



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 91 OF 2019

COSMAS WAFULA NGUTUKU.....PLAINTIFF

VERSUS

1. JOHN WAITHAKA

2. JOHN WAITHAKA KIARIE

3. RICHARD WAINAINA WAWERU.....DEFENDANTS

RULING

The 1st and 2nd Defendants raised a preliminary objection on the grounds that:

1. That there is already another civil suit in the Chief Magistrate’s Court at Kakamega Civil Suit No. 113 of 2019 between the same parties and concerning the same subject matter.
2. That this suit has been brought to this court in clear disregard of the above suit and is an abuse of the due process of court.

The plaintiff/respondent submitted that, he is the bonafide owner of the suit land having duly purchased the same from one Richard Waweru sometimes in the year 2003. That the said Waweru had in turn informed him, that he had purchased the same from the defendants’ late father one Albert Kiarie Waitheka. That the parties are different in the twin matters as one Albert Waweru features in this originating summons but not in the lower court matter. That the two matters respect different subject matters. The lower court matter namely Kakamega Civil Suit No. 113 of 2019 concerns eviction which assumption presumes that the defendants herein still have title to the subject parcel of land. On the other hand, this originating summons regards a determination, based on a question, on whether or not the respondent had their claim to the suit land extinguished upon the foundation of adverse possession. In that regard, the subject matter in this case is different from that at the lower court.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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.”

The defendant submitted, the matter herein is sub judice. That in the Chief Magistrate’s Court at Kakamega Civil Suit No. 113 of 2019 there defendants had filed a suit against the plaintiff on the same subject matter. The plaintiff submitted that this is a suit for adverse possession while the one in the lower court is for eviction. It is not in dispute that this suit was filed after the one in the lower court. I find that indeed the parties are similar in the two suits and so is the subject matter. I find that this matter is sub judice the Chief Magistrate’s Court at Kakamega Civil Suit No. 113 of 2019 between the same parties and concerning the same subject matter. I find the preliminary objection has merit and I uphold the same. This suit is struck off with costs to the 1st and 2nd defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE