



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. E042 OF 2021

THE BOARD OF MANAGEMENT

OLEKERI PRIMARY SCHOOL.....PLAINTIFF/APPLICANT

-VERSUS-

HANNAH WACEKE OTOMA.....DEFENDANT/RESPONDENT

RULING

This ruling is on the Preliminary Objection dated 16th September, 2021 filed by the Defendant. It is to the effect that the suit herein is res judicata.

The issue of res judicata is also raised by the Defendant in the defence dated 28/6/2021 at paragraph 3 and generally throughout the statement of defence.

Secondly, the Defendant urges that the value of the suit land is Kshs. 14,000,000/= as per the valuation dated 14th May, 2018 and therefore within the jurisdiction of the Chief Magistrate's Court.

One of the documents filed by the Plaintiff is a copy of decree in Chief Magistrate's Civil Case Number 137 of 2005 between the current defendant as Plaintiff and Evansons Njuguna, David K. Kahiri and Israel Waruingi as Defendants. The said decree reads in part;

“That Judgement be and is hereby entered on admission for the Plaintiff as against the Defendants jointly and severally for a permanent injunction restraining the Defendants jointly and severally by themselves, their servants and/or any person claiming through them from trespassing into, entering, constructing any permanent structures or any other structure of any kind and in any other manner whatsoever interfering with all that parcel of land known as NGONG/NGONG/15852 plus costs of the suit.

The counterclaim is dismissed with costs”

The Plaintiff in response to the preliminary objection urges that Nairobi CMCC No. 137 of 2005 was between different parties, the only common party being the Defendant and the issue for determination was not ownership of the land but trespass.

Counsel for the parties filed written submissions on 9th September and 22nd September, 2021 respectively.

I have carefully considered the Preliminary Objection in its entirety including the pleadings and the submissions.

I find that the Preliminary Objection has no merit and is dismissed for two reasons;

Firstly, it is not clear to me what the issues in Nairobi CMCC 137/2005 were. Though the affidavit by the Defendant dated 16th June 2007, says at paragraph 22 that a copy of Judgement is annexed, I did not see any such Judgment or record.

It is also disputed whether the plaintiffs were ever joined as parties in the earlier suit.

These uncertainties are clear proof that the Preliminary Objection is not on pure points of fact. It is trite law that a Preliminary Objection should be on a pure point of law. This is not the case here.

Secondly, it is a draconian move to strike out pleadings. The Court should always try to sustain a suit so that the right to a fair hearing under **Article 50(1) of The Constitution** is not denied to a party who has a genuine dispute requiring resolution by a Court.

Finally, the Plaintiff did not controvert the averment that the value of the subject matter is Ksh. 14,000,000/- as per the valuation report dated 14th May, 2018. With no evidence to the contrary, I find that it is the Chief Magistrate's Court which has jurisdiction in this matter because it has a pecuniary jurisdiction of up to Kshs. 20,000,000/=.

Consequently, under **Sections 11 and 18(1) (a) of the Civil Procedure Act**, I order that this suit be and is hereby transferred to the Chief Magistrate's Court at Ngong for hearing and disposal.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF NOVEMBER, 2021.

M.N. GICHERU

JUDGE