



REPUBLIC OF KENYA



KENYA LAW
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Gitau v Trustees Caritas Mariana Holy Family Childrens Thika & another (Environment & Land Case 43 of 2017) [2022] KEELC 2727 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 43 OF 2017**

**JG KEMEI, J
JUNE 23, 2022**

BETWEEN

JOHN MUIKAMBA GITAU PLAINTIFF

AND

**TRUSTEES CARITAS MARIANA HOLY FAMILY CHILDRENS
THIKA 1ST DEFENDANT**

BETHRAND NWACHUKWU 2ND DEFENDANT

RULING

1. On the 16/3/2022 the defendants raised a preliminary objection on the grounds that;
 - a. The suit stands dismissed in view of the orders issued by this honourable court on the 23/2/2022 and hence is incapable of being amended.
 - b. The application as filed does not contain any prayer to either stay or lift the orders issued on the 23/2/2022 which clearly stated that if the Plaintiff fails to set down the suit for hearing within 15 days the suit stands dismissed.
 - c. The Applicant has no right of audience having failed to obey the court order that directed him to pay costs of the defendants advocates.
2. The objection was opposed and the same was argued online by the learned counsels of the parties being Dr Kenyariri for the defendants and Mr Mungai for the plaintiffs on the 17/3/2022.
3. It was argued by Dr Kenyariri that the court issued clear orders on the 23/2/2022 directing the plaintiff to fix the suit for hearing within 14 days from the date thereof and in default the suit to stand dismissed. That the plaintiff failed to fix the suit for hearing as directed and therefore there is no suit available for any proposed amendments to be made.



4. Mr Mungai, learned counsel for the plaintiff in rebuttal argued that a preliminary objectionshould be on points of law. For starters, he stated that he was not aware of the court orders of the 23/2/2022 as it is the plaintiff who was present in court on the material date. further that the defendants have not indicated the prejudice that they stand to suffer if the suit is amended. He reiterated his position thatthe suit is still in existence contrary to the arguments of the defendants. That he filed a Notice of motion within5 days of the date of the orders issued by the court and therefore it would not have been possible to fix a hearing date given that there was a quest to amend the Plaint.
5. Dr Kenyariri while disagreeing with Mr Mungai asserted his earlier arguments and added that court orders must be obeyed and that the said courts orders having not been vacated, appealed and or set aside the suit stands dismissed with nothing to be amended.
6. The key issue for determination is whether the preliminary objection is a pure point of law and secondly if so whether it is merited.
7. A preliminary objection must consist of a point of law which arises from pleadings either express or impliedly. This was the dictum in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 where the Court pronounced itself as follows;

“ 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.”

At page 701 Sir Charles Newbold, P added:

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

8. The argument before thecourt arises out of the orders of the court issued on the 23/2/2022. The Court stated as follows;

“ ... The adjournment is granted subject to the payment of the Defendants advocates fees for today in the sum of Kshs 12,500 plus witness expenses in the sum of Kshs 4000- payable before the next hearing date. Further the Plaintiff is directed to fix the case for hearing within a period of 14 days from today in the registry in default the suit shall stand dismissed with no further orders from this Court”.
9. According to the record the plaintiff filed an application under certificate of urgency on the 4/3/2022 seeking leave to amend theplaint and enjoin Scholastica Wanjiku Wainaina as the 3rd defendant and that the draft amended plaint on record be deemed as filed. This application was heard in chambers by the Hon Justice Eboso J who granted orders directing the applicant to serve the Application for hearing interpartes on the 17/3/2022. On the eve of the hearing of the said Application (16/3/2022) the defendants filed the preliminary objection, the subject of this ruling.
10. For thecourt to answer the question as to whether or not the objection is merited, the court is being called upon to ascertain whether or not the plaintiff fixed the suit for hearing within the 14 days from the date of the orders. This then calls upon thecourt to consider facts on the record and it is trite that



where any objection calls for the ascertainment of facts like in this case, the same cannot be termed as a pure point of law. I find that this is not a pure point of law. And consequently the preliminary objection must fail.

11. From the record the plaintiff filed the application within the 14 days and though it failed to fix the matter for hearing, the fact of the matter is that at the time of filing the application on the 4/3/2022 the suit was in existence. I am persuaded by the argument of the respondent that it was premature to fix the matter for hearing in view of the application seeking leave to amend the suit.
12. In the end I find that the objection is without merit. The same is dismissed with no orders as to costs.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 23RD DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Masinde holding brief for Mungai for Plaintiff

Dr. Kenyariri for 1st and 2nd Defendant

Court Assistant – Phyllis Mwangi

