



**Cambridge Universal College Limited & another v Hasham Lalji Properties Limited & 2 others
(Environment & Land Case E017 of 2022) [2022] KEELC 3528 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E017 OF 2022**

**SM KIBUNJA, J
MAY 25, 2022**

BETWEEN

CAMBRIDGE UNIVERSAL COLLEGE LIMITED 1ST PLAINTIFF

NURIA ABDIRAHMAN SHEIKH 2ND PLAINTIFF

AND

HASHAM LALJI PROPERTIES LIMITED 1ST DEFENDANT

EDCO CONSULTANTS LIMITED 2ND DEFENDANT

HEGEONS AUCTIONEERS 3RD DEFENDANT

RULING

1. The plaintiff moved the court vide the notice of motion dated March 4, 2022 seeking for orders that: -
 - i) “Spent.
 - ii) Spent.
 - iii) That a temporary injunction do issue restraining the respondents either by themselves, their agents, assigns, employees, servants and/ or any other person(s) expressly and/or impliedly acting on their behalf from attaching, offering for sale by way of public auction or private treaty and/or disposing or dealing in any manner the applicant’s properties situated on parcel known as Eldoret Municipality Block 7/113 pending the hearing and determination of this suit.
 - iv) That directions be given as to the payment of the rent to the effect that should the 1st and 2nd respondents be unwilling to accept rent during the pendency of this suit the plaintiff/applicant be at liberty to deposit the same in court.
 - v) That costs be provided for.”



The application is based on seven (7) grounds set out in the motion marked (a) to (g), and expounded on the supporting affidavit of Alex Wanjala Kango, a director of the plaintiff, sworn on March 4, 2022. He among others deposed that the plaintiff is a tenant on Eldoret Municipality Block 7/ 113, the suit property, on a six (6) year lease where it has set up a learning institution. That the plaintiff has encountered challenges in making full rent payments since the Covid 19 pandemic started. That the plaintiff has explained the situation to the 2nd defendant, and has been making partial rent payment as and when it receives enough money. That the 2nd defendant, acting as an agent of the 1st defendant, had instructed the 3rd defendant to recover unpaid rent by attaching their movable properties, and unless restrained, the attachment may proceed. That the plaintiff stood to suffer irreparable loss and damages as the defendants' actions would disrupt learning activities in the school, and damages would not sufficiently remedy the loss. That the application had been brought in good faith, without delay and that the balance of convenience was in favour of maintaining status quo. That the defendants' will not be prejudiced in any way with the grant of the orders.

2. The application is opposed by the 1st and 2nd defendants through the Notice of Preliminary Objection, in which they first objected to the court's jurisdiction to entertain the suit as it was aimed at varying orders issued by Hon Lady Justice W Okwany, on February 10, 2020 in Nairobi HCCC no E148 of 2019 Hasham Lalji Properties Limited & 3 others vs Sultan Hasham Lalji & 2 others. Secondly, they objected to the application on the grounds that it was *sub-judice* to Nairobi HCCC no E148 of 2019. Thirdly, they argued that the application was *res judicata* to the proceedings in Nairobi HCCC no E148 of 2019. They claimed to have annexed the pleadings in the suit and orders of February 10, 2020 in proof thereof. Fourthly, they claimed that the matter in question had already been litigated and dismissed in a previous suit between the same parties, in Eldoret CMCC no E84 of 2022 Cambridge universal College Limited vs Hasham Lalji Properties Limited, Sedco Consultants & Another.
3. The plaintiff responded to the preliminary objection by filing a replying affidavit sworn by Alex Wanjala Kango on the March 17, 2022. He *inter alia* deposed that the defendants had not annexed any proceedings in Nairobi HCCC no E148 of 2020 to enable the court ascertain whether the said orders issued on February 13, 2020 were still subsisting; that the orders sought herein do not in any way seek to vary or set aside the earlier orders; that the parties in Nairobi HCCC no E148 of 2020 Hasham Lalji Properties Limited & 3 others vs Sultan Hasham Lalji & 2 others were not the same as the parties herein, as the 3rd defendant in this suit and in Eldoret CMCC E & L 2020 were not the same firm of auctioneers; that the suit was in the lower court was dismissed at the preliminary stage and not on merits, and hence this suit is not barred by the doctrine of *res judicata*, and that the preliminary objection be dismissed with costs as the court was being invited to ascertain facts.
4. The court gave directions on filing and exchanging the submissions on the March 16, 2022, following which the learned counsel for the 1st and 2nd defendants and the plaintiff filed theirs dated the March 25, 2022, and March 23, 2022, respectively.
5. The following are the issues for the court's determinations;
 - a. Whether the issues in the plaintiff's suit and application are *res judicata* and or *sub judice*, or alternatively;
 - b. Whether this court is with jurisdiction to hear and determine the suit and application pending herein.
 - c. Who pays the costs in the preliminary objection.



