



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT MACHAKOS

ELC CASE NO. E045 OF 2021

PATRICK MUTHOKA AND 70 OTHERS.....PLAINTIFFS

VERSUS

RAPHAEL MUSYOKI NDETI.....1st DEFENDANT

WAVINYA NDETI ODUWOLE.....2nd DEFENDANT

RULING

What is before Court for determination is the Defendants' Notice of Preliminary Objection dated the 17th May, 2021, premised on the following grounds:

- 1) That the Honourable Court does not have the requisite jurisdiction to hear and try this matter in light of the provisions of Section 7 of the Civil Procedure Act.
- 2) That the Notice of Motion, suit and entire proceedings herein are subjudice and res judicata ELC Misc Application No. 56 of 2018 before Environment and Land Court in Machakos and proceedings before the National Land Commission in regard to property LR No. 337/1208.
- 3) That these proceedings offend the provisions of Section 7 of the Civil Procedure Act.
- 4) That the suit against the Defendants does not disclose any cause of action against the Defendants that is actionable in law in contravention to Order 1 Rule 3 of the Civil Procedure Rules.
- 5) That it is in the interest of justice that the Application and the entire proceedings be dismissed and struck out.

The Notice of Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the Defendants' Notice of Preliminary Objection dated the 17th May, 2021 including the rivalling submissions, the only issue for determination is whether this suit should be dismissed with costs for being res judicata.

The Defendants in their submissions contend that this matter is res judicata as the issues in respect to suit land being 337/1208 were canvassed before National Land Commission and the Environment and Land Court in JR Misc App. No. 56 of 2018. They state that all the parties in the present matter are substantially claiming title under the authority of a lease issued by the defunct local authority. A competent court being the Environment and Land Court has already determined the latter in JR No. 56 of 2018. This matter is therefore settled and should not be litigated under new proxies and entities. To buttress their averments, they have relied on the following decisions: **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A. 696** and **Republic vs Registrar of Societies – Kenya and 2 Others Exparte Moses Kirima and 2 Others [2017] KLR** where the Judge cited the case of **Lotta vs Tanaki [2003] 2 E.A. 556**.

The Plaintiffs in their submissions aver that a Preliminary Objection is one which raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. They contend that this court has jurisdiction to handle this matter which deals with occupation and title to land being the suit lands listed in paragraph 4 of the Plaint. They insist this suit does not offend the provisions of Sections 6,7 and 8 of the Civil Procedure Rules, 2010. They explain that this suit was commenced by them being lawful owners

and in occupation of the suit land in Kanaani Phase II (Athi River) for a period of over 12 years specifically listed in paragraph 4 of the Plaintiff.

They claim that ELC Misc Application No. 56 of 2018(JR) was commenced by Dakawou Transporters Ltd as the exparte applicant against the National Land Commission, Chief Land Registrar and the Hon. Attorney General. The defendants in this present suit were not parties to it neither did they participate. They argue that the cause of action in this suit and the judicial review are quite distinct. Further, that there can never be res judicata over a decision of a body that only exercises administrative functions as the National Land Commission was not exercising judicial functions as it can only be inferred over matters before courts of competent jurisdiction.

To support their arguments, they have relied on the following decisions: **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] E.A 696**; **Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999**; **Uhuru Highway Development Limited vs Central Bank of Kenya [1999] eKLR** cited with approval in **Joseph Kaguthi and 11 Others vs Permanent Secretary Ministry of Interior and Coordination of Government & another [2021] eKLR**; and **D.T. Dobie & Company [Kenya] Ltd vs Joseph Mbaria Muchina and Another [1980] eKLR**.

From perusal of the Plaintiff, I note the Plaintiffs seek various orders including a permanent injunction restraining the Defendants from interfering with the suit land as well as evicting them from it. They have further sought to be declared rightful owners of the suit lands by purchase as well as adverse possession. I note the Defendants except for filing the instant Notice of Preliminary Objection failed to file a Defence to controvert the Plaintiffs' averments.

In the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held 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 has 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 nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'**

Further, in the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** referred to **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

"In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit."

While in the case of **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, 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."

The Defendants have filed the Notice of Preliminary Objection claiming this suit is res judicata as it offends the provisions of section 7 of the Civil Procedure Act. Section 7 of the Civil Procedure Act, stipulates that: **'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 note the ELC Misc Application No. 56 of 2018(JR) was commenced by Dakawou Transporters Ltd as the exparte applicant against the National Land Commission, Chief Land Registrar and the Hon. Attorney General. From the title alone, it is evident that neither the Plaintiffs nor Defendants were parties to the said suit. As for the hearing before the National Land Commission which the Defendants claim concerned the suit lands, the same was undertaken before an administrative body and not a court of competent jurisdiction.

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find that this suit is not res judicata as claimed by the Defendants as there is no previous suit in which the matter was in issue between the same parties herein that a court of competent court had determined but has been raised once again in this instant suit. Further, it is my view that the hearing and determination of the dispute over the suit land by National Land Commission cannot be deemed to be res judicata as this is an administrative body that cannot be equated to the Environment and Land Court. It is my considered view that the Defendants should have filed a Defence to controvert the Plaintiffs' averments first and anchor their Preliminary Objection. To my mind I find that the Defendants' averments in the Notice of Preliminary Objection require evidentiary proof to enable the court ascertain facts before making a proper determination of the dispute herein.

In the circumstance, I find the Notice of Preliminary objection dated the 17th May, 2021 unmerited and will disallow it. I direct the Defendants to file their Defence within twenty one (21) days from the date hereof. Costs will be in the cause

DATED SIGNED and DELIVERED VIRTUALLY at MACHAKOS this 8TH day of FEBRUARY, 2022.

CHRISTINE OCHIENG

JUDGE