



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 41 OF 2018

DICKSON MWANDIKI KIBAARA.....PLAINTIFF/RESPONDENT

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT/APPLICANT

RULING

PRELIMINARY OBJECTION

The Respondent raised the following points of law, objecting to the Plaintiff/Applicant's Notice of Motion application dated 30th January 2018;

- 1. Lack of general jurisdiction** - The subject matter of the suit relates to use and occupation of, and/or title to land thus a matter of the **Environment and Land Court** and therefore offends **Section 13 of the Environment and Land Court Act [No.19 of 2011] Laws of Kenya**;
- 2. Pecuniary Jurisdiction** – The value of subject matter of the suit offends **Section 7 (1) of the Magistrates Court Act [No. 26 of 2015] Laws of Kenya as it is below Twenty Million Shillings**; and
- 3. Res Judicata or Sub Judice** – The subject matter of the suit offends **Section 6 and 7 of the Civil Procedure Act Chapter 21** laws of Kenya as it relates to performance of a consent recorded in yet another matter in the lower court.

The Respondent made through Counsel orally the following submission;

Article 165 3(a) COK 2010 the High Court has unlimited jurisdiction and no pecuniary jurisdiction limit or bracket.

The Preliminary objection lacks merit as this Court is not addressing the title/ownership or use of land issue but charged property.

The matter in Magistrate's Court was settled before the issue of interest arose.

DETERMINATION

Issues to be Determined

The Defendant raised the following issue to be determined by this court;

A. Whether the Notice of Preliminary Objection as taken is well founded, valid and merited;

B. Whether the instant suit filed in this court by the Plaintiff is Res Judicata and offends section 7 of the Civil Procedure Act, cap 21 Laws of Kenya given that **RMCC Case Number 4130 of 2012** (Milimani) involving the same Parties and relating to the same subject matter had already been marked as settled by consent of the Parties and a consent order issued;

A. Whether the Notice of Preliminary Objection as taken is well founded, valid and merited;

In the case of James Gathirwa Ngugi –vs- Multiple Haulier (E.A) & 2 Others [2016] eKLR referred to Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors (1969) EA 696 the *locus classicus* on preliminary objection. The C.A. laid down/established what should be considered to be a preliminary objection and that the court should only consider matters of law not matters of fact.

In addition, a preliminary objection must be confined to matters of or points of law which may be argued before the court based on the assumption that all facts pleaded are correct.

In the case of Oraro –vs- Mbaja [2005]1 KLR 141 held as follows;

“1. A preliminary objection correctly understood, is 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 process of evidence.

2. 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.

3. If a matter comes before the court dressed as a “preliminary objection” it will not coexist with such factual scenarios as may lead to the court to exercise its discretion by virtue of section 3A of the Civil Procedure Act.

4. The court’s discretion is never exercised just on the basis of proposition of law there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised

5. It has to be appreciated that the court’s discretion exercised by virtue of Section 3A of the Civil Procedure Act is always for the purpose of upholding the law as far as is possible; and this would require preserving the claims of parties so that they may be heard and determined according to law;

6. The applicant’s plea is that the respondent’s pleadings be terminated in limine. There is no consistency between such a prayer; which belongs to the normal practice attending preliminary objection (matters of law), on the one hand, and the case for ensuring fair trial which the applicant has also urged, on the other hand.”

The Applicant by a Notice of Motion Application dated 30th January 2018, sought the following orders:

a) That an temporary injunction be issued restraining the Defendant, its auctioneers, agents, employees and or servants from advertising for sale, selling, alienating, transferring, parting with possessing or in any way dealing or interfering with land premises known as Thika Municipality/Block20/192 pending the hearing and determination of this application;

b) That an temporary injunction be issued restraining the Defendant, its auctioneers, agents, employees and or servants from advertising for sale, selling, alienating, transferring, parting with possessing or in any way dealing or interfering with land premises known as Thika Municipality/Block20/192 pending the hearing and determination of this suit;

c) That the costs of the application be borne by the Respondent.

This Court confirms from pleadings filed and documents confirm that there is CMCC no 41 of 2018 Dickson Mwandiki Kibaara vs Sidian Bank Limited. There is a consent filed by parties vide letter dated 21st June 2019 by the parties. There is a Valuation Report that values the suit property Ksh 8,500,000/- which is within the Trial Court’s jurisdiction. The Respondent/Applicant has not controverted the fact of this matter in the Trial Court; same parties and same subject matter. These are the same parties and same subject-matter in the instant case.

Section 7 CPA - Res judicata

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The Court finds; it has jurisdiction to hear the instant subject-matter as an appeal from the Trial Court or reference from Taxing Master. Although, the High Court has no pecuniary jurisdiction limit or bracket matters ought to start at the Court of 1st instance with competent jurisdiction. The Chief magistrate’s Court has requisite pecuniary jurisdiction to hear and determine the matter.

The subject-matter involves a commercial transaction; i.e the suit property in a contract is a security for loan facility; it is then a matter within the purview of the Commercial Division of the High Court and not Environment & Land Court or Equal Jurisdiction to the High Court.

From the submissions, the subject-matter has been determined in a Court with competent jurisdiction; the Magistrate’s Court has Ksh 20 million limit pecuniary jurisdiction and was in fact marked as settled. If any issue has arisen since; parties ought to address the Trial Court to reopen the matter; unless the matter is brought to this Court as an appeal.

DISPOSITION

1) The Preliminary Objection is up held to the extent that matter is res judicata it has been heard before the Trial Court/Magistrate's Court.

2) The same parties and same subject-matter cannot be heard again in a different Court unless an appeal is lodged.

DELIVERED SIGNED & DATED IN OPEN COURT ON 25TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. OGUYE HOLDING BRIEF MS KIMANI FOR APPLICANT

KEYA HOLDING BRIEF KURAUKA FOR RESPONDENT

FRED- COURT ASSISTANT