



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CASE NO. 13. OF 2020

DICKSON ESHO.....PLAINTIFF

VERSUS

SUYIANKA MAYUNE.....1ST DEFENDANT

ELIZABETH SIAMANTA YIAILE.....2ND DEFENDANT

PATITA KEIWUA.....3RD DEFENDANT

RULING

1. What is before this court for determination is a preliminary objection raised by the 1st defendant in his statement of defence dated 21st June, 2021. In paragraph 6 of the statement of defence he stated that **‘The 1st defendant contends that the plaintiff’s suit is res judicata and that the same should be dismissed with costs as the same is brought in bad faith and a total waste of court’s time’**. And in paragraph 7, the 1st defendant/applicant stated that **‘The 1st defendant denies that the plaintiff is entitled to the said prayers sought as he did all he needed to have done as an obligation and the plaintiff has so admitted in his plaint in paragraphs 10-12 and shall at the earliest convenient raise a preliminary objection on a point of law’**.

2. The 1st Defendant filed written submissions dated 12th November, 2021. As a preliminary issue, I note that the 1st defendant in his submissions has an index to the written submissions. However, the documents in the index have neither been attached nor paginated as is indicated in the said index. Nonetheless, this court will proceed to determine the preliminary objection by what is contained in the file.

3. The 1st defendant submits that from the chronology of the background of the matter, it is evident that the matter has already been determined through **CMCC 133 of 2018 and ELC Appeals 3 of 2019**. That the issues raised in this current suit were directly and substantially in issue in CMCC 133 of 2018 and in the application in ELC Appeal 3 of 2019. The 1st defendant submits that the assertions in paragraph 15 of the plaint have already been addressed previously. That the same amounts to an abuse of the court process in that the plaintiff is employing unorthodox means by filing the same suit which actions are clear acts of forum shopping. The 1st defendant relies on **Section 7 of the Civil Procedure Act** and the observation of my brother Justice Odunga in **Nairobi High Court Miscellaneous Application No. 394 of 2017**.

4. The 1st defendant also submits that there should be a finality to litigation and this doctrine is a pragmatic protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora to obtain at last outcomes favourable to them. The 1st defendant submits that Article 47 of the Constitution is clear that every person has a right to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair. It is the 1st defendant’s submission that indeed the District Land Registrar and the District Surveyor did visit the disputed boundary in presence of both parties and a report was given that is awaiting implementation. In addition, the suit is ill conceived and is meant to delay the cause of justice.

5. It is also the 1st defendant’s submission that although the right to sue is available to every citizen, the same should be checked against other important constitutional provisions that justice should be served expeditiously in accordance with Articles 47 and 159 of the Constitution.

6. The plaintiff filed undated written submissions on 1st December, 2021. It is the plaintiff’s submission that the preliminary objection raised herein is neither premised on a pure point of law nor does it arise by clear implication of the pleadings as was in the case of **Mukisa Biscuit Manufacturing Co. Limited versus West End Distributors Limited [1969] EA 696**.

7. It is the plaintiff’s submission that for this court to determine res judicata, it would invariably call for an examination of the pleadings filed

herein vis a vis those filed in CMCC Number 133 of 2018. That the issues raised by the 1st defendant fall outside the ambit and cannot be canvassed through a preliminary objection. The plaintiff relies on the case of **Margaret Nyiha Gatambia & 2 others versus Peninah Ngechi Njaaga & 3 others [2019] eKLR**.

8. The plaintiff further submits that in the unlikely event that this court finds that the instant preliminary objection arises by the implication of the pleadings herein, then it should consider that the title/ capacity upon which they were litigating under in CMCC No. 133 of 2018 is not similar as those contained in this suit. Further, that this suit was instituted on behalf of the estate of Reteti Esho (deceased) whereas the 1st defendant's claim in CMCC No. 133 of 2018 was against the plaintiff's mother in her personal capacity. Secondly, that the 1st defendant's claim in CMCC No. 133 of 2018 was premised on allegations of trespass by the plaintiff's mother on land parcel number LR No. NAROK/CIS MARA/ENABELBEL/ENENGATIA/257 which is not the issue therein. The plaintiff relies on the case of **Independent Electoral and Boundaries Commission versus Maina Kiai and 5 Others [2017] eKLR**.

9. I have read and carefully considered the written submissions filed by both parties. However, and noting that this preliminary objection emanates from the 1st defendant's statement of defence dated 21st June, 2021, neither parties attached documents or authorities to be relied upon in their written submissions. It is prudent to attach authorities relied upon to enable ease of reference by the court.

10. 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”.

11. Arising from the above, it is not in doubt that a preliminary objection ought to raise a 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 have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. Further, in the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

12. It is this court's opinion that in determining a preliminary objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

13. Before the court embarks on determining the merit of the notice of preliminary objection, it has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. As the Court determines whether what the 1st defendant pleads in his statement of defence amounts to a preliminary objection or not, the Court will also be persuaded by the findings in the case of **Oraro Vs Mbaja (2005) 1KLR 141**, where the Court 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”.

14. In that regard, the doctrine of res judicata is set out in the **Civil Procedure Act at Section 7** as follows:

“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 can 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. The Civil Procedure Act also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

16. In essence therefore, the doctrine implies that for a suit to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of **HENDERSON VS HENDERSON (1843-60) ALL E.R.378**, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

17. The 1st defendant’s claims that the instant suit is res judicata owing to the fact that the issues were determined in CMCC 133 of 2018 between Suiyanka Mayune (1st defendant) and Elizabeth K Esho (plaintiff’s mother).A look at the proceedings before the trial court indicated that the dispute involved boundary of land parcels Narok/CisMara/Enabelbel-Enangetia/ 257 and 258.The defendant, in this case the plaintiff’s mother did not attend the hearing despite service of a Hearing notice upon her counsel. The chief magistrate delivered her judgment in which she stated that the plaintiff was seeking orders that the District Land Registrar, Narok be ordered to visit the suit parcels of land and establish the boundaries between two parcels of land namely Narok/Cismara/Enabelbel-Enangetia 257 and Narok/Cismara/Enabelbel-Enangetia 258. The trial court granted prayer 2 in the plaint and directed the District Land Registrar to have the boundaries between the two parcels of land fixed. A decree was thereafter issued on 19th June, 2020 in which it was ordered that the defendant(plaintiff’s mother) is restrained from using any of the portion of land that is Narok/CisMara/Enabelbel-Enangetia/257 and that the District Land Registrar, Narok District is directed to have the boundaries between the two parcels of land fixed namely parcels numbers Narok/CisMara/Enabelbel-Enangetia/257 and Narok/CisMara/Enabelbel-Enangetia/258 and the plaintiff (1st defendant) is awarded costs of the suit.

18. In the instant plaint, the plaintiff is the son to the defendant in CMCC 133 of 2018. He brings this suit in his capacity as personal representative of the estate of Reteti Esho alias Retati Esho (deceased) who is the registered proprietor of Narok/CisMara/Enabelbel-Enangetia/258.A plain reading of the plaint indicates that the issues raised herein revolve around boundary as relates the two parcels of land and a further claim that the 1st defendant herein sneaked in a prayer for determination of a boundary by the District Land Registrar and the Surveyor in blatant disregard of the law. The plaintiff in this suit seeks the following orders: -

a) A declaration that the estate of Retati Esho (deceased) comprising that property known by reference as L.R. No. Narok/CisMara/Enabelbel/Enangetia/258 having not been a party to the proceedings in Narok Chief Magistrates Court Environment and Land Court Civil Suit No. 133 of 2018 ought not to have been subject of its judgment delivered on 20th March, 2019 and therefore the said judgment is null and void ab initio.

b) An order of injunction barring the district land registrar from visiting that property known by reference as Narok /CisMara /Enabelbel /Enangetia /258 with the intent of fixing the boundary between it and that property known by reference as L.R. No. Narok/CisMara/Enabelbel/Enangetia/257 in compliance with the judgment of the Narok Chief Magistrates Court Environment and Land Court Civil Suit No. 133 of 2018

c) An order directing the parties herein to cause the ascertainment and fixing of the boundaries between those properties known by reference as Narok/CisMara/Enabelbel/Enangetia/257, L.R. No. Narok/CisMara/Enabelbel/Enangetia/1220 and 1221 (formerly comprised in L.R. No. Narok/CisMara/Enabelbel/Enangetia/252) and Narok/CisMara/Enabelbel/Enangetia/258, in line with the law.

d) Costs of, and incidental to this suit.

19. What is plainly evident in the instant plaint is that the issue involves a boundary between the two parcels of land an issue which was determined in CMCC 133 of 2018.It is also plainly evident that the defendant in CMCC 133 of 2018 raised a preliminary objection to the effect that she could not be sued without her taking the letters of administration. The same was dismissed vide a ruling dated 15th July, 2017. It is also clear to me that the plaintiff is attempting to approach this court for redress whereas the dispute as relates the boundary and locus standi have previously been determined by a court of competent jurisdiction. A further attempt to introduce other parcels of land to appear as though the issues are not similar to the issues in CMCC 133 of 2018 is totally hopeless. Litigation must come to an end.

20. The upshot of the foregoing is that the preliminary objection raised by the 1st defendant herein in paragraph 6 of his statement of defence succeeds. The plaint dated 24th June, 2020 is hereby dismissed with costs to the 1st defendant. It is so ordered.

DATED, SIGNED AND DELIVERED ON 15TH FEBRUARY, 2022.

MBOGO C.G

Judge

15/2/2022

IN THE PRESENCE OF: -

CA: T.CHUMA