



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO.15 OF 2021

MARGARET NJERI GITAU.....PLAINTIFF

VERSUS

JULIUS MBURU GITAU.....1ST DEFENDANT/OBJECTOR

FRANCIS WAIRAGU GITAU.....2ND DEFENDANT

LAND REGISTRAR MURANG'A.....3RD DEFENDANT

RULING

The matter for determination is the **Notice of Preliminary Objection** dated **22nd November 2021**, brought by the 1st Defendant on the grounds that the Plaintiff's entire suit is **Res Judicata** as parties had litigated the same matters in Thika, **CMCC 257 of 1992** and a Bill of costs of **Kshs. 28,650/=** in favour of the 1st Defendant has never been settled.

On **23rd November 2021**, the Court directed that the **Preliminary Objection** be canvassed with by way of written submissions and in compliance with the said directive, the 1st Defendant/ Objector through the **Law Firm of Kithunka Kithunka & Company Advocates** filed his written submissions dated **21st January 2022**, and submitted that he tendered in evidence certified copies of proceedings of Civil Case No. **257 of 1992**, at **Thika** where the Plaintiff had sued him seeking a transfer of **2 acres of land** from **L.R No. LOC 4/Kiranga/793**, belonging to the 1st Defendant. That it is the same exact similar request sought against the 1st Defendant in this suit **ELC Case No15 of 2021**, only that it is now filed in **Murang'a**. That a Judgment in the former suit was issued and the suit dismissed for failure by the Plaintiff to prove her case. Further, that the Plaintiff/ Respondent has come to Court with unclean hands expecting the 1st Defendant to again defend this suit of a similar request without settling the Bill of costs owing to the 1st Defendant.

It was further submitted that the Plaintiff must be prevented from litigating this particular suit against the 1st Defendant since **Thika Law Courts** has already ruled on it. Further, that the Plaintiff herein had through **Land Case No. 1 of 2011**, in **Kandara** sought to have 2 acres of **L.R No LOC 4/Kiranga/793**, belonging to the 1st Defendant transferred to her. That the suit is a vexatious suit brought about by the 1st Defendant's /Objector's siblings out to frustrate him. That the Court has no power to try this suit through the doctrine of **Res Judicata** as it has already been settled in former suits.

The Plaintiff/ Respondent filed her written submissions dated **24th January 2022**, through the **Law Firm of Githiga Kimani & Company Advocates** and submitted that in the instant suit, the Plaintiff pleads Customary trust on **L.R 793, 869 and 870**, while in the former suit **THIKA RMCC 257 of 1992**, the Plaintiff/ Respondent grounded her claim on the fraudulent transfer and gave particular of fraud. Further that the former suit was not between the same parties or parties under whom any of them claim under and the parties were not litigating under the same title. That in the instant suit, the Plaintiff/ Respondent sues in her own interest and also as a legal representative of the Estate of **Joyce Njoki Gitau alais Josphine Njoki Gitau (Deceased)**, while in the former suit, she was suing on her own behalf. Therefore, the suit is not **Res Judicata**.

The Court has carefully read and considered the Preliminary Objections together with the rival written submissions and finds that the issue for determination is **whether the Notice of Preliminary Objection is merited**.

The 1st Defendant/ Objector has raised a Preliminary Objection on the ground that the suit is **Res Judicata**. Before the Court can determine whether the Objection is merited, it must first determine whether what has been raised amounts to a Preliminary Objection.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean: -

“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 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”.

Further Sir Charles Nebbold, JA stated that:-

“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 had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

It is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. The Court will also take into account that the **Preliminary Objection** must stem from the pleadings and raises pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of Oraro...Vs...Mbaja(2005) 1KLR 141, where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

The 1st Defendant/Objector has contended that the suit is **Res Judicata**, whereas the Plaintiff/ Respondent has disputed the said facts. Further the 1st Defendant/ Respondent in support of the Objection has annexed a list of bundle of documents dated 22nd November 2021, which he seeks the Court to consider. For the Court to be able to ascertain whether or not the matter is Res Judicata, it will have to ascertain the facts as pleaded by the 1st Defendant/Objector and those as raised by the Plaintiff/ Respondent by also probing the bundle of documents. In doing so, the Court will be probing evidence. In the case of Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) ECLR, 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”.

Further in the case of George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eCLR, where the Court held that: -

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. 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. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

Since a Preliminary Objection cannot be raised on disputed facts and as to whether or not the matter is **Res Judicata**, will require the probing of evidence, the Court finds and holds that what has been raised does not amount to a **Preliminary Objection**.

Consequently, the Court finds that the **Preliminary Objection** is not merited and the same is **dismissed** entirely with costs to the Plaintiff/ Respondent.

The issues raised herein by the 1st Defendant/Objector will be considered as the Court determines the merit of the case in totality.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 24TH DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

Delivered online

In the presence of;

Mr Kimani Githiga for the Plaintiff

1st Defendant/Objector – Absent

2nd Defendant – Absent

3rd Defendant - Absent

Kuiyaki - Court Assistant

L. GACHERU

JUDGE