



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC MISC. CASE NO. 11 OF 2020

MUSA SAID.....PLAINTIFF

VERSUS

MIRAJI MUSTAFA

SWALEH MUSTAFA

AHMED MUSTAFA

HUSSEIN MUSTAFA

KULTHUM MUSTAFA.....DEFENDANTS

RULING

The respondents before the hearing of the application dated 5th January, 2021 raised a preliminary objection on the following points of law;

1. That the application is res judicata and statutorily time barred hence fatally and incurably defective in law.
2. That the prayer for review has been statutorily time barred by the fact that the applicant filed a Notice of Appeal and has instituted appeal proceedings in the appellate court hence the entire application should be struck out with costs to the respondents herein.

The respondent submitted that the substantial issues in question that the applicant is seeking to raise through review are the same issues that were fully determined by the ruling. Order 45 Rule of Civil Procedure Rules 2010, provides, only two instances where a party is allowed to apply for review of the court orders and further states that review can only be sought when a decree from which an appeal is allowed but no appeal has preferred. Discovery of new evidence. Mistakes or errors apparent on the face of the records. Such an application must be made without delay unreasonable.

That the application for review is incurably time barred, the ruling having been delivered on the 26th day of October, 2020 and the applicant's application having been filed on the 5th day of January, 2021, no explanations has been given for the inordinate delay.

This court has considered the preliminary objection and the submissions herein. 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 the pleadings referred to in the preliminary objection this is an application for review and hence cannot be res judicata. Secondly the issue as to whether the review can be granted or not and matters of being time barred will be determined upon the evidence adduced and is not a matter of law. I find this preliminary objection is not merited and I overrule the same. Costs to be in the cause.

It is so ordered.

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

N.A. MATHEKA

JUDGE