



**Ireri v Njagu & 2 others; Nguru (Interested Party) (Environment & Land
Case 171 of 2014) [2022] KEELC 2575 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 171 OF 2014
A KANIARU, J
JUNE 30, 2022**

BETWEEN

ANDREW IRERI PLAINTIFF

AND

ISAACK MUCHIRI NJAGU 1ST DEFENDANT

EMBU COUNTY GOVERNMENT 2ND DEFENDANT

MINISTRY OF HOUSING AND CO-OPERATION 3RD DEFENDANT

AND

ANDERSON NJUE NGURU INTERESTED PARTY

RULING

1. This ruling is on a preliminary objection dated 25.9.2021 and filed on 7.10.2022. The objection targets the suit as filed. It is premised on the ground that the alleged amended Originating Summons and even the original Originating Summons are bad in law. The same is raised by the defendants.
2. The plaintiff filed a suit by way of Originating Summons dated 19.9.2011 and filed on 20.9.2011. The suit was initially filed in the High Court of Embu under Case No. 114 of 2011. The parties in the Originating Summons are Andrew Ireri, the plaintiff, while Isaack Muchiri, Embu Municipal Council and Njue Nguru, are the Defendants.
3. The pleadings were later amended and an amended Originating Summons was filed on 1.12.2014. It is dated 5.11.2014. The parties in it are Andrew Ireri Njeru, the plaintiff, while Isaac Muchiri Njagu, Embu County Government, Ministry of Housing and Co-operation are the defendants. Anderson Njue Nguru is an interested party.



4. In the amended originating summons, it was pleaded that the interested party had demolished the house after knowing that the court had granted orders of stay. The 1st defendant was said to be registered as proprietor in the register of the Embu County Government land register. The contested house was said to have been built by the Embu County Council to assist the landless. It was stated that the amendment of the pleadings had been necessitated by the fact that the Embu County Government was now the custodian of the register as opposed to the Embu Municipal Council. It was further pleaded that the interested party had on 18.9.2011 entered into the suit premise and destroyed two doors valued at Kshs. 5,600/= on pretence that he was the owner of the house, hence committing acts of trespass. The interested party was further alleged to have occasioned damage in the sum of Kshs. 1,073,000/= by filing a miscellaneous application no. 45 of 2013 when there was a pending case before the court. The disputed house was further said to have been built by the Embu Ministry of Housing & Cooperative as opposed to the Embu County Government. The grounds in support of the application were that the plaintiff has been in continuous occupation for more than 15 years from the year 1996 without any cause of threat and that between the year 2011 and 2013 the interested party has continuously threatened the plaintiff.
5. The orders sought in the application are for the court to cancel the name of the 1st defendant and replace it with the plaintiff's name; the Embu County Government to replace the name of the plaintiff; and for an order to be issued that the plaintiff shall build a house and for the 4th defendant to be informed of it.
6. In response to the application, the defendants filed the preliminary objection whose ground I have outlined above. The objection was canvassed by way of written submissions. The defendants filed their submissions on 29.3.2022. It was said that the Originating Summons filed was not easy to understand and made no sense. It was equally submitted that the applicant intended in his mind to seek orders for adverse possession but that the said orders had not been sought in the application.
7. With regard to the amended Originating Summons, it was said that the amended summons were completely different from what was sought to be amended. It was stated that the amended application was purported to be brought under Order 8 rule 4 and 5 *Civil Procedure Act*. That the supporting affidavit in the amended originating summons was not easy to understand and that the amended originating summons had no relevance to what was being amended. According to the defendants, the plaintiff was not on the land when he filed the originating summons. Prayers were sought for the plaintiff's pleadings to be struck out.
8. The plaintiff on his part filed their submissions on 4.4.2022. He averred that the preliminary objection was not clear on what law or section had been quoted to prove how the originating summons was bad in law. He prayed for the preliminary objection be struck out from the record of the suit. It was stated that the defendants having failed to respond to the suit then the plaintiff prayer was for the court to enter judgment against the defendants and for the court to allow the matter to proceed for formal proof hearing. The court was urged to consider the matter with regard to the law.

Analysis And Determination

9. I have considered the objection as raised, the submissions by both parties, and the pleadings in general. The brief facts are that plaintiff filed this suit by way of Originating summons which he later amended. The defendants in response to the suit had filed the current preliminary objection on grounds that the suit was bad in law. They argued that the originating summons could not be understood on exactly what the plaintiff was seeking. It was contended that the plaintiff suit seemed to be on adverse possession but that the plaintiff had not sought for orders of adverse possession. It was also argued that



the amended originating summons was different from the initially filed originating summons and that the supporting affidavit therein had no relevance to the amended originating summons.

10. The plaintiff did not at all agree with them. He attacked the preliminary objection for failing to cite any law or section in which it was anchored. It was his submission that the respondent having failed to respond to the suit, then the court should enter judgment in his favour and have the matter proceed for formal proof hearing.
11. The Locus Classicus case on preliminary objection is the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where it was stated thus:

“..., 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.”

12. Further in the case of *Oraro vs. Mbaja* [2005] 1 KLR 141 Ojwang, J (as he then was) while restating the principle in the Mukhisa case expressed himself as follows on preliminary objections:

“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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

13. A preliminary objection is therefore one that raises a pure point of law raised on the assumption that the facts pleaded are correct and not contested. Further, a preliminary objection should not be blurred with facts or deal with disputed facts. It should also not be raised where there would be need to call for proof or adducing of evidence for its authentication. It is similarly not a preliminary objection when it derives its foundation on facts that need to be investigated, probed and subjected to rules of evidence.
14. The preliminary objection raised herein is that the suit is bad in law. Does this ground of objection meet the criteria as stated above? I do not think so. The issue as to whether a suit is bad in law is not a point of law if the specific law is not stated. Secondly this is an issue anchored on factual basis that



would need the court to ascertain. Basically the entire allegation to establish whether the suit is indeed bad in law or not requires proof through trial.

15. While examining the grounds of objection raised before it, the court in the case of *Josephat Njuguna Karugu v Margaret Nduta Ngugi & 2 others* [2021] eKLR stated as follows with regard to an objection being bad in law

“It is not in doubt that for the Court to ascertain whether the instant suit is .. bad in law.., the Court will have to ascertain and probe evidence more so as the parties are disputing various issues”.

16. As already stated, this issue cannot be raised as a preliminary objection as it does not meet the criteria of one. The respondents in the suit seem to however seek to have the pleadings struck out for one reason or another but the manner in which they have approached the court is wanting. The respondents could simply have filed a proper application before the court for its consideration to establish whether the suit is one for striking out or not. This has however not been done and I cannot consider that which is not before me. I find that the preliminary objection filed herein lacks merit and is hereby dismissed.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 30TH day of JUNE, 2022.

In the presence of Momanyi for respondent/defendant.

Court Assistant: Sylvia W.

A.K. KANIARU

JUDGE

