



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC NO. 230 OF 2015**

**THERESA OJIAMBO.....PLAINTIFF**

**VERSUS**

**FRANCIS MWAURA IKINU.....DEFENDANT**

**RULING**

The Defendant filed a Notice of Preliminary Objection dated **21<sup>st</sup> September 2015**, against the Plaintiff's suit in its entirety on grounds that:

1. *The Notice of Motion dated 18<sup>th</sup> June 2015 and the entire suit is an abuse of the Court process as the matters raised in the suit by implication relates to the execution process in respect to the suit property in Nairobi HCCC No. 477 of 2011. The suit ought to be dismissed with costs to the Defendant.*
2. *Pursuant to Section 34 of the Civil Procedure Act, the Plaintiff ought to have moved the Court in that suit and not by way of a fresh suit.*
3. *The Plaintiff has since been joined in Nairobi HCCC No. 477 of 2011 as the 2<sup>nd</sup> Defendant.*
4. *This suit is frivolous.*

The preliminary objection was canvassed by way of written submissions. On behalf of the Defendant, counsel submitted that the title to the suit property was acquired through a public auction by the Defendant following an execution process in respect to the said property in **Nairobi HCCC No. 477 of 2011**. Thus, the appropriate action by the Plaintiff would be to move the Court in the said suit and not institute a fresh suit. It was submitted that the suit herein was filed in direct violation of the provision of **Section 34 of the Civil Procedure Rules** which is to the effect that where there are questions arising out of an execution process, the same shall be determined by the Court executing the decree. It was counsel's submission that having been joined as the 2<sup>nd</sup> Defendant in the said suit, the Plaintiff has an appropriate avenue to ventilate the issues raised in this suit. Counsel urged the court to allow the objection thereby to dismiss the suit with costs.

On behalf of the Plaintiff, counsel submitted that the Preliminary Objection was filed with the intention to delay the just determination of the Plaintiff's application dated **18<sup>th</sup> June 2015**. It was submitted that the

Defendant failed to avail to this Court the record of **Nairobi HCCC No. 477 of 2011** and thus this Court cannot reach a determination that the current suit relates to the execution process in the other suit. Counsel also submitted that the Plaintiff in the instant suit is seeking to exercise her right of possession as the registered owner of the suit property and that the said right of ownership was not granted in **Nairobi HCCC No. 477 of 2011**. Counsel urged the Court to disallow the objection.

I have now considered the rival submissions and I make the following findings. Firstly, I am satisfied that the objection herein raises a pure question of law that properly belong in the province of a preliminary objection as it has the potential of determining or affecting the further hearing of the present suit as expounded by the Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**. The question for determination is whether this suit is an abuse of the Court process in view of the provision of **Section 34 of the Civil Procedure Act**. Which provides as follows:-

**34. (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.**

**(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.**

**(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.**

**Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.**

In my view, the above provision is very clear. The same applies to persons who were parties to a suit leading to the decree. The Plaintiff herein was not a party in **HCCC No. 477 of 2011** and in that case, **Section 34 of the Civil Procedure Rules** is inapplicable. On that basis alone, the Preliminary Objection herein cannot stand. I am also of the considered view that the order sought by the Plaintiff cannot be sustained by a miscellaneous application without a parent suit since she was not a party thereto.

For the reasons stated above, I dismiss the Preliminary Objection with costs to the Plaintiff.

Dated, Signed and Delivered this **15<sup>th</sup>** day of **April, 2016**

**L. GACHERU**

**JUDGE**

In the Presence of:-

M/s Dave holding brief Mr Kimathi the Plaintiff

None attendance the Defendant though notified

Lerionka: Court Clerk

**L. GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the presence of M/s Dave holding brief Mr Kimathi for Plaintiff and absence of Defendant advocate though notified.

**L.GACHERU**

**JUDGE**