



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 17 OF 2020

DANIEL KIPKEMOI BETT.....1ST PLAINTIFF

DAVID KIBITOK KEMBOI.....2ND PLAINTIFF

VERSUS

JOSEPH RONO.....DEFENDANT

RULING

(On the Defendant's Preliminary Objection to

institution of suit)

Introduction

1. Land is an emotive resource in Kenya. The complexity about the intertwining weavings and intersections between its ownership and the attachment many a person in Kenya give it so much so that it brings out the intensity of emotions attendant to it can only be discerned from the length of time some cases take and the energy and zeal they often take from both the litigant and learned counsel as well as judicial officers. Different scenarios present themselves to courts when they handle matters on land which draw long and protracted litigation. In the instant case, although the suit appears to be a relatively recent one, land parcel **LR. No. 1800/3 Kaptien Farm** (*hereinafter referred to as the "suit land"*) which measures approximately **132.5 acres** has formed the subject matter of long history in different courts for some time now.
2. The suit land has been litigated on from Land Tribunals, to this Court, the High Court in Kitale in a Succession Cause and the Court of Appeal in Eldoret, and it is still back in a different form. In determining the present preliminary objection, I will focus on the matters presented before this Court and the Court of Appeal.
3. This matter was heard and determined by my two learned brother judges who have sat in this Station in succession. In **Kitale High Court Land Case No. 35 of 1997**, the suit land was the subject matter. It was between **Appollo Mwangi Muna -vs- Julius Kimeli and 6 Others** (three of the Defendants were the Plaintiffs and the Defendant in the instant case). In that suit, the Plaintiff sought for a declaration that **132.5 acres** comprising of the suit land solely belonged to him. At the interlocutory stage, he sought a temporary injunction against the defendant together, with costs of the suit. The outcome was that by a judgment dated **19/11/2002** his case was dismissed.
4. The second case in relation to the suit land was **Kitale High Court Land Case No. 55 of 2009**. In the case, **Daniel Kipchumba Bett, David Kibitok Kibet, Julius Kimeli, Joseph Rono, Kipkemboi Bett, Kiptoo Barngetuny, Benard Kitaria and Tamatra Chebichi** were the Plaintiffs suing **Margaret Wanjiku Chege** (who was the daughter-in-law of **Appollo Mwangi Muna**) who was the Plaintiff in the case above mentioned. In this suit, the Plaintiffs sought for a declaration that they were the rightful and lawful owners of **LR. No. 1800/3 Kaptien Farm** and that the defendant was not entitled to **132.5 acres** of the suit land and that she was a trespasser. They also sought for eviction orders against the defendant and any other person who claimed through her from interfering with the suit land in any manner whatsoever, mesne profits, costs and any other relief which the court deemed fit to grant. Judgment in the case was delivered on **23/9/2015**. It was in favour of the Plaintiffs. By it the court declared the Plaintiffs to be the rightful and lawful owners of the suit land and that the defendant was not entitled to the **132.5 acres** or any part thereof and that she was a trespasser. Eviction orders were issued against her. As a result of the judgment the defendant moved to the Court of Appeal in Eldoret vide **Appeal No. 116 of 2015**. The appeal is still pending hearing and determination. It is worth noting that on **9/5/2016**, the Court of Appeal issued orders of maintaining of *status quo* in respect to the suit land pending the determination of the appeal.
5. Now, before finalization of the appeal, there is yet another case that has been filed before me in respect to the same suit land. However, this time around, it is the Plaintiffs in **ELC No. 55 of 2009** that are litigating against each other.
6. In the instant suit, the Plaintiffs sought for a declaration that the defendant is only entitled to **Six (6) acres** of land out of the remaining

portion of **One Hundred and Thirty-Two (132)** in LR. No. 1800/3, an **Order of permanent injunction to be issued against the defendant either by himself, his agents, servants or anyone claiming through him from encroaching, trespassing, fencing, ploughing, planting, alienating or in any manner dealing with the remaining portion of One Hundred and Thirty Two (132) acres apart from the six (6) acres that he is entitled to, costs of the suit and interest and ‘any other relief the court might deem fit to grant.’**

The Preliminary Objection

7. On **20/5/2020**, the defendant filed a preliminary objection together with other documents, including his statement of defence. By it, the objector stated the suit herein was an abuse of the courts’ process. He also stated the suit property was the subject matter of the Court of Appeal in **Eldoret in Civil Appeal No. 116 of 2015** and that the application was frivolous, vexatious and contemptuous. Further that the law firm acting for the Applicants was not supposed to act against the respondent and the prayers in the application amount to asking the court to review and set aside the orders issued by the Court of Appeal.

Directions

8. Through directions made on **1/12/2021**, this Court ordered that the preliminary objection be determined by way of written submissions. Both parties filed respective submissions. The defendant filed on **9/12/2021** and the Plaintiff on **15/12/2021**.

Defendant’s Submissions

9. While urging this Court to dismiss the plaintiff’s suit with costs, the defendant gave a brief introduction on the previous suits litigated over the subject matter before the present one was commenced. He also narrated the prayers in the suits as well as the orders issued in them. He then related them to the present case. He challenged the subdivision of the suit land and argued that the prayer could not be granted because this Court lacked jurisdiction to do so since the matter was pending in the Court of Appeal at Eldoret. Again, he said, contended that this court could not review orders issued by the appellate Court. In support of the objection, the defendant relied on a number of decided cases.

Plaintiffs’ Submissions.

