



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 21 OF 2020

JOSEPH KINUTHIA NJENGA.....PLAINTIFF/RESPONDENT

VERSUS

HANNAH WANGARI KINUTHIA.....1ST DEFENDANT

SAMUEL MWAURA FELIX.....2ND DEFENDANT/OBJECTOR

RULING

The 2nd Defendant/Objector filed a **Notice of Preliminary Objection** dated 4th May 2020, seeking for dismissal and striking out of the suit on the following grounds:-

- 1. THAT the instant suit is Res Judicata as it offends Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya given that the subject matter of claim was dismissed with no order as to costs in ELC Suit Number 1213 Of 2015 at Nairobi;- Joseph Kinuthia Njenga (Suing Through Francis Kigo Njenga) Vs Hannah Wangari Kinuthia And Samuel Mwaura Felix Kariuki by Justice Eboso on 15th October 2019 and as such any contrary decision in this matter may embarrass this Honourable court.**
- 2. THAT the Verifying Affidavit accompanying the Plaint in the instant suit offends Order 4 Rule 1(1)(f) of the Civil Procedure Rules 2010 given that the plaintiff has failed to disclose to this Court that there has been another previous proceedings in another court between the parties over the same subject matter.**
- 3. THAT the verifying Affidavit accompanying the Plaint in the instant suit offends order 4 Rule 1(2) of the Civil Procedure Rules 2010.**
- 4. THAT the instant suit offends Section 18(2) of the Land Registration Act , 2012 No. 3 of 2012 Laws of Kenya.**
- 5. THAT the Plaintiffs claim before this Court is a deliberate abuse of court process by invoking a multiplicity of proceedings for the collateral purpose of imputing an otherwise lawful process while the contested issues are pending before a Court of competent jurisdiction where the Plaintiff failed to comply with the order of the court.**
- 6. THAT in the circumstance, the Plaintiff's suit and the order or prayers sought therein are a monumental procedural and substantive legal nullity , abuse of the court process , vexatious, mischievous and a proper candidate for dismissal and or striking out with costs.**

The Preliminary Objection is supported by the Affidavit of **Samuel Mwaura Felix Kariuki**, sworn on 4th May 2020. He averred that his Advocates on record have advised him that the matter in the instant suit is directly and substantially in issue in a former suit being Nairobi **ELC Case No. 1213 of 2015**, involving the same parties and same subject matter in which a competent court dismissed the suit for failure by the Plaintiff to comply with the order of the Court to initiate a boundary determination, despite the Plaintiff being served with the said order. That no prejudice will be suffered by the Plaintiff if the suit is dismissed with costs as it is an abuse of the Court process.

The Preliminary Objection is opposed and the Plaintiff filed a Reply dated 19th June 2020, and averred that:-

- 1. The Plea of Res Judicata is misconceived and inapplicable in the present suit , in that the subject matter ELC Suit No. 1213 of 2015 at Nairobi was for trespass and boundary dispute over L.R No. 164/74 and 164/75, which suit was not heard and determined on merit, but was struck out for want of jurisdiction. That the subject matter in the current suit is for breach of contract and for Specific Performance against the 1st Defendant and for fraud against both Defendants of 0.20 acre portion where the Plaintiff's home is located , comprised in L.R No. 164/73 fraudulently transferred by the 1st Defendant to the 2nd Defendant.**

2. That the allegation that the verifying Affidavit offends Order 4 Rule 1(1) (f) is untrue. Further that the previous suit was not pending as at the date of filing of the present suit neither was there any previous proceedings between the Plaintiff and the Defendants over the same subject matter.

3. That Order 4 Rule 2 of the Civil Procedure Rules 2010 is strictly complied with.

4. That the Subject matter of this suit is not a boundary dispute, but fraud and Section 18(2) of the Land Registration Act 2012 does not arise.

5. That ground 5 of Preliminary Objection is misleading and false and does not specify allegation “ the contested issues are pending before a Court of competent jurisdiction” or the alleged abuse of the Court process.

6. Further that the deposition by the 2nd Defendant in paragraph 6 of his Affidavit in support of the Preliminary Objection that no prejudice will be suffered by the Plaintiff if this suit is dismissed with costs is striking illustration of his determination to fraudulently acquire the 0.20 acre portion and plaintiff home thereon valued at kshs. 29 million without consideration, and without being held to account .

7. That the present suit seek for hearing and determination on merit of the issues and subject matter set out in 1 above and it is fair and just for all parties to be heard, without undue regard to technicalities.

8. That the Preliminary Objection is without merit and should be dismissed with costs.

The 2nd Defendant/Objector swore a further Affidavit on 29th June 2020, and averred that the allegations by the Plaintiff that the cause of action in the present suit is for breach of contract and for Specific Performance is misleading and utterly false and a look at the Plaintiff shows that no order or relief of specific performance has been sought by the Plaintiff.

That after **ELC 1213 of 2015** was dismissed by a Court of competent jurisdiction, and the Plaintiff never appealed against the said decision. That he has now brought a similar claim which is a deliberate abuse of the Court process by invoking a multiplicity of proceedings. He contended that it has not been controverted that both the Plaintiff and 2nd Defendant have different titles in respect of their respective parcels of land and the allegation being touted by the Plaintiff is a claim over **0.20 acre** being part of his parcel of land and it is thus clear that the crux of the Plaintiff’s allegation is founded in a boundary dispute. Further that the Plaintiff is abusing the Court process having deliberately failed to disclose to the Court that there was a previous suit relating to the same subject matter between the same parties.

The Notice of Preliminary Objection was canvassed by way of written submissions which the Court has carefully read and considered. The issue for determination is **whether the Preliminary Objection is merited.**

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“So far as I am aware, 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”.

Further Sir **Charles Nabbold, JA** stated that:-

“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. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

From the above description of what a **Preliminary Objection**, it is clear that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. The same cannot be raised if any facts has to be ascertained from elsewhere or when the court is called upon to exercise judicial discretion. In the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Therefore, it is evident that a **Preliminary Objection** must stem from the pleadings and raise pure point of law. See the case of **Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

In determining whether what has been raised amount to a Preliminary Objection, the Court will consider the findings in the case of **Oraro...Vs...Mbaja(2005) 1KLR 141, where the Court held that:-**

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

In the instant **Preliminary Objection**, the 2nd Defendant/ Respondent has raised various grounds amongst them that the suit is **Res Judicata** and that the Suit offends the Provisions of **Order 4 Rule 1 (f)** of the Civil Procedure Rules. On whether or not an issue of Res Judicata can be properly raised as a Preliminary Objection, the Court finds that it cannot. For the Court to determine whether the issues herein were directly and substantially in issue with the ones from the other suit, the Court will have to ascertain facts. Further from the definition of what, a Preliminary Objection is, it is quiet clear that the same cannot be raised on disputed facts. While the 2nd Defendant/ Objector contends that the issues in the instant suit are substantially similar to those in **ELC 1213 OF 2015** , the said contention has been disputed by the Plaintiff/ Respondent who contends that the issues raised are very different.

The fact that the 2nd Defendant/ Objector saw the need to attach an Affidavit to his Preliminary Objection, is a clear indication that there is clearly a need for ascertainment of facts and probing of the same that must be done. Therefore, the issue of whether or not a suit is Res Judicata, will require the Court to probe evidence and the best way to raise such an issue is for the party to file a Notice of Motion Application where pleadings would be annexed to allow the Court consider whether the issues in the previous suit are similar to the issues in the suit being in issue . See the case of . **Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) ECLR**, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

Further in the case of **George Kamau Kimani & 4 Others ...Vs... County Government of Trans Nzoia & Another (2014), eCLR**, where the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

