



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA

ELC CASE NO. 82 OF 2019

JAMES MURUNGA KHAIYA..... PLAINTIFF

VERSUS

DISMAS SEREMBWADEFENDANT

RULING

The defendant raise a preliminary objection on a point of law in that:-

1. The suit/application herein was effectively withdrawn vide Notice of withdrawal of suit dated 6th November, 2019.
2. The suit in any event is sub-judice in so far as MCLE & L No. 94 of 2019 is concerned.

The hearing date was taken by consent but the plaintiff failed to attend court or file any grounds of opposition.

This court has considered the Preliminary Objection that the suit was withdrawn and secondly that the suit is sub-judice. As stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696, 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”

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) eKLR 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 or sub-judice is therefore properly raised and should be determined at this stage of the case. 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.”

The defendant submitted that the plaintiff withdrew this suit by filing a notice in court so that he would file the same in the lower court. That the matter herein is sub judice MCLE & L No. 94 of 2019 filed in the lower court. I have perused the court file and indeed find that a notice of withdrawal dated 6th November, 2019 was filed in court however the said is not signed. Be that as it may, on checking in the lower court registry I find that MCLE & L No. 94 of 2019 was filed concerning the same parties and the same subject matter is now pending appeal. I find that this matter is sub judice MCLE & L No. 94 of 2019 and I strike it out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 20TH APRIL 2021

N.A. MATHEKA

JUDGE