



**REPUBLIC OF KENYA**

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

**ELC CASE NO. E049 OF 2021**

**FLORENCE SHEILA WAIRIMU CHOGLI.....PLAINTIFF**

**VERSUS**

**PHILISTA PRUDENCE MINJA ONYANGO.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. On the 20<sup>th</sup> May, 2021, the Plaintiff filed this suit by plaint seeking for a permanent injunction to restrain the Defendant from interfering with land parcel number Mavoko Town Block 12/9334, together with a declaration that the said property belongs to the Plaintiff. On the same date, the Plaintiff filed a Notice of Motion application dated 20<sup>th</sup> May, 2021 seeking for the following orders; -

- a) **That application herein be certified as urgent and be heard *ex parte* in the first instance.**
- b) **That pending the hearing and determination of this application a temporary order of injunction do issue restraining the Respondents whether by themselves or their representatives, servants, agents, and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the properties known as Mavoko Town Block 12/93334 (*the suit property*).**
- c) **That pending the hearing and determination of this suit, an order of injunction do issue restraining the Respondents whether by themselves or their representatives, servants, agents and/or assigns from howsoever selling, alienating, trespassing onto, and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as Mavoko Town Block 12/3334(*the suit property*).**
- d) **That the County Commander in charge of Machakos County be directed to ensure enforcement of the orders granted by this honourable Court.**
- e) **That the costs of this application be awarded to the Applicant in any case.**

2. Before the said application could be determined, on 31<sup>st</sup> May, 2021, the Defendant filed a preliminary objection dated 26<sup>th</sup> May, 2021, based on the following grounds;

- a) **This honourable court as competently constituted, though, lacks jurisdiction to hear the Notice of Motion application dated 20<sup>th</sup> May, 2021 as well as the entire suit.**
- b) **The application is an abuse of the process of the court.**
- c) **The application is fatally defective and cannot stand as it offends mandatory provisions of the law.**
- d) **The Notice of Motion application dated 20<sup>th</sup> May, 2021 is not justifiable**
- e) **The Jurisdiction of this honourable court is not invoked at all.**
- f) **There is a judgment in this matter by the Environment and Land Court sitting at Machakos, the Hon. Mr. Justice D.A. Angote, J delivered a judgment on 24<sup>th</sup> may, 2019 and the decree issued on 27<sup>th</sup> June, 2019.**
- g) **The orders sought by the applicant cannot be granted.**

**h) And the defendant herein Philista Prudence Minja Onyango prays that the Notice of Motion application dated 20th May, 2021 as well as the entire suit, be dismissed with costs.**

3. Therefore, this ruling is in respect of the said preliminary objection which the court directed that the same be heard first. The preliminary objection was canvassed by written submissions. The defendant filed her submissions dated 22<sup>nd</sup> June, 2021 on 25<sup>th</sup> June, 2021, while the plaintiff filed her submissions dated 12<sup>th</sup> August, 2021 on 13<sup>th</sup> August, 2021.

**THE DEFENDANT'S SUBMISSIONS:**

4. The Defendant submitted that the plaintiff's Notice of Motion application dated 20<sup>th</sup> May, 2021 as well as the entire suit is *res Judicata*, and therefore this court lacks the jurisdiction to determine the same. It was further contended by the Defendant that the application was an abuse of the court process. Counsel argued that the defendant sued the Plaintiff in this matter in ELC Machakos ELC No. 191 of 2017 where a judgment was delivered in favour of the Defendant in this matter on 27/6/19 and served on the Plaintiff on 17/10/19.

5. It was the defendant's contention that the parties, the subject matter and the issues in Machakos ELC 49 of 2021 were the same as those in the instant suit. She further averred that by this suit the plaintiff wants this court to sit on appeal of its decision in Machakos ELC 191 of 2017. Counsel Mentions that there should be an end to litigation because an order of a court of competent jurisdiction is conclusive. He argued that issues as to who is the legal owner of the disputed property and encroachment by either Florence Sheila or Philista Onyango were well canvassed in ELC NO. 191 of 2017 and hence the issues raised in this matter are *res judicata* as they were determined in the above suit.

6. Counsel placed reliance on the cases of **Raphael Wanjohi & Another vs Peter Kamonye, Meru HCC No. 188 of 1996, Timotheo Makenye Manunga Ngochi Court of Appeal Civil Appeal No. 25 of 1978**, which this court has considered. The Defendant argued that the only recourse for the applicant/plaintiff herein would be to file an appeal in Machakos ELC 191 of 2017 and not to file a fresh suit.

