



DJC v BKL (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10189 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET**

CIVIL SUIT E021 OF 2021

EKO OGOLA, J

JUNE 27, 2022

IN THE MATTER OF THE MATRIMONIAL PROPERTIES ACT

AND

IN THE MATTER OF ARTICLE 45 (3) OF THE CONSTITUTION 2010

AND

IN THE MATTER OF SECTION 93 (1) OF THE LAND REGISTRATION ACT, 2012

BETWEEN

DJC PLAINTIFF

AND

BKL DEFENDANT

RULING

Introduction

1. The Plaintiff filed a Notice of Motion Application dated August 5, 2021 and the Defendant filed a Notice of Preliminary Objection dated August 24, 2021.
2. On November 23, 2021 the parties proposed that both the Notice of Motion Application and the Preliminary Objections be heard and determined concurrently.
3. This Court shall proceed to make a determination of the Preliminary Objection and in the event that the same is found to be unmeritorious, proceed to make a determination of the Notice of Motion Application.

Background

4. The Defendant filed a Notice of Preliminary Objection dated August 24, 2021 on the following grounds:



- i. The suit herein offends Section 6 of the *Civil Procedural Act* as it is an abuse of the process of the Court as there exists ELC (Chief Magistrate) No. 113 of 2021.
 - ii. The suit offends section 6(2) and 7 of the *Matrimonial Property Act* No. 49 of 2013.
 - iii. The firm of M/SLimoR.K & Co is conflicted in this matter.
 - iv. The suit be struck out.
5. The Defendant and the Plaintiff filed Written Submissions dated November 29, 2021 and December 20, 2021 respectively.

Determination

6. I have read the Preliminary Objections and the Written Submissions filed by the parties herein. The primary issue for determination is whether the Notice of Preliminary Objection dated August 24, 2021 has merit.
7. The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:
- “ a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... 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 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. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:
- “ ... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
9. In view of the foregoing, this Court shall seek to establish whether the grounds outlined in the Preliminary Objection herein, have meet the threshold set out in the aforementioned cases.
10. The first ground contends that the suit herein offends the provisions of Section 6 of the *Civil Procedure Act* which provides as follows:

Stay of suit

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.

11. I note that although this ground raises a pure point of law, its effect would not result in the dismissal of the claim but it would merely result in an order staying the latter suit pending the determination of the suit that was the first to be filed. In view of the foregoing, I find that strictly speaking, this ground is not a proper ground to be raised in a Preliminary Objection.
12. In *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* (2014) eKLR, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. 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. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.
13. The second ground is to the effect that the instant suit offends section 6(2) and 7 of the *Matrimonial Property Act*. To establish whether the parcels of land in issue are matrimonial property and to establish the contribution each of the spouses made towards their acquisition, this Court will need to examine the parties seeking to establish the facts and such an examination is only possible in the course of a trial. I find that this ground requires the ascertainment of facts, thus it is not a proper ground to be raised in a Preliminary Objection.
14. The third ground contends that the firm of Limo R.K and Company is conflicted. Although both the Defendant and the Plaintiff addressed this ground at length in their respective Written Submissions to this Preliminary Objection, this Court is of the considered view that the existence of a situation of conflict of interest does not constitute a proper ground to be raised in a Preliminary Objection as it requires a detailed examination of the facts.
15. The fourth ground is also not a proper ground to be raised in a Preliminary Objection. No law has been advanced to back the ground that the suit ought to be struck out.
16. In the circumstances, I find that the Preliminary Objection dated August 24, 2021 has no merit.
17. I order that the proceedings in this claim be stayed pending the hearing and determination of Eldoret CMCC ELC no. 113 of 2019.
18. Noting that the dispute is a family dispute parties shall bear own costs.
19. I will not make a determination of the Notice of Motion Application dated August 5, 2021 noting that the proceedings in this claim have been stayed on the strength of the provisions of Section 6 of the *Civil Procedure Act*.

DATED, SIGNED AND DELIVERED THIS 27TH OF JUNE 2022.

E. K. OGOLA
JUDGE

