REPUBLIC OF KENYA

IN THE HIGH COURT

AT MERU

Civil Appeal 2 of 1996

ENDLEY MUTEGI ………………………….. APPELLANT

VERSUS

SAMUEL KIOGORA ………………………. 1ST DEFENDANT

ELIJAH M'MWITHIGA M'IMPWI ………… 2ND DEFENDANT

(An appeal against the Ruling and order of Mr. Solomon Wamwayi Chief Magistrate in CMCC No. 390 of 1995 (Meru) delivered on 28th December 1995)

JUDGMENT

The respondent filed a plaint in the lower court which was later amended on 15th February 1995. By that plaint, the respondent was suing as the administrator of the estate of Impwi Ambutu (deceased). He alleged in his claim that parcel No. Ntima/Ntakira/1463 belonged to his deceased father Impwi Ambutu. He further alleged in his claim that the 2nd respondent who is his brother had fraudulently sold that parcel of land to the appellant and this sale took place after the death of their father and without notice to the rest of the family members who were settled on that land. He therefore prayed for a declaration that the appellant's dealing with the land was wrongful and fraudulent and that the parcel be declared to be owned by the family. The first respondent filed an interlocutory chamber summons dated 15th December 1995. In that application, the 1st respondent sought for interim injunction against the appellant. When the application came up for hearing on 22nd December 1995 the appellant raised preliminary objection to the

same. It ought to be noted that the appellant had only filed grounds of opposition to that application dated 15th December 1995. Those grounds were as follows:-

1. The plaintiff's (1st respondent) application is unprocedural, incompetent, bad in law and an abuse of the court process and therefore lacks merit.

2. The plaintiff's application is self defeating and based on a matter which is res judicata vexatious and ought to be dismissed with costs for lack of merit.

3. The applicant has not complied with the law of procedure and entire claim ought to have been raised in PMCC No. 34 of 1990 where the applicant/plaintiff was a party.

4. The issues raised on the plaintiff's application ought to have been raised on appeal if any, in PMCC No. 34 of 1990.

On 22nd December 1995, the appellant's counsel raised a preliminary objection to the effect that there was previous suit namely, Meru PMCC No. 34 of 1990 where the 1st respondent was a party and hence making the matter before the lower court to be *res judicata.* The appellant further raised an objection to the hearing of the application and for that matter the suit on the basis that the suit property's value was beyond the pecuniary jurisdiction of the lower court. In raising the objection relating to the previous suit, the appellant relied on an annexure to the first respondent's application where the first respondent had filed an affidavit in PMCC No. 34 of 1990 seeking to object to the transfer of the suit property to the appellant. It should be noted that PMCC No. 34 of 1990 had the appellant as the plaintiff and the 2nd respondent as the defendant. The 1st respondent was not a party to the same. He however seemed to have filed an objection although the lower court was not informed of the outcome of that objection during the hearing of the preliminary objection. There was therefore no basis to support the allegation that the 1st respondent's chamber summons was *res judicata.* There certainly was no evidence that PMCC No. 34 of 1990 was finally concluded and if so, how it affected the 1st respondent. Such proof would be necessary in order to satisfy Section 7 of the Civil Procedure Act. That section is in the following terms:-

"***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 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."***

As can be seen from the provisions of that section, a matter ought to have been determined by a competent court for the court to find that the subsequent case is *res judicata*. There was also no evidence laid before the lower court that the value of the suit property was beyond the jurisdiction of the court. The learned magistrate in his ruling of 28th December 1995 found against the appellant and rejected the preliminary objection. He too commented that there was no evidence before court of the value of the parcel of land. There was also no evidence, he noted of the first respondent being a party in PMCC No. 34 of 1990. It is that ruling that provoked this appeal. The appellant has brought 5 grounds for

consideration by the court. They are in the following terms:-

1. That the learned chief magistrate erred in law in failing to appreciate and find that CMCC No. 390 of 1995 is res judicata in accordance with S. 7 Cap 21 Laws of Kenya the same issues raised and subject matter having been dealt with by the same parties vide PMCC No. 34 of 1990.

2. The learned chief magistrate erred in law and facts in failing to appreciate and find that the issues raised in the suit appealed from should only have been dealt with an appeal emanating from PMCC No. 34 of 1990 in which suit it was ordered and ownership of the subject matter in dispute being land parcel No. NTIMA/NTAKIRA/1463 determined finally.

3. The learned chief magistrate erred in law in ordering the matter to be heard before him thus usurping appellate jurisdiction.

4. The learned chief magistrate erred in law and fact in failing to appreciate that the subject matter of the suit appealed against is far beyond his jurisdiction being 21.37 acres and valued over Kshs. 500,000/=.

5. The learned chief magistrate's ruling and order dated 28th December 1995 is bad in fact and law.

The appellant as can be seen from those grounds faulted the chief magistrate for failing to uphold his preliminary objection. It is now accepted since the decision of **Mukhisa Biscuit Manufacturing Ltd. Vs. West End Distributors (1969) EA** 696 that a preliminary objection can only be raised where a party accepts as correct all the pleadings of the other party. Further, a party in raising a preliminary objection cannot seek the exercise of the court's discretion. The Court of Appeal for East Africa in that case had this to say on a preliminary objection:-

"***So far as I am aware, a preliminary 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 ………..…. 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 has to be ascertained or if what is sought is the exercise of judicial discretion."***

It was decided in the case **Garden Square Ltd Vs. Kogo & Another** [2002] LLR by Justice Ringera (*as he then was)* that what constitutes true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application entirely. I make a finding that the objection raised by the appellant were not pure point of law. They were objections which intended to engage the court in the exercise of inquiry. For example, the appellant wanted the lower court to inquire on whether or not the 1st respondent was or was not a party in PMCC No. 34 of 1990. As I stated before,

the papers that were before the lower court showed that the 1st respondent was not a party. Secondly, without any material being placed before the lower court the appellant sought the said court to determine the value of the suit property. I can only aptly describe the appellant's preliminary objection by borrowing the words of Hon. Mr. Justice Njagi in the case of **Uunet Kenya Ltd Vs. Telkom Kenya Ltd & another** [2004] IEA 348 where the said Judge stated as follows:-

"***In the instant application, some of the arguments advanced under the cloak of preliminary objection do not properly constitute grounds of preliminary objection. Instead, they are matters that are fit and proper for argument in the substantive application."***

Similarly, in this case, the appellant should have raised the issues contained in the preliminary objection in a substantive application where he would have annexed documents to prove his arguments and where the 1st respondent would have had an opportunity to respond by way of affidavit evidence. The present appeal to put it mildly was very ill advised. It is more unfortunate to note that it was filed in 1996 some 13 years ago yet it had no merit. The appeal is hereby dismissed with costs being awarded to the 1st respondent.

Dated and delivered at Meru this 26th November 2009.

MARY KASANGO

JUDGE