



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Zara Properties Limited (CPR/2010/24490) v Zamina Properties Limited & 3 others
(Environment & Land Case E428 of 2021) [2023] KEELC 17894 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E428 OF 2021**

EK WABWOTO, J

MAY 25, 2023

BETWEEN

ZARA PROPERTIES LIMITED (CPR/2010/24490) PLAINTIFF

AND

ZAMINA PROPERTIES LIMITED 1ST DEFENDANT

SAMWEL NJERU M'UTHI 2ND DEFENDANT

YE LAND COMPANY LIMITED 3RD DEFENDANT

CHIEF LANDS REGISTRAR 4TH DEFENDANT

RULING

1. This ruling is in respect to the 1st Defendant's preliminary objection dated October 13, 2022 which was filed as a response to the Plaint dated December 14, 2021 and the 3rd Defendant's counterclaim dated April 19, 2022.
2. The 1st Defendant's preliminary objection was premised on the following grounds:
 - a. The instant suit by the Plaintiff is fatally and irredeemably defective and for striking out limine litis as it violates the legal principle of res judicata and the related maxim of estoppel under Section 5 & 7, *Civil Procedure Act* Cap 21 on the defect in the suit in respect of the two(2) rulings of this Court by the Hon Justice EO Obaga of the October 8, 2020 and November 30, 2021 in ELC 69 of 2015(as consolidated in ELC 92 of 2015 and ELC 183 of 2011).
 - b. The Counterclaim by the 3rd Defendant is fatally and irredeemably defective and for striking out limine as it violates Order 7 Rule 8 & 11, *Civil Procedure Rules*, 2010.
 - c. The said proceedings before the Hon Court are therefore for dismissal in limine with costs on a full indemnity basis.



3. On February 27, 2023, the Court directed that the preliminary objection would be heard first. The Objectors were given 14 days to file and serve submissions after which the 1st Defendant would have 14 days to file written submissions.
4. The 3rd Defendant filed submissions dated February 24, 2023 in opposition of Paragraph 2 & 3 of the Notice of preliminary objection. It was submitted that the Court should uphold Sections 1A, 2A and 3A of the *Civil Procedure Act* and Article 159 (2) (d) of the *Constitution*. Relying on the case of *DT Dobie & Co Ltd v Joseph Mbaria Muchina* [1982] 1 KLR 1 and *Martha Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR it was argued that striking out of pleadings is a drastic measure and the Court should focus on substantive issues. It was also submitted that any error in the title was a curable issue and should not present any technicalities in determination of the matter.
5. In submissions dated April 12, 2023, the 1st Defendant argued that the Plaintiff's action of filing a new suit was an attempt to circumvent subsisting orders of the Court. It was further argued that it was within the Plaintiff's right to pursue review of the ruling dated November 30, 2021 or appeal against it. Relying on the cases of *Origo & Another v Mungala* [2015 eKLR cited in *Mokua Ongiri v John Nyasende Mosioma & Another* [2015] eKLR it was submitted that whereas the Plaintiff had a right to decide the best course of action, it was wrong to resuscitate a decided matter by filing a fresh suit.
6. I have considered the respective written submissions and the authorities cited. The main issue for determination is whether the preliminary objection is merited.
7. A Preliminary Objection must be raised on a point of law .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. When relying upon Section 7 of the *Civil Procedure Act* ,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. It is undisputed that there exist pending suits with regard to LR 209/12261. My perusal of ELC 69 of 2015 (Consolidated with ELC No 92 OF 2015 & ELC No 183 of 2011) confirms that the consolidated suits revolve around the issue of ownership of LR 209/12261. Moreover, the lead file includes several similar parties where Samwel Njeru Muthi (as Plaintiff), Zara Properties Ltd (as 3rd Defendant) and Ye Land Properties Ltd (as 4th Defendant).
10. 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. In the case of *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 (2009) eKLR 229, the court of appeal stated as follows;-

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive’.

12. In view of the foregoing analysis, I must stay that even though a court of law should try as much as possible to allow a suit to be determined on its merits, the court should not shy off from acting to rid the court process of proceedings that are clearly an abuse of court process. As I have held in other several cases, I have proceeded to strike out suits falling under such abuse of the court process.
13. Ultimately, I find the preliminary objection dated October 13, 2022 is merited and the suit is hereby struck out with no orders as to costs.

It is so ordered.

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

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Mutuku h/b for Miyare for the Plaintiff.

Mr. Lusi for the 1st Defendant.

N/A for the 2nd Defendant.

Ms. Wanyoike h/b for Ndungu for the 3rd Defendant

Mr. Allan Kamau for the 4th Defendant.

Court Assistant; Caroline Nafuna.

