory injunction restraining the Defendants from interfering with the Plaintiff's quiet possession of the suit premises L.R. No. 36/1/133 situated within Eastleigh, Nairobi County.
2. The 2nd Defendant herein in response to the Plaintiff's application filed a notice of Preliminary objection dated 13th February 2023 listing eight (8) grounds therefore, namely;
 - i. That the honourable court lacks jurisdiction to entertain the suit and this instant application to the extent that the subject property L.R. No. 36/1/33 is under determination in case number ELC 1030/2013 (Haji Omari v Edward Njunguna Kang'ethe).
 - ii. That the application and the main suit as presented violate the doctrine of sub-judice and as such bad in law contrary to the Civil Procedure Rules. 3.



- iii. That the orders sought by the Plaintiff/ Applicant may conflict with the previous orders issued in the aforementioned suit therefore violating the sanctity of court orders bringing this court into disrepute.
- iv. That this suit was filed in March 2022 immediately after judgment had been rendered in ELC. 1030 /2022 on 24.2.2022 declaring the Defendant a trespasser when the Plaintiff supposedly had already entered into sale agreement in the year 2013 whereas the court orders were in place stopping sale/transfer of the same.
- v. That to the extent that all the reliefs sought in the suit cannot be granted, there is no purpose of the suit going on.
- vi. That there is no cause of action against the 2nd Defendant since their purported sale contract was between the Plaintiff and the 1st Defendant only, and the 2nd Defendant was not a party and did not assume any obligation to the Plaintiff under the contract.
- vii. That the suit and application and the main suit herein are an abuse of the court process.
- viii. That it is in the interest of justice that the decline jurisdiction forthwith.

Court's directions

- 3. The court's direction were that the 2nd Defendant's preliminary objection be heard first and by way of written submissions. All the parties filed their respective submissions which the court has had an opportunity to read.

Issues for Determination

- 4. Having considered the preliminary objection as presented by the 2nd Defendant to the Plaintiff's application and suit, I am of the view that the only issue for determination is whether the 2nd Defendant's preliminary objection meets the threshold of a preliminary objection.

Analysis and determination

- 5. In the case of *Nelson Gitahi Wanuna v Peter Gitau Kariuki & 2 others*, (Nairobi ELCC E207 OF 2021), this court in considering a preliminary objection raised by the 1st and 2nd Defendants therein made reference to the holding by the Supreme Court of Kenya in the case of *Hassan Ali Njoho & Another v Suleiman Said Shabal & 2 others* [2014] eKLR where the court restated the definition of a preliminary objection in the case of *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* [1969] EA. The Court of Appeal of East of Africa in the case stated that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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 the case of *Oraro v Mbaja* [2005] eKLR, the court had too stated that:-

“I think the principle is abundantly clear. 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.”

7. The 2nd Defendant’s preliminary objection is that the Plaintiff’s suit herein is sub judice on the basis that a judgment has already been pronounced in another case being ELCC 1030 of 2013 (Haji Omar v Edward Kangethe) declaring the Defendant therein (who is the 1st Defendant in this matter) a trespasser in respect to the suit property the subject matter of this suit. He therefore avers that this court lacks jurisdiction to hear and determine this matter on the basis that the dispute has already been determined by a court of competent jurisdiction in ELCC 1030 of 2013; by a judgement dated 24th February, 2022.
8. The 2nd Defendant cites the provisions of Section 6 of the *Civil Procedure Act* to support his objection. The Section bars the court from proceeding with the trial of any suit or proceedings 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 court or any other court having jurisdiction in Kenya to grant the relief claimed.
9. The Plaintiff in her submissions argue that the court in this instance would require to establish if indeed the facts in the case referred to by the 2nd Defendant are similar to the facts in the present case. The Plaintiff therefore submits that that is an issue that cannot be determined as a preliminary objection.
10. I agree with the Plaintiff’s submission on this aspect. As this court held in the Nelson Gitahi Wanuna v Peter Gitau Kariuki case (supra), the court needs to be supplied with some material evidence about the other case (ELCC 1030 of 2013) in form of the pleadings therein, the judgement and decree of that other court to verify the allegations raised in the preliminary objection.
11. The issues in the 2nd Defendant’s preliminary objection need to be backed up by some form of evidence. The ideal way of raising such issues is by way of a normal application supported by an affidavit attaching the necessary material evidence for the court’s appraisal.
12. I fully agree with the holding of the court in the case of *George Kamau Kimani & 4 others v County Government of Transzoia* [2014] eKLR, where the court stated that:-

“All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata.”
13. Similarly, in *Henry Wanyama Khaemba v Standard Chartered Bank Limited & Another* [2014] eKLR, the court stated as follows:-

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection.”
14. I make a similar finding in this matter. The issues raised by the 2nd Defendant as preliminary objections do not quality to be raised as such. They need to be backed by evidence to enable the court make an informed decision. The 2nd Defendant’s preliminary objection dated 13th February 2023 is therefore overruled and dismissed with costs to the Plaintiff.



15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF APRIL, 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Maruja for the 2nd Defendant

M. Siagi for the 1st Defendant

No appearance for the Plaintiff

Court assistant - Yvette

M.D. MWANGI

JUDGE

