



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 57 OF 2018

MAULID MOHAMED OGONA.....PLAINTIFF

VERSUS

JIKOMI SAID MARO.....DEFENDANT

RULING

1. Before me for determination is the Notice of Preliminary Objection dated 13th September 2018 by the Defendant which seeks to dismiss the suit with costs on the grounds that the same is *res judicata* and is an abuse of the court process and brought in bad faith in a bid to frustrate the 1st defendant.

2. The defendant submitted that the plaintiff's suit is *res judicata* because the subject matter, parcel No. Kilifi/Kijipwa/54 has been extensively litigated on between the parties herein at Kilifi SRMCC No. 53 of 2011 to which the magistrate's court delivered judgment on 18th February, 2015. That in the Kilifi magistrate's court case which was determined on merit, the plaintiff was the same as in the current suit. That in the former suit, the plaintiff was seeking injunctive orders to stop the defendant from trespassing and evicting her and her family. It is submitted that the court heard both parties vide their evidence and came to an informed decision in which judgment was delivered in favour of the defendant, and the plaintiff's case was dismissed. That the court in the said judgment held that the defendant had stayed on the suit property for over 40 years and that the defendant's recourse was to seek for orders of adverse possession at the High Court. The defendant submitted that litigation has to come to an end as parties cannot be entangled in court battles throughout their lives. The defendant relied on the case of **Independent Electoral & Boundaries Commission –v- Maina Kiai & 5 Others (2017) eKLR; Christopher Orina Kenyariri t/a Kenyariri & Associates –v- Salama Beach Hotel Ltd & 3 Others (2017) eKLR** and **Njue Ngai –v- Ephantus Njiru Ngai & Another (2016) eKLR**. It is the defendant's submission that the plaintiff herein has approached the court with unclean hands and is only forum shopping for courts having presented the same claim at Kilifi Magistrate's Court to which his claim was dismissed. That the plaintiff has now approached this court in an attempt to circumvent the system and hope to get favourable orders against the defendant. The defendant urged the court to find that the plaintiff's suit is frivolous and abuse of the court process as it is *res judicata*.

3. The plaintiff opposed the preliminary objection and submitted that the same is without merit and should be dismissed with costs. The plaintiff submitted that the defendant has tendered to court uncertified handwritten copy of a judgment which is not authenticated. The plaintiff denied the allegation of there having been a suit filed at the Kilifi magistrate's court. Citing Section 110 and other provisions of the Evidence Act, Cap 80 Laws of Kenya, the plaintiff submitted that the onus is on the defendant to prove the existence of a previous suit to support the plea of *res judicata*. That the uncertified handwritten copy of the judgment is attached to the defendants list of documents as opposed to an affidavit where the maker in the latter case owns the contents of the affidavit and its attachments and can be cross-examined on it. It is submitted that the defendant seems not to be willing to own the uncertified handwritten copy of the said judgment and as such it will be prejudicial not only to the plaintiff but also to the court to rely on it. The plaintiff urged the court to dismiss the defendant's notice of preliminary objection with costs.

4. I have considered the submissions made. The preliminary objection by the defendant is mainly on the ground that the plaintiff's suit is *res judicata*. In the decision of the then Court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Ltd –v- West End Distributors Ltd (1969) EA 696**, Sir Charles Newbold, the president of that court stated:

“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 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 issues. This improper practice should stop...”

5. In the same case, Law J. A stated:

“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....”

6. I have perused the pleadings herein. In the plaint, the plaintiff has pleaded that he is still the registered owner of parcel KILIFI/KIJIPWA/54. The plaintiff avers that in mid February 2014, the defendant without any colour of right, unlawfully, encroached and trespassed onto the suit land and started cultivating it and then built a structure thereon without the consent of the plaintiff. The plaintiff's claim against the defendant is for vacant possession and eviction as well as an injunction.

7. In response to the plaintiff's claim, the defendant filed a statement of defence and counterclaim in which the defendant has denied the plaintiff's claim. The defendant further avers that the suit is res judicata, as the same was heard and determined in Kilifi SRMCC No 53 of 2011. In the counterclaim, the defendant has pleaded that she has lived on the suit property for more than 50 years and has therefore acquired the land through adverse possession. The defendant wants the plaintiff's title to be cancelled and the defendant to be issued with title in his name. The defendant filed a list of documents enclosing a copy of the handwritten judgment allegedly from Kilifi SRMCC NO 53 of 2011 delivered on 18th February 2015. In the defence to the counterclaim, the plaintiff has inter alia, disowned the uncertified handwritten copy of the purported judgment in Kilifi CMCC No. 53 of 2011. The plaintiff has maintained the same position in his submissions herein. It is clear from the above that both parties are not in agreement on the issues herein. In my view, and being guided by the authority cited herein above, the issues raised herein cannot be resolved through the preliminary objection. The preliminary objection cannot be said to raise a pure point of law. It raises some issues of fact which have to be ascertained such as whether or not there was a previous suit, Kilifi CMCC No. 53 of 2011 between the same parties and over the same subject matter and that the matter was heard and finally determined. In my view, there are so many facts which are not clear and which need to be established. It is worth noting that the document relied on by the defendant is only a copy of handwritten judgement which is not certified and is not even accompanied by the pleadings and proceedings in that case. Moreover, both the defendant and the plaintiff have raised some issues of facts through their rival submissions. Raising issues of fact through submissions amounts to giving evidence from the bar which in my view, is not proper as there is a clear legal procedure on how facts or evidence ought to be laid before a court of law.

8. For the foregoing reasons, I am inclined to dismiss the notice of preliminary objection dated 13th September, 2018 and decline to dismiss the suit as requested. The plaintiff shall have costs.

9. It is so ordered.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 27th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE