



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 88 OF 2018

CLARK AMBEMBA.....PLAINTIFF

VERSUS

MUSA MWANDILIDEFENDANT

RULING

In the plaintiff's originating summons dated 3rd November, 2013 and filed in this honourable court on 5th of November, 2013, the 1st defendant raised a preliminary objection on the ground that:-

1. That there has been another suit and that there have been previous proceedings in Senior Principal Magistrate's court at Butere Civil Suit No. 51 of 2014 between the parties of the suit premises Land Reference No. Kisa/Emasatsi/596, 597 and 1465 and the defendants concerning the same subject matter and the cause of action relates to the plaintiff named in the originating summons.
2. That the suit herein was dismissed on 20th April, 2013 and no orders of reinstatement of this suit has been issued.
3. That this suit has been brought to this court in clear disregard of the above facts and is an abuse of the due process.
4. That the whole suit is ill conceived, fatally defective and incompetent and should be struck out and/or dismissed.

This court has considered the preliminary objection and submissions therein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

"..... 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"

In the same case, Sir Charles Newbold said:

"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".

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

"I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the 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 preliminary objection, and 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. I am in agreement that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

The issue as to whether or not this suit is res judicata is therefore properly raised as a Preliminary Objection and the court will consider the same first. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“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.”

I have perused Kakamega ELC Case No. 88 of 2018 which was originally Kakamega High Court No. 324 of 2013. It is clear that this case was dismissed on 20th April, 2013 by Justice Mwita and no orders of reinstatement of this suit has been issued. Secondly, Senior Principal Magistrate’s court at Butere Civil Suit No. 51 of 2014 is between the same parties concerning the same subject matter and the cause of action relates to the plaintiff named in the originating summons. In this case judgement was entered on the 1st March 2018. Hence the order made by the High Court by Justice Njagi on the 24th September 2018 that Senior Principal Magistrate’s Court at Butere Civil Suit No. 51 of 2014 be transferred to the ELC Court Kakamega for purposes of consolidation with Kakamega High Court No. 324 of 2013 is not enforceable and that application is an abuse of the court process. For one, Kakamega High Court No. 324 of 2013 which is now Kakamega ELC Case No. 88 of 2018 does not exist having been dismissed way back in 2013. Secondly even if it still existed it would be res judicata Senior Principal Magistrate’s Court at Butere Civil Suit No. 51 of 2014. For, these reasons this suit stands dismissed by the orders of the court issued on 20th April 2013. There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST APRIL 2021.

N.A. MATHEKA

JUDGE