



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 20 OF 2020

PAUL MUTUKU KITAKA.....PLAINTIFF

VERSUS

JAMES PIUS MUTINGA.....DEFENDANT

RULING

1. By a Plaint dated the 10th of August 2020, the Plaintiff herein sought for the following orders against the Defendant: -

- a. A declaration of land Parcel No. Mbooni/Itetani/141 is the property of the Plaintiff and his siblings as the beneficiaries of the estate of Daniel Kitaka Kitua (deceased).**
- b. A permanent injunction order restraining the Defendant from disposing off, trespassing and or interfering with the land parcel No. Mbooni/Itetani/141.**
- c. An order for eviction restraining the Defendant from occupying the disputed suit property.**
- d. That costs and interest of the suit be awarded to the Plaintiff.**

2. The Defendant filed a statement of defence on the 27th August, 2020 and denied the Plaintiff's claim.

3. The Defendant filed a Notice of a Preliminary Objection dated 15th February, 2021 on the following grounds: -

- a. That there exists in Tawa Law Courts, ELC Suit No 7 of 2020 where the Plaintiff herein is the 1st Defendant therein, which suit was filed prior to this suit.**
- b. That this suit is Sub Judice in so far as ELC Suit No 7 of 2020 is concerned.**

4. The Preliminary Objection was canvassed by way of written submissions. The Defendants written submissions were filed on 28th September 2021. The Plaintiff did not file their written submissions. The Defendant argues that this suit should not be entertained as it offends the Sub Judice rule. He submitted that the subject matter in this suit was the dispute on the ownership of Land No. Mbooni/Itetani/141, was also the subject matter in Tawa Law Courts ELC No 7 of 2020. He urged the court to dismiss this suit with costs to the Defendant.

5. I have considered the Preliminary Objection, the submissions by the defendant as well as the authorities cited.

6. The law on preliminary objection is settled. A preliminary objection must be on a pure point of law. In **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696**, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

7. Further on **Sir Charlse Newbold JA** stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issue. The improper practice should stop.”

8. In **ORARO Vs MBAJA 2005 eKLR OJWANG J** (as he then was) described it as follows: -

“I think the principle is abundantly clear. A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

9. Section 6 of the Civil Procedure Act provides as follows: -

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other court having jurisdiction in Kenya to grant the relief claimed.”

10. It is obvious that the Sub-Judice rule only applies where another suit or proceeding is pending in another Court involving the same parties or their privies over the same subject matter.

11. I have considered the written submissions by the Defendant and I find that there is no evidence in the form of a Pleat, copies of Pleadings or Proceedings relating to Tawa ELC No. 7 of 2020 that have been placed before this Court to demonstrate that indeed the parties and the subject matter in this suit are the same or litigate under the same title as in Tawa ELC No 7 of 2020.

12. In the absence of any supporting evidence, I find that the preliminary objection has no merit and the same is dismissed with costs to the Plaintiff/Respondent.

SIGNED, DATED AND DELIVERED AT MAKUENI VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2021

.....

HON T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court Assistant - Mr Kwemboi

Mr. Hassan holding brief for Judah Kioko for the Plaintiff.