



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 15 OF 2019

JACKTONE NYENDE OBUYU.....PLAINTIFF

VERSUS

PENINA MBITHE MBITHI1ST DEFENDANT

MBUKONI HOLDINGS LIMITED.....2ND DEFENDANT

RULING

1. The 1st Defendant has filed a Preliminary Objection dated 25th February, 2019 in which she has averred that the Plaintiff filed a similar suit and Application being Nairobi ELC. No. 1079 of 2016, Jacktone Nyende Obuyu vs. Penina Mbithe Mbithi & Another, which was struck out owing to the existence of Machakos HCCC No. 28 of 2015; that the present suit is an abuse of the court process and that this suit should be struck out with costs.

2. The Preliminary Objection proceeded by way of written submissions. The 1st Defendant's advocate submitted that the 1st Defendant is the proprietor of land known as Mavoko Town Block 3/6091 which she subsequently sub-divided into 144 sub-plots; that the Plaintiff and several other persons were conned by the 2nd Defendant who purported to sell to them portions of the said land and that the Plaintiff and 74 others filed Machakos HCCC No. 28 of 2015 in which the Plaintiff is the 66th Plaintiff.

3. The 1st Defendant's counsel submitted that instead of prosecuting Machakos HCCC No. 28 of 2015, the Plaintiff filed Nairobi HCCC No. 1079 of 2016 in respect to the same suit property; that the 1st Defendant filed a Preliminary Objection and complained about the existence of two similar suits and that the said Preliminary Objection was upheld by Okong'o J. and struck out the Plaintiff's suit.

4. The 1st Defendant's counsel submitted that even after the Ruling of Okong'o J, the Plaintiff went ahead to file this suit and that the Plaintiff's conduct is not just plain gross abuse but open willful defiance and contempt of court.

5. In his submissions, the Plaintiff's advocate submitted that Machakos HCCC No. 28 of 2015 was filed by individuals unknown to the Plaintiff; that the Plaintiff herein is not one of the Plaintiffs in Machakos HCCC No. 18 of 2015 and that the finding of Okong'o J. in Nairobi ELC. No. 1079 of 2016 was based on the 1st Defendant's Preliminary Objection and before the hearing in Machakos HCCC No. 28 of 2015.

6. After Okong'o J. dismissed Nairobi ELC. No. 1079 of 2016, the Plaintiff's counsel submitted that the Plaintiff found out that Machakos ELC. No. 28 of 2015 had already been dismissed by this court on 21st September, 2018 for want of prosecution; that no other case involving the subject parcel exists and that the 1st Defendant has not raised a true Preliminary Objection because the issue of duplicity of suits will require probing of evidence which is incapable of being handled as a Preliminary Objection.

7. The principles governing the legal delimitations of a Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A 696** as follows:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which raises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are collect. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. The 1st Defendant has argued that the Plaintiff is amongst the Plaintiffs who filed Machakos HCCC No. 28 of 2015; that when the Plaintiff filed Nairobi ELC. No. 1079 of 2016, the court struck out the suit for being sub-judice Machakos ELC. No. 28 of 2015 and that instead of prosecuting Machakos ELC. No. 28 of 2015, the Plaintiff filed the present suit.

9. While Replying to the Plaintiff's Application dated 7th February, 2019, the 1st Defendant raised the same issue of this suit being sub-judice Machakos ELC No. 28 of 2015. The 1st Defendant annexed on the said Replying Affidavit the copies of the pleadings in Machakos HCCC No. 28 of 2015 and Nairobi ELC No. 1079 of 2016, including the Notice of Preliminary Objection that was filed in that suit.

10. In addition to the copies of the pleadings filed in the two suits, the 1st Defendant also filed the Ruling that was delivered by Okong'o J. in Nairobi ELC. No. 1079 of 2016 dated 20th December, 2018.

11. The issue of the Plaintiff having filed Machakos ELC. No 28 of 2015 and Nairobi ELC No. 1079 of 2016 and the Ruling of the court in Nairobi ELC. No. 1079 of 2016 has therefore been pleaded. Indeed, the pleadings in the said matter are on record. Consequently, the issue of whether the current suit is sub-judice the two previous suits is a pure point of law which is not blurred with factual details liable to be contested.

12. The court considered the issue of whether Nairobi ELC. No. 1079 of 2016 and Machakos HCCC No. 28 of 2015 are similar in terms of the parties and the subject matter. After quoting the provisions of Section 6 of the Civil Procedure Act, the court held as follows:

“... In the absence of any explanation from the Plaintiff as to why he chose to file this suit while a similar suit was pending is Machakos, the 1st Defendant's contention that the Plaintiff was out to abuse the process of the court cannot be resisted. The upshot of the foregoing is that the 1st Defendant's Preliminary Objection dated 4th October, 2016 is upheld. The Plaintiff's suit together with the Notice of Motion dated 2nd September, 2016 is struck out with costs to the 1st Defendant as an abuse of the process of the court.”

13. I have perused the Plaintiff's suit in this matter. The Plaintiff's suit is similar, word for word, as the Plaintiff's suit that was struck out in Nairobi ELC. No. 1079 of 2016 for being sub-judice Machakos HCCC No. 28 of 2015. If the court in Nairobi ELC. No. 1079 of 2016 found that suit to be sub-judice Machakos HCCC No. 28 of 2015 and an abuse of the court process, any other contrary holding by this court would be akin to overturning the decision of the court in Nairobi ELC No. 1079 of 2016.

14. Indeed, the Plaintiff's only option after the decision of the court in Nairobi ELC. No. 1079 of 2016 was to either Appeal against the decision or have it reviewed. This court cannot at this stage consider if indeed the Plaintiff herein agreed to be made a Plaintiff in Machakos HCCC No. 28 of 2015 or not.

15. That being the case, just like in Nairobi ELC. No. 1079 of 2016, the 1st Defendant's Preliminary Objection succeeds. If Machakos HCCC No. 28 of 2015 was dismissed by the court for want of prosecution, the Plaintiff's recourse was to apply for the reinstatement of the suit and not filing a similar suit. Filing a suit similar to the one that has been dismissed by the court for want of prosecution is an abuse of the court process.

16. For those reasons, I strike out with costs the Plaintiff's suit together with all the Applications on record.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2019.

O.A. ANGOTE

JUDGE