



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 169 OF 2015**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**SHELDON LIVASIA MUDOGO**

**WILSON GACANJA.....DEFENDANT**

**RULING**

This application is dated 29<sup>th</sup> May 2019 and is brought under Sections 7 Civil Procedure Act, Order 1 Rule 10 (2), order 17 of the Civil Procedure Rules, 2010 seeking the following orders:-

1. That the application herein be certified urgent to be heard on priority basis.
2. That this suit be and is hereby dismissed with costs to the 1<sup>st</sup> defendant for being res judicata.
3. That the 2<sup>nd</sup> defendant be struck out from the proceedings.
4. That costs of this application be provided for.

It is based on the grounds that the matter directly and substantially in issue has been directly and substantially in a former suit between parties herein, which matter is Judicial Review No. 1 of 2011. That there is a decision in the said matter which has not been appealed. That the 2<sup>nd</sup> defendant is deceased and has not been substituted. That the suit parcel is no longer existent, it has since been subdivided into two new parcels. That this case is an abuse of court process because litigation must come to an end. That this case is scandalous, frivolous and vexatious. That it is in the interest of justice that the orders sought herein be granted by this honourable court.

The respondent submitted that the matter directly and substantially in issue has been directly and substantially been in issue in a former suit between the parties herein. That vide Judicial Review Proceedings filed in a previous suit, the learned judge ruled that there was no evidence that he fraudulently obtained the suit property. (Annexed herewith and marked SLM-001 is a copy of the judgment) That the learned judge in the said judgment also ruled that it was not true that he had acquired the suit property illegally. That a look at the amended plaint herein demonstrates that the main bone of contention by the plaintiff/respondent as against himself is fraud and illegality. (Annexed herewith and marked SLM-002 is a copy of amended plaint) That following the decision of the learned judge where his ownership of parcel number Kakamega/Municipality Block III/220 was declared lawful and undisputable, he has since gone ahead to subdivide the suit parcel into new numbers namely Kakamega/Municipality/Block III/382 and Kakamega/Municipality/Block III/383. (Annexed herewith and marked SLM-003 is a copy of approval letter.) He rely on the following authority in which the doctrine of res-judicata; Civil suit No. 20 of 2015 in the High Court of Kenya at Malindi Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates Vs Salama Beach Hotel Limited Hans Juergen Langer Tour and Technology GMBH (Tour & Tech GMBH) Accredo AG.

The respondent submitted that the matters in issue are not the same as those in Judicial Review No. 1 of 2011. In that case the 1<sup>st</sup> defendant was challenging the procedure resulting in the revocation of its title the suit property herein. This suit challenges the allocation of the suit property. That the matters in this suit have not been determined and the plaintiff must be granted the opportunity to litigate the same. That this preliminary objection is brought mala fides and is an abuse of the court process. The matters raised by the 1<sup>st</sup> defendant cannot be brought by way of a preliminary objection. They pray that it be dismissed with costs. They relied on the cases of; Republic vs Attorney General & 4 others Ex parte Diamond Hashimalji and Ahmed Hashimalji (2014) eKLR, Kavin Aggrey Wakoli & another vs Housing Finance Company Kenya Limited (2015) eKLR, Republic vs Registrar of Titles & Another Ex parte David Gachina Murithi & Another (2014) eKLR, Republic vs Registrar of Titles Mombasa & 4 Others Ex parte Abdulgani Limited (2018) eKLR and Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696.

This court has considered the application/preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of

*“..... 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 or sub judice is therefore properly raised as a Preliminary Objection. 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.”*

I find that the issue of res judicata in the instant case has been properly brought as a preliminary objection. The preliminary objection dated 1<sup>st</sup> September, 2018 is premised on the following points of law that the plaintiff’s suit is res judicata in view of Kakamega High court Judicial Review Miscellaneous Application No. 1 of 2011 currently designated as Environment and Land Court Judicial Review No. 11 of 2017. That following the determination of Kakamega High “Court Judicial Review Miscellaneous Application No. 1 of 2011 currently designated as Environment and land court Judicial Review No. 11 of 2017 the plaintiff is barred from bringing any further suit on that property known as Kakamega town Block III/220. That the plaintiff’s suit is an abuse of the court process. That entertaining this matter amounts to sitting on an appeal in Kakamega High court Judicial Review Miscellaneous application No. 1 of 2011.

On the issue that this suit is res-judicata in view of Kakamega High court Environment and Land Court Judicial Review No. 11 of 2017, I have perused the court proceedings and do find that the subject matter in both the suits is Kakamega Town Block III/220. The parties to both suits are:- The Kenya Anti-Corruption commission which applied and was enjoined in judicial Review No. 1 of 2011 on 11<sup>th</sup> July, 2011. The Ministry of Lands, The Commissioner of Lands, The Land Registrar-Kakamega, County Council of Kakamega, Sheldon Livasia Mugogo and Wilson Gacanja. I find that the subject matter is the same and so are the parties. This court is being called upon to decide on whether or not the 1<sup>st</sup> defendant acquired Kakamega/Municipality Block III/220 fraudulently and or illegally. An issue which has already been decided in the judicial review case. I agree with the applicant that entertaining this matter would amount to sitting on an appeal in Kakamega High Court Judicial Review Miscellaneous application No. 1 of 2011. This court has no such powers. The plaintiff herein had the opportunity to appeal against the judgment in Judicial Review No. 11 of 2017 formerly No. 1 of 2011. This application is merited. From the circumstances of this case I find that this suit is res judicata Judicial Review No. 11 of 2017 formerly No. 1 of 2011 and I strike it out with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**