



**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 266 OF 2010**

BENARD OOGA OGAO ..... PLAINTIFF

VERSUS

CHARLES ONYARI ONDIEKI ..... DEFENDANT

**RULING**

1. The plaintiff brought this suit against the defendant on 27<sup>th</sup> September 2010. In his plaint of the same date, the plaintiff averred that the plaintiff is the registered proprietor of all that parcel of land known as **LR No. West Mugirango/Bonyamatuta/911** (hereinafter referred to as “**suit property**”) while the defendant is the registered proprietor of all that parcel of land known as **LR No. West Mugirango/Bonyamatuta/ 2001** (hereinafter referred to as “**Plot No. 2001**”). The plaintiff averred that on the 15<sup>th</sup> September, 2010 the defendant without any lawful cause entered the suit property and fenced off a portion thereof on which he dug a pit latrine which he was in the process of constructing. The plaintiff contended that as a result of the defendant’s said act of trespass, the plaintiff has been dispossessed and/or deprived of the use of the said portion of the suit property.
2. The plaintiff prayed for a declaration that the plaintiff is the registered proprietor of the suit property, an order for the eviction of the defendant from the portion of the suit property under his occupation and the demolition of the pit latrine that he has put up thereon and a permanent injunction to restrain the defendant from trespassing onto, interfering with and/or in any other manner whatsoever dealing with the suit property. The defendant entered appearance and filed his statement of defence to the plaintiff’s claim on 26<sup>th</sup> October 2010. In his defence, the defendant denied the plaintiff’s claim in its entirety save that he is the registered proprietor of Plot No. 2001. The defendant denied that he has trespassed on the suit property and contended that there is a boundary dispute between the parties in relation to the two parcels of land.
3. When this suit came up for hearing on 11<sup>th</sup> February 2014 the defendant’s advocate indicated to the court that the defendant had a preliminary objection to the plaintiff’s suit which he wished to argue before the hearing of the suit. The plaintiff’s advocate did not have any objection to the defendant’s request. I therefore directed that the preliminary objection be argued by way of written submissions. The defendant’s advocates filed their written submissions on 28<sup>th</sup> February 2014 while the plaintiff’s advocates filed their submissions in reply on 13<sup>th</sup> May 2014. I have considered the defendant’s notice of preliminary objection dated 5<sup>th</sup> April 2013 and filed in court on the same date, the pleadings filed herein and the respective submissions by the advocates for the parties. The following is the view that I take of the matter. The law on preliminary objection is now fairly well settled.
4. In the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] E. A 696**, a preliminary objection was defined as consisting 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. It was stated further in the said case that a preliminary objection **“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”** What I need to determine is whether the defendant’s preliminary objection raised herein has the ingredients of what constitutes a preliminary objection, and if so whether it has any merit. The defendant raised the following objections to this suit;

