



Kalume & 16 others v The Legal Representative of Cassam Suleiman Sumar & Haji Dad Kumberi (Executors of the Estate of Haji Suleiman Sumar Khamisa) & 2 others; Ruda (Intended Defendant) (Environment & Land Case 194 of 2010) [2023] KEELC 18784 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 194 OF 2010**

**SM KIBUNJA, J
JULY 19, 2023**

BETWEEN

KAHINDI CHARO KALUME & 16 OTHERS PLAINTIFF

AND

THE LEGAL REPRESENTATIVE OF CASSAM SULEIMAN SUMAR & HAJI DAD KUMBERI (EXECUTORS OF THE ESTATE OF HAJI SULEIMAN SUMAR KHAMISA) 1ST DEFENDANT

HAKIKA TRANSPORT SERVICES LTD 2ND DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 3RD DEFENDANT

AND

HARJI GOVIND RUDA INTENDED DEFENDANT

RULING

1. The plaintiffs have raised a notice of preliminary objection dated 30th September 2022 to the applicant/intended defendant's application dated 15th September 2022 on the following five (5) grounds:
 - a. "That the application is misconceived and an abuse of the court process having withdrawn a similar application on 14th October 2021 seeking the same orders Notice of Motion dated 14th September 2020 and contempt to pay costs and Order 25 Rule 4 provides for a stay of the subsequent suit until such costs shall have been paid which to date the Applicant/Intended defendant has declined to pay hence escalating unnecessary costs is estopped from proceeding with a similar application until costs are settled.



- b. That the Applicant/Intended defendant Harji Govind Ruda lacks the locus standi to make this application as the same offends Order 1 Rule 10 taking note he is yet to seek leave to be enjoined in this proceedings.
 - c. That this matter is sub judice Section 6 of the *Civil Procedure Act* (stay of suit) as there is an already pending case touching on the same subject matter before this honourable court ELC No. 335 of 2017 whereof parties are Harji Govind Ruda (plaintiffs) v National Land Commission (defendant) & Nazir Ahmed Kassam Suleiman & Kahindi Charo Kalume & 16 others.
 - d. That the applicant herein is seeking to litigate Plot No. 2618 in which ruling delivered on 17th May 2021 delivered by Hon. Justice Sila Munyao made a finding that plot No. 2618 is not a subdivision of Plot 387 and that finding is final and cannot be relitigated once again and hence the doctrine of issue of estoppel sets in and precludes their application before the court and Section 7 on *res judicata* applies.
 - e. That this honourable court is *functus officio* having issued a judgement herein on 30th October 2014 and a decree issued & perfected and the land subdivided to new occupants over the last 8 years.”
2. The court gave directions on the 13th March 2023 for the filing and exchanging submissions on the preliminary objection. The learned counsel for the plaintiffs and intended defendant filed their submissions dated the 2nd May 2023 and 4th May 2023 respectively, which the court has considered.
 3. The issues for the court’s determinations are as follows;
 - a. Whether the grounds in the preliminary objection raised by the plaintiffs constitutes a pure point of law.
 - b. Whether the plaintiffs’ preliminary objection to the intended defendant’s application should be upheld.
 - c. Who pays the costs in the preliminary objection.
 4. The court has carefully considered the grounds on the notice of preliminary objection, the submissions by both learned counsel in support of and in opposition thereto, superior courts decisions relied upon, and come to the following conclusions;
 - a. That a preliminary objection must be correctly raised and qualify the principles set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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.

Sir Charles Newbold P. further held,

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

The notice of preliminary objection herein has raised five grounds. The court need to establish whether they meet the threshold set in the *Mukisa Biscuit* (*supra*).