**THE PLAINTIFFS' SUBMISSIONS:**

7. The Plaintiff submitted that she was not a party in Machakos ELC 191 of 2017 which was between Philista Prudence Minja Onyango vs Florence Sheilla Muthoni, while the suit property therein was Mavoko Town Block 12/130 measuring approximately 2.00 Ha. She asserted that this is totally different property from the parcel of land in the instant suit which is land parcel number Mavoko Town Block 12/9334 measuring approximately 2.10 Ha and the suit is between Florence Sheilla Wairimu Chogi vs Philista Prudence Minja Onyango.

8. The Plaintiff further argued that a preliminary objection should be based on a pure point of law which should be clear from the pleadings without a need for evidence to prove facts relied upon. Counsel relied on the case of **Mukisa Biscuit Manufactory Co. Ltd v West End Distributors Ltd [1969] E.A. 696** to argue that the defendant's preliminary objection does not meet the threshold for a preliminary objection.

9. While the Plaintiff conceded that there was indeed a judgment in Machakos ELC 191 of 2017, she argued that the subject matter and the parties in that suit and in this suit were different. She stated that the land in issue in ELC 191 of 2017 was Mavoko Town Block 12/130 measuring 2.0 Ha while the land in this suit is parcel number Mavoko Town Block 12/9339.

10. Further the Plaintiff stated that she had annexed to her pleadings documents showing her name and the title number of the suit land which to her, clearly shows that the parties and the land in the two suits are different. Placing reliance on the case of **Independent Electoral and Boundaries Commission vs Maina Kiai and 5 Others, Nairobi C.A. Civil Appeal No. 105 of 2017 [2017] EKLR**, the Plaintiff argued that to prove *res judicata*, the following elements must be established;

- a) **The suit or issue was directly and substantially in issue in the former suit.**
- b) **That the former suit was between the same parties or parties under whom they or any of them claim.**
- c) **Those parties are litigating under the same title.**
- d) **The issue was heard and finally determined in the former suit.**
- e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

11. The Plaintiff argued that Florence Sheilla Muthoni, the defendant in ELC 191 of 2017 is not one and the same person as Florence Shila Wairimu Chogi. Counsel relied on the case of **Kibundi vs Mukobwa & Another [1993] eKLR**, which this court has considered. She urged the court to dismiss the preliminary objection.

**ANALYSIS AND DETERMINATION:**

12. I have considered the preliminary objection as well as the parties' submissions. Therefore, the issues that arise for determination are; -

- a) Whether the preliminary objection dated 26<sup>th</sup> May, 2021 meets the threshold for a preliminary objection.
- b) Whether the preliminary objection raised is merited.

13. Principles consenting what constitutes a preliminary objection are now settled. In the *locus classicus* case on the subject, namely, **Mukisa Biscuit Manufacturing Co. Ltd** (Supra), the court held as follows: -

**“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”.**

In that case, the court further held as follows: -

**“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”**

14. Therefore, a preliminary objection can only be raised where facts are not in dispute, and the same should be purely on a point of law. In the instant suit, the defendant contends that the parties, the subject matter and the issues in Machakos ELC No. 191 of 2017, are the same as the parties, the subject matter and the issues in this matter. The Plaintiff on the other hand has stated that the parties are different, the land in issue is different and the issues are different. She has argued that she was not a party in Machakos ELC No. 191 of 2017, as the defendant in that suit is Florence Sheila Muthoni, while her name is Florence Sheila Wairimu Chogi. She further pointed out that the suit land in Machakos ELC No. 191 of 2017 is Mavoko Town Block 12/130, while the suit land in this matter is Mavoko Town Block 12/9334. Essentially, there is no congruence on facts. Each party has a different set of parties, the subject matter and the issues. That means that the same can only be ascertained upon full hearing of the evidence in this matter.

15. That being the case, at this stage it cannot be ascertained as to whether the suit land in Machakos ELC No. 191 of 2017 is the same parcel of land in this matter and whether the Plaintiff was a party in ELC 1901 of 2017. It is my finding therefore, that the preliminary objection raised herein does not meet the threshold of a preliminary objection.

16. In the end, I dismiss the preliminary objection dated 26<sup>th</sup> May, 2021

with costs.

17. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15<sup>TH</sup> DAY OF DECEMBER 2021.**

**A. NYUKURI**

**JUDGE**