



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NUMBER 78 OF 2020

SOLOMON SOMO & 120 OTHERS.....PLAINTIFFS

VERSUS

THE BOARD OF TRUSTEES,

METHODIST CHURCH IN KENYA....1ST DEFENDANT

REGIONAL POLICE COMMANDER,

COAST REGION.....2ND DEFENDANT

RULING

1. There are two separate Notice of Preliminary Objections filed by the 1st and 2nd defendants on the same point of law that I wish to dispose of concurrently.

2. The 1st defendant filed a Notice of Preliminary Objection dated 31st August 2020 objecting the plaintiff suits in its entirety on the following grounds;-

a) That the plaintiffs' suit is Res Judicata.

b) That the plaintiffs' suit is an unprecedented fallacy inviting the honorable house to sit on appeal of its own decision on 16th December 2019 in Mombasa ELC No 589 of 2011.

3. The 2nd defendant filed a Notice of Preliminary Objection dated 8th October 2020 to object the Application dated 13th July 2020 and the suit to be dismissed on the following grounds;

a) That this suit is Res Judicata; issues herein having been determined in Mombasa ELC No 589 of 2011: Askel Lameck & 121 others V Methodist Church of Kenya and 7 others though this court's judgement delivered on 16th December 2019.

4. The parties agreed to dispose the both preliminary objections by way of written submissions. The 1st defendant filed its submissions in support of its preliminary objection on 5th November 2020. The 1st defendant submitted that Section 7 of the Civil Procedure Act provides for the principle of Res judicata. That the current suit filed by the plaintiffs are substantially and directly in issue to the previous suit. The plaintiffs had filed ELC 589 of 2011, where they sought the same orders that they are seeking in the current suit.

5. The 1st defendant also submitted to court that though differently constituted the issues herein are similar to those issues in ELC 589 of 2011 which have been heard and determined. That the plaintiffs having lost in the previous suit ought to have appealed rather than bring up a new suit raising the same issues. The 1st defendant urged court to dismiss both the application and the suit with costs to the defendants.

6. The 2nd defendant did not file submissions. However they relied on the submissions filed by the 1st defendant since it is a related matter.

7. The plaintiffs' filed submissions opposing both preliminary objections on 27th November 2020 and had this to tell court. That a preliminary objection raises a pure point of law and cannot be raised if any fact has to be ascertained. That the preliminary objections raised by the defendants are not on pure point of law and they invite court to ascertain of the veracity of those statements.

8. The plaintiffs further submitted that the Preliminary Objections raises matters of evidence which require court to ascertain certain facts. That the issues raised cannot be determined by court without looking into facts. That the 2nd defendants was not a party in ELC 589 of 2011 and for court to establish the parties in the initial suit it has to call evidence to ascertain the parties. The plaintiffs prayed that the Preliminary Objections be dismissed with costs.

9. I have considered the two preliminary objections, the submissions in support and the submissions opposing the same and I have this issue to determine whether the issues raised in the two preliminary objections are merited.

10. The law on Preliminary Objections is now settled by then, Court of Appeal for East Africa, in **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696**, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, JA.

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

Newbold, P.:

“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

11. Much more recently, the Supreme Court pronounced itself on the use of Preliminary objection as follows in the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others [2015] eKLR**.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

12. Since a preliminary objection may only be raised on a pure point of law, the Supreme Court in **Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR**, had this to say:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

13. On this basis, the questions that emerge are what point of law the defendants have raised in their preliminary objection and are they settled? The point of law being raised is that the suit is res judicata to ELC 589 OF 2011. The law on Res judicata is provided for by Section 7 of the Civil Procedure Act that

“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.”

14. This court cannot prima facie from the defendants’ preliminary objection come to a conclusion that the plaintiffs’ suit is res judicata. The court needs to consider factual evidence to determine if the requirements for res judicata have been met. Once court needs to refer to facts and evidence to establish a preliminary objection it ceases to be on a point of law.

15. I find that the preliminary objections dated 31st August 2020 and 8th October 2020 filed by the 1st and 2nd defendants’ respectively have no merit and I disallow them. Cost shall be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA this 25th day of February, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE