



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 90 OF 2016**

**TOM ATANCHA.....PLAINTIFF/APPLICANT**

**VERSUS**

**MARGARET NYANCHAMA MOSE OKIRO.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. This ruling is in respect of the Preliminary Objection raised by the Defendant on 9<sup>th</sup> November, 2020 in response to the Plaintiff's application dated 23.9.2020. The said Preliminary Objection raises two main grounds; firstly that the application dated 23.9.20 is *res judicata* and secondly that the said application is an abuse of the court process.

2. Before delving into the merits of the Preliminary Objection, it is necessary to give a brief background of this matter. The Plaintiff filed suit against the Defendant on 16.8.2016 seeking inter alia a declaration that the Plaintiff was the legal owner of a parcel of land known as L.R NO. CENTRAL KITUTU/DARAJA MBILI/1724, an order of eviction against the Defendant and a permanent injunction restraining the Defendant from interfering with the suit property. He also prayed for general damages and costs.

3. The Defendant filed a Defence and Counterclaim dated 18<sup>th</sup> April, 2016 denying the Plaintiff's claim and alleging that the Defendant intended to fraudulently deprive her of her property. In her Counterclaim she sought the sum of Kshs. 44,000 being rent from the month of December 2015 to the time when the Defendant would render vacant possession of the suit property, mesne profits, a declaration that the Defendant was the rightful owner of the suit property, an order of injunction to restrain the Plaintiff from interfering with the suit property and an order of eviction against the Plaintiff.

4. The suit was set down for hearing but the Plaintiff failed to attend court on the hearing date. The court therefore dismissed the Plaintiff's case and proceeded with the hearing of the Defendant's Counterclaim. Judgment was delivered on 24<sup>th</sup> March 2017 when the court dismissed the Plaintiff's suit with costs to the Defendant and entered judgment for the Defendant as prayed in the Counterclaim. The Defendant subsequently applied for execution but the Plaintiff filed an application dated 16<sup>th</sup> August, 2017 seeking a stay of execution. He also sought to liquidate the decretal sum by monthly instalments of Kshs. 20,000 and 90 days to vacate the suit premises.

5. When the application came up for hearing on 5<sup>th</sup> September 2017, the Applicant informed the court that he had vacated the suit premises. After noting that the only issue outstanding was money, he encouraged the parties to agree. The parties then recorded a consent in the following terms:

“By consent the Applicant is granted leave to liquidate the decretal sum of Kshs. 1656,500 as follows:

1. “Kshs. 250,000/= to be paid on or before 20<sup>th</sup> September 2017.
2. Kshs. 250,000 /= to be paid on or before 1<sup>st</sup> October 2017.
3. The balance thereof to be paid in two equal installments, the first installment to fall on 1<sup>st</sup> November 2017 and the second to be paid on or before 1<sup>st</sup> December 2017.
4. In default execution to issue.”

Since the Plaintiff failed to honour the terms of the consent, the Defendant applied for execution on 3<sup>rd</sup> October 2017.

6. By an application dated 17<sup>th</sup> October, 2017 the Plaintiff who had since changed advocates applied for stay of execution as well as review or setting aside of the consent entered on 5<sup>th</sup> September, 2017. The said application came up for hearing on the 24<sup>th</sup> November, 2017 and the court delivered a ruling on the same day dismissing the application with costs to the Defendant. The court further directed that the matter be placed before the Deputy Registrar for directions relating to the Notice to Show Cause dated 9<sup>th</sup> October, 2017.

7. The Plaintiff once again changed advocates and filed an application dated 1<sup>st</sup> October, 2020 seeking a stay of execution and setting aside of the consent order dated 5<sup>th</sup> September 2017. He also sought an order that the taxed costs in favour of the Defendant be remitted to the Taxing Master for fresh taxation. It is in response to this application that the Defendant filed a Replying Affidavit sworn 9<sup>th</sup> November, 2020 opposing the application and the Preliminary Objection which is the subject of this ruling.

8. When the matter came up for hearing on 5.5.2021, counsel for the Defendant prayed that the Preliminary Objection be heard first. He also indicated that he did not wish to file any submissions on the Preliminary Objection. On his part counsel for the Plaintiff requested for 14 days to file his submissions on the Preliminary Objection.

9. However, on 27.7.2021, Mr. Meroka learned counsel for the Defendant indicated that both parties had filed their submissions and Mr. Malanga learned counsel for the Plaintiff requested for time to respond to the Defendant's submissions and the court granted him 7 days to respond to the Plaintiff's submissions. When the matter came up for mention on 9.11.2021, Mr. Meroka indicated to the court that both parties had filed their submissions.

10. From the record it is clear that Applicant filed his submissions dated 29<sup>th</sup> April, 2021 on 26<sup>th</sup> July, 2021 while the Respondent filed her submissions on the Application on the same date.

11. The only issue for determination is whether the Preliminary Objection is merited and whether it should be sustained.

12. As pointed out earlier in this ruling, the Preliminary Objection raises two points; first, that the suit is *res judicata* and secondly, that the application is an abuse of the court process.

13. The starting point is to define what a Preliminary point of law is.

In the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd [1969] EA 696** the court held as follows:

*"A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

Justice Newbold in the said suit argues 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"*

14. The doctrine of *res judicata* in Kenyan law is embodied in Section 7 of the Civil Procedure Act CAP 21. This section provides as follows:-

***"7. Res judicata***

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

15. Applying the above provision to the instant application, it is clear that the Plaintiff filed a similar application dated 17<sup>th</sup> October, 2017 seeking a stay of execution and setting aside of the consent order dated 5<sup>th</sup> September, 2017. The said application was considered by my learned brother Justice Mutungi after which he dismissed the same with costs to the Defendant. The application dated 23<sup>rd</sup> September, 2020 is therefore *res judicata* and there would be no basis for me to consider the said application as the issues and the parties are the same.

16. The contention by learned counsel for the Plaintiff that I ought not to consider the Preliminary Objection because counsel for the Defendant indicated that he did not wish to file submissions on the same is not well founded. I say so because nothing stops the court from disposing of a suit or application *suo moto* on a point of law such as *res judicata* without inviting the parties to file submissions.

17. Sections 1A, 1B of the Civil Procedure Act and Section 3(1) of the Environment and Land Court Act enjoin this court to further the overriding objective of the Civil Procedure Act and the Environment Land Court Act by facilitating the just, expeditious, proportionate and affordable resolution of civil disputes governed by these two Acts. Furthermore, Article 159 2 (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities.

18. In view of the fact that this is a clear case where the Plaintiff is abusing the court process and postponing the day of reckoning by filing similar applications, it would be in the interest of justice to strike out the application as I hereby do. For the avoidance of doubt, I find merit in the Preliminary Objection and I uphold it. Consequently, the application dated 23<sup>rd</sup> September, 2020 is struck out with costs to the Defendant/Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**J.M ONYANGO**

**JUDGE**