



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO. 4 OF 2014

KEPUE ole NGWETA.....PLAINTIFF

-VERSUS-

KARINO ole MESHUNGO.....1ST DEFENDANT

SARAH NJOKI MUNGE t/a SANJOMU AUCTIONEERS.....2ND DEFENDANT

RULING

1. This ruling concerns the 2nd Defendant's Applicant's Notice of Preliminary Objection dated 20th March 2014 and filed on 24th March 2014. The Applicant has objected to the entire suit and has asked the court to strike it out on the ground that it offends the provisions of Section 34 of the Civil Procedure Act.
2. The objection was argued before the court on 7th July 2014. Mr. Githui for the Applicant told the court that the 1st Defendant filed suit against the Plaintiff before the Chief Magistrate's Court at Narok in CMCC NO. 175 of 2011 seeking eviction and injunction orders against the Plaintiff from the parcel of land known as Plot No. 1251 of Kipise Adjudication Section. The 1st Defendant's claim was allowed and it was further ordered that the eviction be undertaken under the supervision of the Police.
3. The Plaintiff's case is premised on the execution of the said judgment of the court. He alleges that the execution of the decree was done recklessly and as a result he incurred loss for which he now seeks monetary compensation.
4. Counsel argued that the Applicant should have presented his grievance before the court that determined the execution of the decree. He relied on the provisions of **Section 34** of the **Civil Procedure Act** which provides that questions arising out of execution of a decree shall be determined by the court executing the decree and not by way of a separate suit.
5. Counsel also submitted that the fact of the existence of an earlier suit is not denied by the Plaintiff. He pointed out the averment in the Applicant's Defence at the 3rd paragraph which has not been denied by the Plaintiff in his Reply to the Defence. Therefore under **Order 2 Rule 11** it is deemed as admitted. He urged the court to strike out the matter for being *res judicata*, an abuse of the court process and for offending **Section 34** of the **Civil Procedure Act**.
6. Counsel for the 1st Defendant supported the objection and fully associated himself with the submissions of the Applicant's Counsel. He relied on paragraphs 7 and 8 of the 1st Defendant's Statement of Defence wherein he avers that this suit is bad in law, incompetent and amounts to an abuse of the court

process as the questions raised herein ought to have been determined by the court that passed the decree. He also argued that the complaint with regard to execution of the judgment should have been made before the court which gave orders for execution which has the monetary jurisdiction to determine the Plaintiff's claim of Kshs. 1,200,000/=.

7. Counsel for the Plaintiff submitted that the preliminary objection was not on pure points of law. There are issues of fact, regarding the parcel of land involved, that need to be first determined. He denied the contention that the fact of the existence of an earlier suit whose execution of the decree was the cause of action of the present suit had been admitted by the Plaintiff. He maintained that all the allegations in the defence have been denied although the reply to the 1st Defendant's defence is not clear on this the one in response to the 2nd Defendant defence states that there is a rejoinder of all issues which amounts to a denial of all the issues. He took the view that the preliminary objection be dismissed in the interest of justice.

ANALYSIS

8. A preliminary objection was defined in Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd (1969) EA 696 as follows:

"So far as I'm 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."

9. Sir Charles Newbold further stated:

"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."

10. By this definition, any fact which is disputed and must be proved by way of evidence cannot form the basis of a Preliminary Objection. All facts on which the point of law is premises, must be admitted, or can be inferred with a degree of certainty from the pleadings.

11. It is not disputed that the 1st Defendant filed a suit in the lower court, Narok CMCC No. 175 of 2011, against the Plaintiff. He was declared the owner of the parcel of land known as Plot No. 1251 Kipsise Adjudication Section and was also issued with eviction orders against the Plaintiff who was in occupation of this land at the time.

12. The Plaintiff's claim in this suit, is in regard to the manner in which the execution was carried out. He alleges that the Defendants charged into Plot No. 487 Kipise Adjudication Section, which he was legitimately occupying, under the guise that they were executing court orders and destroyed his property worth Kshs. 1,200,000/=.

13. The Defendants' argument is that the Plaintiff should present these grievances in the court that made the decree by virtue of **Section 34** of the **Civil Procedure Code Cap. 21**. This suit is an abuse of the court process and should be strike out.

14. The Plaintiff's main objection to the Preliminary Objection was that that it did not raise pure points of law. There was a dispute concerning the plot of land which the Defendants encroached, Plot No. 487, and that which was the subject of the court decree, Plot No. 1252. The exact parcel of land needs to be ascertained before the proper forum can be determined.

15. Upon perusing the documents filed by the parties and in particular, the Valuation Report dated 28th November 2013 and the copy of the decree issued by the lower court on 26th September 2012, I find

that **Section 34** is not applicable in the instant case.

16. That section provides that issues relating to execution, discharge or satisfaction of the decree, be filed in the court that made the decree. The Plaintiff's case is for compensation for damages that resulted after the Defendants unlawfully invaded his property Plot No. 487. The parcel of land in dispute before the lower court whose decree was being executed was Plot No. 1252.

17. The parcels of land are distinct and separate and bear no relation. The Plaintiff is entitled to file a separate suit to support his claim for damages. This being a Preliminary Objection which only raises matters of law, this court cannot ascertain whether both parcels of land are one and the same without the evidence being fully tested at a full hearing. That the parcel of land which the Plaintiff is in occupation and which was invaded as that cited in the decree of court is a question for determination by the trial court upon evidence being presented.

18. It also follows that the suit cannot be deemed as *res judicata*. **Section 7** of the **Civil Procedure Act** prohibits the court from determining an issue which has been directly and substantially in issue in a former suit between the same parties. In the instant case, the rights over the property known as Plot No. 487 and whether the Defendant had any lawful reason to invade the property and whether they should be held liable have not been determined.

DETERMINATION

19. Accordingly, I find that the Preliminary Objection has no merit in light of the clear provisions of **Sections 34** and **7** of the **Civil Procedure Act** because the subject matters in this suit and that filed in the lower court are different.

20. Notwithstanding this finding, I find that the suit should have been filed in the lower court which has jurisdiction to determine the questions of damages to be awarded for trespass.

21. Accordingly, I invoke the provisions of Section 17 and order that the suit be transferred to the court of competent jurisdiction within Narok or Naivasha.

22. The costs of the application shall be in the cause.

Orders Accordingly.

Dated, Signed and Delivered at Nakuru this 17th day of February, 2015

A. MSHILA

JUDGE