6. The court has carefully considered the grounds on the preliminary objection, submissions by the parties' learned counsel, the superior courts decisions cited therein and come to the following findings;

a. That what amounts to a preliminary objection was laid down in the classical case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, where it was held that:

“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.” (emphasis added)

That a preliminary objection raises a pure point of law and does not rely on ascertainment of facts. The plaintiff has submitted that for the court to determine the preliminary objections raised, it has to ascertain the facts. That the 1st and 2nd defendants' objections requires this court to look at the court orders and or pleadings in both Nairobi HCCC no E148 of 2020 Hasham Lalji Properties Limited & 3 others vs Sultan Hasham Lalji & 2 others and Eldoret CMC no E84 of 2022, to make a finding as to whether this suit and the application are either *sub judice* and or *res judicata* the two other previous suits.

b. That for a party who wishes for a determination as to whether a matter in court is *sub judice* or *res judicata* due to the existence of another suit, or decision, such a party should move the court through a notice of motion, supported by an affidavit so as to allow the other party file a response preferably through a replying affidavit. That to raise the issue through a notice of preliminary objection would not be proper as no facts or evidence would be called in support or opposition in view of the *Mukisa Biscuit* case (*supra*). That I am in agreement with the decision taken in the case of *Petronilla Mutuku Makilya & 2 Others v Caroline Mbinya Kathendu & 4 others; Land Registrar, Machakos Land Registry & another (interested Parties)* [2022] eKLR, on a similar issue The question of whether a matter is sub-judice, and even *res judicata*, requires evidence to be raised of the similarity of issues and parties in two suits of competent jurisdiction. At the very least, these claims require comparison of the pleadings and that analysis of evidence is not a character of preliminary objections.

c. That to confirm that both sides are aware the issues in the preliminary objection would need the court to take evidence, the 1st and 2nd defendants attached some pleadings and order in Nairobi HCCC no E148 of 2019 and Eldoret CMCC no E84 of 2022, as evidence of their claim, proving that they too understand that evidence is needed to adjudicate their preliminary objection. That on their part, the plaintiff found it necessary to file a replying affidavit that the court has referred to above. That the parties' apparent appreciation that the issues raised would need facts to be ascertained confirms those questions are not pure points of law, that would have otherwise been determined without the need to call evidence.

d. That the parties have already brought to the attention of the court that other litigations over the suit land have been filed in at least two other courts, the court is of the view that justice will



be served by directing that costs in the preliminary objection be in the cause notwithstanding the provisions of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.

1. That in view of the above, I find no merit in the issues raised in the preliminary objection, and it is rejected with each party bearing their own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 25TH DAY OF MAY, 2022

S M Kibunja,J.

Environment & Land Court - Eldoret

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF: absent

DEFENDANTS: absent

COUNSEL: Mr Kipkurui for the plaintiffs

Mr Odhiambo for the 1st and 2nd defendants

COURT ASSISTANT: ONIALA

S M Kibunja,J

Environment & Land Court - Eldoret