- i. The suit is *res judicata*
  - ii. The pleadings do not conform with the Civil Procedure Rules.
5. In their written submissions in support of the preliminary objection, the defendant’s advocates submitted that the issues raised in this suit by the plaintiff were in issue in Nyamira Land Disputes Tribunal Case No. 11 of 2007 (“the tribunal case”) which was between the same parties and was heard and determined conclusively. The defendant’s advocates submitted that the decision that was made in the tribunal case was adopted as a judgment of the court in Kisii CM Misc. Application No. 134 of 2010 which judgment has not been varied or set aside and as such binding between the parties. The defendant’s advocates submitted therefore that this suit is *res judicata* and as such this court is barred under section 7 of the Civil Procedure Act from entertaining the same.
  6. On the second limb of the preliminary objection, the defendant’s advocates submitted that, under Order 4 rule 1 (f) of the Civil Procedure Rules the plaintiff had a duty to disclose to the court the fact that there have been previous cases between the plaintiff and the defendant which includes the tribunal case and Kisii CM Misc. Civil Application No. 134 of 2010 that I have referred to hereinabove and a previous Kisii High Court Case No. 126 of 2006. The defendant’s advocates submitted that this omission makes this suit an abuse of the process of the court and a candidate for striking out. The defendant’s advocates cited two authorities in support of their submissions. They also annexed a bundle of documents consisting mainly of pleadings in the other cases that I have referred to hereinabove for the court’s perusal.
  7. In their response to the defendant’s advocate’s submissions, the plaintiff’s advocates submitted that the defendant’s preliminary objection was not well taken and as such it has no merit. The plaintiff’s advocates submitted that the issues raised by the defendant herein as preliminary objection were not pleaded by the defendant in his statement of defence and as such the same cannot be raised as a preliminary objection. The plaintiff’s advocates submitted further that the facts pleaded by the plaintiff herein are not admitted by the defendant. There being a dispute on the facts which calls for the ascertainment of the same, the plaintiff’s advocates submitted that the defendant’s preliminary objection cannot be lawfully taken. The plaintiff’s advocates submitted that the bundle of documents annexed to the defendant’s written submissions are not admissible when what is being considered is a preliminary objection.
  8. The plaintiff’s advocates submitted that the defendant’s preliminary objection does not meet the parameters set by the law and as such the same is misconceived and untenable. On the merit of the objection, the plaintiff’s advocates submitted that this suit is not *res judicata*. The plaintiff’s advocates submitted further that there is no material before the court on the basis of which the court can reach a conclusion that his suit is *res judicata*. The plaintiff’s advocates submitted that the court would need to peruse the pleadings in the previous cases referred to by the defendant to ascertain whether the issues that were raised in those suits are the same issues raised herein which perusal the court cannot do without taking evidence and having the said pleadings produced as exhibits. The plaintiff’s advocates argued further that the tribunal was not competent to determine the issues raised in this suit and as such the tribunal case cannot be a basis for a plea of *res judicata*.
  9. The plaintiff’s advocates argued further that the cause of action in this suit is not the same as those which had been raised in the previous suits in the Tribunal and the high court. On the defendant’s contention that the plaintiff had failed to disclose the previous suits between the parties, the plaintiff’s advocates submitted that the plaintiff had no obligation to do so since the issues that were the subject matter of the previous cases are not the same with the issues raised herein. The plaintiff’s advocates submitted further that in any event failure to comply with order 4 rule 1 (1)

- (f) of the Civil Procedure Rules is a procedural error which this court can ignore for the sake of substantive justice. The plaintiff's advocates submitted that this suit is not in any way an abuse of the process of the court.
10. I am in agreement with the submissions by the advocates for the plaintiff that the defendant's preliminary objection is not well taken for the following reasons. First, the issues raised as a basis for the preliminary objection does not arise from the defendant's statement of defence or by clear implication from the pleadings. These issues cannot therefore form a basis for a preliminary objection. Secondly, the issues raised by the defendant are not on pure points of law. Whether the plaintiff and the defendant were involved in previous suits is a matter of fact which if not admitted must be ascertained before a determination can be made thereon. The defendant seems to have been alive to this fact. The defendant has attached to his submission a bundle of documents from which the court has been called upon to ascertain the existence of the previous suits.
11. As rightly submitted by the plaintiff's advocates, these documents are inadmissible in a preliminary objection hearing leave alone the manner in which they have been presented to court. I am in agreement with the plaintiff's advocate's submission that if the defendant wanted to adduce evidence in support of his *res judicata* plea he should have filed an application instead of raising the issue as a preliminary objection. Due to the foregoing, I find no merit at all in the defendant's preliminary objection based on the issue of *res judicata*.
12. On the issue of the defendant's failure to comply with order 4 rule 1 (1) (f) of the Civil Procedure Rules, the same argument that I have put forward above shall apply. This issue was not raised in the defendant's defence and it will also require facts to establish there being no agreement as to whether or not there were previous suits involving the plaintiff and the defendant in which the subject matter in this suit was in issue. I doubt also if failure to disclose the existence of previous suits between the parties should attract the striking out of a suit. I believe that, that is a procedural error which can be corrected by amendment. The court can also ignore the same for the sake of substantive justice pursuant to the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010.
13. In conclusion, I find no merit in the defendant's preliminary objection. The same is accordingly dismissed with costs to the plaintiff.

**Delivered, signed and dated at KISII this 31<sup>ST</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Oguttu-Mboya	for the plaintiff
Mr. B. Masese	for the defendant
Mr. Mobisa	Court Clerk

**S. OKONG'O**

**JUDGE**