



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.123 OF 2019(O.S)

MARGARET WACHU KARURI.....PLAINTIFF/RESPONDENT

VERSUS

JOHN WAWERU RIBIRO.....DEFENDANT/OBJECTOR

RULING

By a Notice of Preliminary Objection dated **30th August 2019**, the Defendant/ Objector sought for the striking out of Originating Summons dated **24th December 2018**, on the grounds that;-

1. This is in breach of the subjudice rule under Section 6 of the Civil Procedure Act and a violation of the Overriding Objective Under Section 1B of the Civil Procedure Act which requires that there be an efficient use of the available Judicial and Administrative resources for the reason that:

a) The Plaintiff has deliberately failed to disclose to this Court the existence of Nairobi ELC Appeal No. 211 of 2016;- John Waweru RibiroVs.... Margaret Wachu Karuri.

b) In the said suit in the ELC Court Nairobi , the Respondent is the Plaintiff in this suit while the Appellant is the Defendant and the main issue raised in that matter and in this suit is ownership of land parcel Number Limuru/Bibirioni/4131.

c) The said Appeal No. 211 of 2016;- John Waweru Ribiro...Vs... Margaret Wachu Karuri, is scheduled for mention on 16th February 2020, to confirm filing of submissions.

2. It is therefore clear that this suit is an abuse of the Court process and should be struck out.

On **27th May 2020**, the Court directed that the Preliminary Objection to be canvassed by way of written submissions. In compliance with the said directive, the Defendant/Objector through the **Law Firm of Nyamu J & Company Advocates**, filed his written submissions dated **18th September 2020**, and submitted that a Preliminary Objection is intended to invoke the jurisdiction of the Court to determine a case in limine and in a summary manner. That the Principle of subjudice excludes the Court from hearing and determining matters which raise substantially similar issues raised in other matters already filed and subsisting before Court. He relied on the case of **Thiba Min. Hydro Ltd ...Vs... Josphat Karu**

Ndwiga (2013) eKLR.

It was further submitted that duplicity in the cause of action based on the ownership of the same subject matter is what precipitated the Defendant/ Objector to file the Notice of Preliminary Objection to urge the Court to decline to entertain the matter. That the orders sought are the same that have been sought in the Appeal to wit **ELC Appeal No. 211 of 2016**. The Court was therefore urged to remain vigilant.

It was further submitted that the Originating Summons is an abuse of the Court process as the Plaintiff/ Respondent filed the pleadings herein while wholly aware that there is an existing Appeal at the Environment & Land Court Nairobi adjudicating upon the same issues, The Court was therefore urged to dismiss the suit.

The Plaintiff/ Respondent filed her written submissions through the Law Firm of **E.M Wachira & Company Advocates**, dated **3rd March 2021** and submitted that the Preliminary Objection is premised upon **Section 6 of the Civil Procedure Act and that the side notes adjacent to Section 6** read “**stay of suit**”. That there is no provision for striking the suit under the said Section. It was the Plaintiffs submissions that the Defendant/Objector has not met the proper criteria to establish a Preliminary Objection. That the point raised by the Defendant/Objector are matters of facts as opposed to pure points of law as the Court has to ascertain itself what issues are pending in **ELC Appeal No. 211 of 2016**, and what relief are sought in **Limuru SPMCC No, 179 of 2016**, to make a determination as to whether the matters raised in the respective matters are similar or distinct.

That the point of Law that is relied upon by a party ought to be pleaded or implied in the pleadings and as no response to the Originating Summons has been filed, hence no point of law has been raised. It was further submitted that the Defendant filed a suit being **SPMCC No. 179 of 2016**, and the same was dismissed wherein the Defendant filed an Appeal. That the Orders sought were for forceful eviction and costs. That the Plaintiff herein seeks vesting orders by way of **Adverse Possession** and so the orders sought cannot be adjudicated upon in the Appeal and neither could they have been litigated upon in the subordinate Court. That the parties are the same, but their claims are not the same. It was further submitted that the Defendant/Objector has not demonstrated what prejudice he will suffer if the suit is heard to its logical conclusion. The Court was therefore urged to dismiss the Notice of Preliminary Objection.

The Court has carefully read and considered the Notice of Preliminary Objection and the written submissions and renders itself as follows;-

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir **Charles Nebbold, JA** stated 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 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

The above being the description of a **Preliminary Objection**, it is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other

side are correct. The **Preliminary Objection** must stem from the pleadings and raises pure point of law. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

Before determining the merit of the *Notices of Preliminary Objections*, the Court will first determine whether what have been raised by the parties herein satisfy the ingredients of a **Preliminary Objection**. In this determination, the Court will be persuaded by the findings in the case of *Oraro...Vs...Mbaja (2005) 1KLR 141*, where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

The Defendant/Objector has averred that the suit herein is **in breach of the Subjudice rule as the Plaintiff/ Respondent has deliberately failed to disclose to this Court the existence of Nairobi ELC Appeal No. 211 of 2016 John Waweru Ribiro....Vs.... Margaret Wachu Karuri**. This Contention has however been denied by the Plaintiff/ Respondent who has submitted that the instants Preliminary Objection raised is not a Preliminary Objection properly raised. That the point raised by the Defendant/Objector are matters of facts as opposed to pure points of law as the Court has to ascertain itself what issues are pending in **ELC Appeal No. 211 of 2016**. In the case of *Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) EKLR*, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court’s considered view that it will have to ascertain facts and probe evidence be ascertaining whether the issues raised in the instant suit are the same as the once in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and or relate to the same issues. On whether or not the same is **Subjudice**, facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts. Therefore, this Court holds and finds that what has been raised by Defendant/Objector does not amount to a **Preliminary Objection**, and thus the Preliminary Objection is **not merited**.

Consequently, the Court finds and holds that the **Notice of Preliminary Objection** dated **30th August 2019**, by the Defendant/ Objector is **not merited** and the same is **dismissed entirely** with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 17th day of June 2021.

L. GACHERU

JUDGE

17/6/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Respondent

No appearance for the Defendant/Objector

L. GACHERU

JUDGE

17/6/2021