10. On the other hand, the Plaintiffs submitted that the preliminary objection did not disclose a pure point of law and ought to be dismissed with costs. They argued that the suit raised contentious issues of law and the cause of action was different hence the suit ought to proceed to full hearing. They argued that the suit disclosed a reasonable cause of action and was not an abuse of the courts’ process which, to them, was clothed with the jurisdiction to hear the matter to its finality. They submitted further that the issues raised in the Court of Appeal were not the same and the parties in the two matters were different hence the objection was a farce.

Issues, Analysis & Determination.

11. I have carefully considered the preliminary objection, the parties’ rival submissions, the law as well as the relevant cases cited. The issues that commend for determination therefore are:

(a) Whether the preliminary objection was merited;

(b) What orders to issue and who to bear costs.

12. I will analyze the issues one after the other as hereunder.

(a) Whether the Preliminary Objection is merited

13. In law, a preliminary objection may take various forms but it has to be determined on a case to case basis. As to its meaning, I am guided by the seminal case of *Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696*, where Sir Charles Newbold defined it as follows:

“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... 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.”

14. I considered all the points raised as a preliminary objection in the matter. One of them that stuck out clearly as a preliminary point of law was the defendants’ challenge to the **jurisdiction** of this court to hear and determine the instant suit. They argued that since the subject matter was pending before the Appellate Court, it is now seized of the jurisdiction on it and is the right Forum to deal with it.

15. Indeed, as revealed from the chronology of events in respect to the suit land, there is a pending appeal before the Appellate Court in Eldoret, being **Appeal No. 116 of 2015**. The Appellate Court issued orders in regard to preserving the *status quo* on the suit land pending the hearing and determination of the appeal. That notwithstanding, the Plaintiff herein came to this court asking it to declare that the defendant was only entitled to **6 acres** out of the whole suit land. In other words, he has asked this Court to subdivide the subject matter of the Appeal.

16. It is clear that the suit land herein is the subject of the Appeal alluded to. If this Court were to issue the orders contrary to those issued by

the superior court it would amount to issuing parallel orders and result in interfering with the substratum of the appeal. By law I am barred from doing so. Ultimately, I find that this court lacks jurisdiction to entertain this matter. I am left with option but to down my tools.

17. A number of Courts hold that jurisdiction is everything and without it, the court must down its tools. In the case of the **Owners of Motor Vessel "Lilian S" vs Caltex Oil Kenya Ltd (1989) KLR1** the court held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. This court also observed that the subject matter herein and the issues, that is to say, **L.R.No. 1800/3 Kaptien Farm** and ownership, are similar as those under litigation before the Court of Appeal. Therefore, to comment on, discuss and or hear and determine on them as proposed herein, would amount to engaging in *sub judice*.

19. The concept of *sub judice* is one that bars a Court from trying a matter that is in one way or other before another Court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title. In essence, if both Courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be *res judicata*. **Section 6 of the Civil Procedure Act** bars any court from engaging in matters *sub judice* before them. It provides as follows:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

20. In a recent decision, my brother Justice Mativo discussed the concept *sub judice*. This was in **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** where he stated as follows:-

"...there exists the concept of sub judice which in Latin means "under Judgement." It denotes that a matter is being considered by a court or judge. The concept of sub judice that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage."

21. The import of the concept is that as soon as the Court finds a matter *sub judice* it stays immediately the proceedings until the prior one is heard and determined. On this point, the Supreme Court of Kenya in **Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)**, stated therein as follows: -

"[67] The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

22. In the instant case, as much as the parties herein appear not to be similar to those in **Eldoret Civil Appeal No. 116 of 2015** they share one thing in common: litigating over or against the same subject matter either on one side or opposites ones, and the expected outcome in the two courts both of which have competence in jurisdiction automatically impact on the same subject matter. I will clarify the point as follows, in **Kitale HCC No. 55 of 2009** which gave rise to the **Civil Appeal No. 116 of 2015**, all the three parties herein were Plaintiffs, among other parties and sued one Margaret Wanjiku Chege. They sought the relief that they were the lawful owners of the parcel of land in question. They succeeded in the matter hence the Appeal. In this suit two of the three have turned against the third of their own and sued, asking the Court to declare that the third - the Defendant herein - be declared the lawful owner of only **six (6)** acres of the whole parcel. They bring out a scenario of where it is agreed that, "let us put concerted efforts in killing the enemy first and then we share the spoils." And having 'killed' the enemy by way of success in **Kitale HCC No. 55 of 2009**, hell has broken loose in the pack. In the instant matter, only roles have been switched between the three.

23. To avoid a situation such as the one described above, Parliament in its wisdom enacted the provisions to cater for cases where overzealous parties might run to and fro in the corridors of justice so as to mine for the best result in their estimation. In that regard, **Section 5 of the Civil Procedure Act** lays the basis for the operation of **Section 6 of the Civil Procedure Act** by stating that any court can try any suit of a civil nature as long as it has jurisdiction, except the suits in which that act or process is either expressly or impliedly barred. For this reason, this court having found that it is barred by the operation of law and in particular, **Section 6 of the Civil Procedure Act**, it lacks the requisite authority to hear and determine this suit.

(b) What orders to issue and who to bear costs

24. The upshot is that the preliminary objection is merited and is hereby allowed. The suit before this court is hereby stayed pending the determination of **Eldoret Civil Appeal No. 116 of 2015**. The costs of the Application shall be to the Defendant/Respondent. For the avoidance of any doubt, interim orders that were issued on **11/3/2020** are hereby vacated. The parties are directed to move this Court appropriately within a month of the determination of the Court of Appeal matter.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 17TH DAY OF FEBRUARY, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.