



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
CIVIL APPEAL 43 OF 2013

YUSUF SALIM KUTWAA APPELLANT

VERSUS

RIZIKI KASSIM MASUDI..... RESPONDENT

RULING

1. The Respondent herein has by way of a Preliminary Objection dated 18.11.15 objected to the Notice of Motion dated 22.6.15 filed under Certificate of Urgency on 124.6.15 by the Appellant herein. The Applicant seeks the following orders that:

a) Spent;

b) The Court be pleased to issue an order of restraining the Respondent either by himself his agents servants or anybody who so ever maybe from unlawfully subdividing, selling, leasing or fencing anywhere in the said premises and/or interfering in any manner with the said estate pending the interparty (sic) hearing of this application.

c) The Court be pleased to issue the said orders misplacement of the file notwithstanding.

d) The costs be in the cause.

2. The Preliminary Objection is seeking the striking out and dismissal of the Application on the grounds:

a) That the appellant's application dated 22.6.15 is incompetent, bad in law and should be dismissed with costs.

b) That the appellant's application is res judicata and should be struck out with costs.

c) That the orders sought in the application cannot issue.

3. The Appellant filed Grounds of Opposition dated 24.11.15 as follows:

a) That the Preliminary Objection does not raise any pure point of law.

b) That a ground of res judicata cannot be raised by way of a preliminary objection.

c) That the Respondent's application is defective and bad in law.

d) That the Respondent's application lacks merit and is a waste of the court's time.

4. The Preliminary Objection was canvassed by way of oral submissions by the parties' counsel which I have duly considered. I have also considered the authorities cited by the Appellant.

The Respondents' Case

5. The main thrust of the Respondent's Preliminary Objection is that the Appellant's application is res judicata the issues therein having been raised in another application by the Appellant dated 18.12.13 which was dismissed in a Ruling of this Court delivered on 5.9.14. He argued that Court cannot sit on appeal of its own decision. Counsel invited the Court to look at the said application and ruling. Counsel went on to submit that the Application does not have details of the land reference number of the property in dispute and that the prayers sought are unclear and that this Court cannot be called upon to give an order that is not specific.

The Appellant's case

6. Counsel for the Appellant submitted that the Preliminary Objection does not raise any pure point of law and that the grounds therein are factual. He argued that given that the facts and points of law raised need to be ascertained, they should be canvassed in an application and not by way of preliminary objection. Counsel further submitted that a ground of res judicata cannot be raised by way of a preliminary objection. He contended that the issues now raised in the Preliminary Objection were addressed by the Respondent in his Replying Affidavit sworn on 22.7.15 and should be canvassed therein. Counsel cited several authorities to support the Appellant's position.

Determination

7. I have considered the Application, the rival Affidavits and the Preliminary Objection. I have also considered the authorities cited by the Appellant. The Respondent did not cite any authorities in support the Preliminary Objection. The issue for determination is whether a preliminary objection can be raised on the ground of res judicata. The Respondent submitted that the issues raised in the Appellants application dated 22.6.15 are res judicata having been raised in another application by the Appellant dated 18.12.13 which was dismissed in a Ruling of this Court delivered on 5.9.14. The Appellant's position is the Preliminary Objection does not raise a pure point of law and that res judicata cannot be a ground for a preliminary objection.

8. On the contention by the Appellant that the Preliminary Objection does not raise a pure point of law, I am guided by the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 in which Sir Charles Newbold rendered himself thus:

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

9. The ground raised in the Preliminary Objection is that the Appellant's application is res judicata having been determined in the Court's Ruling on 5.9.14. In his submissions, Counsel for the Respondent further argued that Application does not have details of the land reference number of the property in dispute and that the prayers sought are unclear. All these are facts that must be probed and interrogated to be ascertained. The Preliminary Objection therefore fails the test as it has raised factual issues and not a pure point of law.

10. On whether res judicata can be a ground for preliminary objection, Obaga, J in George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & Another [2014] eKLR stated

“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”.

11. Though this is a decision of a court of concurrent jurisdiction, it is of persuasive value and I choose to adopt the same. In the instant case, the Respondent in his response to the Application dated 22.6.15 did raise this very issue of res judicata in his Replying Affidavit sworn on 22.7.15. The same would have been adequately and properly dealt with at the hearing of the Application. It is not clear why the Respondent chose to file this Preliminary Objection and to do so four months after filing the Replying Affidavit. Sir Charles Newbold in the Mukisa Biscuit case supra opined

“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

12. This is evidently a clear case of improper raising of a preliminary objection and has done nothing but to unnecessarily delay the matter herein and increase costs. The point of res judicata could have been argued in the hearing of the Appellant’s Application dated 22.6.15. The Preliminary Objection has wasted judicial time that could otherwise have been utilized in hearing the main application.

13. In the result, I find that the Preliminary Objection raised by the Respondent lacks merit and the same is hereby dismissed with costs to the Appellant. The application dated 22.6.15 to be fixed for hearing *interpartes* on priority basis.

DATED, SIGNED and DELIVERED in MOMBASA this 23rd day of March, 2016.

M. Thande

Judge

In the presence of: -

..... **for the Appellant**

..... **for the Respondent**

..... **Court Assistant**