Given the limited scope of the jurisdiction on **Preliminary Objection** and the test to be applied, the Court finds that an issue of *resjudicata*, involves probing of evidence and therefore the same cannot be determined via a **Preliminary Objection**. It is also important to note that the issue on whether or not the provisions of **Order 4 of the Civil Procedure** had been complied in the Plaintiff’s/ Respondent’s **Verifying Affidavit** will also require the probing of evidence. This is so as the same is bound to have the issue whether the instant suit is Res Judicata be determined first. For the above reasons, the Court finds that the grounds of failure to abide by order **4 (1)(f) of the Civil Procedure Rules** and the issue on whether the instant suit is Res Judicata are not Preliminary Objections properly raised given the description of Preliminary Objection in the **Mukisa Biscuits case (supra)** The said issues cannot be determined without ascertainment of facts from elsewhere and therefore they are not Preliminary Objections properly raised.

Further, the 2nd Defendant/ Objection has also averred that the suit offends **Section 18(2)** of the **Land Registration Act**. The said provision of Law provides that;

“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

The 2nd Defendant/ Objector has also called into question the Jurisdiction of this Court. Jurisdiction is everything and without it, a Court of law has no option but to down its tools. A question of jurisdiction is based on a pure point of law and therefore the Court finds and holds that on that aspect alone, the Preliminary Objection herein meets the description of what amounts to a Preliminary Objection.. See the case of **Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR**,where the Court held that:-

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction”.

Therefore, the Court finds that the **Notice of Preliminary Objection** as filed by the 2nd Defendant /Objector on the ground whether the instant suit offends the provisions of **Section 18 (2)** of the Land Registration Act falls under the category of what amounts to a **Preliminary Objection** as described in the **Mukisa Biscuits Case (Supra)**.

The next question is whether the said **Preliminary Objection** is merited.

While the 2nd Defendant/ Objector has submitted that the instant suit

is a boundary dispute, the Plaintiff's/Respondent's has contended that the suit is not a boundary suit. It is no in doubt that while the Court has no jurisdiction to determine a matter that involves a boundary dispute, as the provisions of the Land Registration Act are coached in mandatory terms, the Court must first determine whether the matter herein is a boundary dispute as the same is disputed.

The **Blacks Law Dictionary Free Online Legal Dictionary 2nd Ed** redefines a boundary suit as:-

“a lawsuit that determines the boundaries of lands and is a dispute between 2 adjoining land owners.”

This Court has gone through the Plaint dated **10th March 2020**, and has considered the definition of what a boundary dispute is. Having carefully gone through the Plaint, the Court notes that the Plaintiff/ Respondent has laid claim to the portion of the suit property and has also contended that the 2nd Defendant's/ Objector's registration of the suit property be declared null and void. Further the Plaintiff has also claimed that the 1st Defendant is in breach of a contractual agreement between them. It is therefore clear that the Plaintiff/ Respondent is challenging the registration of the 2nd Defendant/ Objector as the owner and laying claim to the ownership of the suit property. Therefore, the Court finds and holds that the instant suit is not a boundary dispute.

Consequently the Court finds that the suit does not fall within the confines of **Section 18 (2) of the Land Registration Act**. In accordance with **Section 13 of the Environment & Land Court Act**, the Court finds that it is well equipped with the necessary jurisdiction to hear and determine the instant suit. The Upshot of the above is that the Preliminary Objection is not merited .

Having now carefully read and considered the Preliminary Objection, the Affidavit thereto and the written submissions by the parties, the Court finds and holds that the Preliminary objection herein dated **19th June 2020**, is not merited an the same is dismissed with costs to the Plaintiff/ Respondent. Let the suit be heard at the main trial by calling of evidence and be determined on merit.

It is so ordered.

Dated, signed and delivered at Thika this 4th Day of March 2021

L. GACHERU

JUDGE

4/3/2021

Lucy - Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by the Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Njoroge Baiya for the Plaintiff / Respondent

No appearance for the 1st Defendant

Mr. Ogye holding brief for Kimani for the 2nd Defendant/Objector

L. GACHERU

JUDGE

4/3/2021