



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 146 OF 2017

NATCLIFF MUDONGI INDASI

JOHN INJAIRU VUKUNDU.....PLAINTIFFS

VERSUS

THE COUNTY GOVERNMENT OF VIHIGA.....DEFENDANTS

RULING

The defendant herein the County Government of Vihiga raised a preliminary objection seeking orders of the honourable court to strike out and or dismiss the plaintiffs’ suit with costs on grounds that:-

1. The suit is Res judicata as the remedies sought in the suit are the same as those in Vihiga Civil Suit No. 114 of 2013 which order re-opening of the road and the order was duly executed as per the report of the surveyor relied upon by the plaintiffs.
2. The suit is incompetent in that the plaintiffs’ suit seeks orders of this honourable court issued by the Principal Magistrate in Vihiga Civil Suit No. 114 of 2013.
3. The honourable court lacks jurisdiction to entertain or continue entertaining the matter.
4. The defendant is non-suited in the matter as she is not registered owner of any of the land parcels in dispute and is improperly enjoined to the suit.
5. The suit amounts to gross abuse of the process of the honourable court.

The plaintiffs herein submitted that they filed a suit against the defendant for a permanent injunction prohibiting defendant from erecting a structure in the road reserve. Demolition of the building prohibiting the defendant from erecting on the road reserve inter-alia. The defendant/applicant raised a preliminary objection to which the plaintiffs/applicants vehemently oppose. That the case herein connotes different parties from Civil Suit 114 of 2013. The county government was never part of the suit. More so, the subject matter in contention in this suit is North Maragoli/Kegondi/434 and not North Maragoli/Kegondi/382 as was in the Vihiga Civil Suit 114 of 2013. They relied on the case of Dara Residence Association and Another vs. Ananas Holdings Limited and 4 others; Director of Survey and 3 others (Interested parties) (2020) eKLR.

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.”

The defendant submitted that this suit is Res judicata as the remedies sought in the suit are the same as those in Vihiga Civil Suit No. 114 of 2013 which order re-opening of the road and the order was duly executed as per the report of the surveyor relied upon by the plaintiffs. The plaintiffs submitted that the case herein connotes different parties from Civil Suit 114 of 2013. The County Government was never part of that suit. I have perused the order in Vihiga Civil Suit No. 114 of 2013 dated 14th March 2014. Indeed I find that the plaintiffs are the same and their suit parcels are the same, that is, North Maragoli/Kegondi/427 and North Maragoli/Kegondi/426. Indeed in their plaint Paragraph 4 in the instant suit they state that the defendants in Vihiga Civil Suit No. 114 of 2013 were the tenants of the defendant in the present suit. Paragraph 9 of their plaint seeks the same orders as in Vihiga Civil Suit No. 114 of 2013 which is reopening of the road which was granted in 2014. I find that the parties and the suit parcels are substantially the same as in Vihiga Civil Suit No. 114 of 2013. Nothing stops the plaintiffs from executing that order if at all or pursuing the matter in the said file. For these reasons I find that this suit is res judicata Vihiga Civil Suit No. 114 of 2013. I find the preliminary objection has merit and I uphold the same. This suit is struck off with costs to the defendant.

It is so ordered.

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

N.A. MATHEKA

JUDGE