- b. The first ground is that the application is misconceived and is an abuse of the court process, since a similar application was withdrawn on 14th October 2021 seeking similar orders. The point raised herein calls for the court to exercise its judicial discretion in order to determine whether the application is misconceived and an abuse of the court process. Once the court is called to exercise its discretionary powers in deciding a matter raised, the issue stops being a pure point of law, and the preliminary objection based on such a ground fails.
- c. The second ground of objection is that the intended defendant lacks locus standi to make the application, and that it offends Order 1 Rule 10 of *Civil Procedure Rules*, as he is yet to seek for leave to be joined in the proceedings. Rule 1 provides for the joinder of parties as plaintiffs, while Rule 3 caters for joinder as defendants with leave of court. Locus standi is the capacity to institute or defend a suit, and where one lacks it the suit is incompetent and ought to be struck out without going into the merits of the case. Indeed, locus standi is a sufficient pure point of law that can dispose of a suit and passes the *Mukisa Biscuit* [*supra*] test.
- d. The intended defendant has argued in his submissions that he has in prayers 4, 5 and 6 of his application sought for leave to be joined in the proceeding, and be allowed to defend the suit. The plaintiffs’ preliminary objection on the ground of locus standi was therefore prematurely raised when the court has not considered whether or not the intended defendant’s application for joinder has merit. I have perused the prayers in the application, and I do note that in prayers 4 and 5 the applicant is seeking inter alia leave to join the suit and file pleadings. That as the position of the law is that any person is at liberty to seek leave of court to be joined in an ongoing suit as long as they can demonstrate that they have a legal interest in the suit, the court finds the preliminary objection on the ground of locus standi has no merit, and is premature.
- e. The third ground raised in the preliminary objection is that the suit herein is sub judice as there is a pending case relating to the same subject matter which is before this court in Mombasa ELC No. 335 of 2017 Harji Govind Ruda (plaintiffs) v National Land Commission (defendant) & Nazir Ahmed Kassam Suleiman & Kahindi Charo Kalume & 16 others. In his submissions, the intended defendant has admitted that ELC No. 335 of 2017 indeed exists and touches on the same subject matter. He has opined that there is a need for that suit and the present one to be consolidated. That the prayer for consolidation is sought in his application dated 31st January 2023. Section 6 of the *Civil Procedure Act* provides for the principle of sub judice in the following words;

“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.



Explanation. — The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

The doctrine of sub-judice is not in my view a pure point of law that can dispose of a matter as envisioned in *Mukisa Biscuit* [supra], case for the reason that this court would be required to interrogate the pleadings of ELC No. 335 of 2017 and this instant suit in order to determine whether the current suit is sub-judice. The principle of Sub-judice invites the court to ascertain the facts in both cases, and determine the extent of their similarities to see whether they offend Section 6 of the *Civil Procedure Act*. In the case of *Margaret Wachu Karuri v John Waweru Ribiro* [2021] eKLR the court held that;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court’s considered view that it will have to ascertain facts and probe evidence be ascertaining whether the issues raised in the instant suit are the same as the once in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and or relate to the same issues. On whether or not the same is Subjudice, facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts. Therefore, this Court holds and finds that what has been raised by Defendant/Objector does not amount to a Preliminary Objection, and thus the Preliminary Objection is not merited.”

That for the above reason the preliminary objection based on this suit being sub judice equally fails.

- f. The 4th ground raised is that the intended defendant is restrained by the doctrines of estoppel and *res judicata* from seeking to litigate on Plot No. 2618 which was litigated upon and a ruling delivered on 17th May 2021 in which it was determined that plot No. 2618 is not a subdivision of plot No. 387. The fifth (5) ground is that this court is *functus officio* as the court had already delivered a judgement herein on the 30th October 2014, following which a decree was issued and executed eight years ago, resulting subdivision of the suit land to new occupants. For the court to pronounce itself on the ruling dated 17th May 2021 and judgement delivered on the 30th October 2014, the court would be called upon peruse them, and if contested by the intended defendant, make a determination of the facts on merit. These two grounds in my view are blurred by contested factual details. In the case of *Oraro v Mbaja* [2005] eKLR the court held 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. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”

The doctrines of estoppel, *res judicata* and *functus officio* as raised by the plaintiffs in the preliminary objection requires authentication of facts through the calling of evidence and for the court to exercise



its discretion in making determinations, unlike where a pure point of law is raised. In the case of *Henry Wanyama Khaemba v Standard Chartered Bank (K) 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. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.”

The foregoing show that the issues raised by the plaintiffs in their notice of preliminary objection should have stood a better chance had they been raised in a formal application or as a replying affidavit in response to the application dated 15th September 2022. That way, the other parties would have had the opportunity to respond thereto effectively, and the court would then make a determination upon considering the law and the facts presented before it.

g. That under the provisions of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the event unless where for good cause the court directs otherwise. That as the preliminary objection by the plaintiff to the intended defendant’s application is without merit, then ordinarily the plaintiffs should have been ordered to pay the other party costs. However, as the intended defendant’s notice of motion for joinder is still pending, the court is of the view that the costs in the preliminary objection abides the outcome of that application.

5. Flowing from the foregoing, the court finds and orders as follows;

- a. That the plaintiffs’ preliminary objection dated 30th September 2022 to the intended defendant’s application dated the 15th September 2022 is without merit and is hereby rejected.
- b. That the costs in the preliminary objection to abide the outcome of the intended defendant’s application.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 19th DAY OF JULY 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Plaintiffs : Mr Tindi Advocate.

Defendants : M/s Yusto For Kibaara For 3Rd Defendant.

Intended Defendant : Mr Borana Advocate.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

