



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND COURT**

**AT KAKAMEGA**

**ELC NO. 205 OF 2017**

**LEONARD MAKWA SHIBWONI.....PLAINTIFF**

**VERSUS**

**SAMSON MAKHOYA MUKABANA.....DEFENDANT**

**RULING**

The defendant herein raised a preliminary objection on points of law on the following grounds:-

1. That the plaintiff lacks locus standi to file the instant application as well as the entire suit which proceedings are therefore without legal basis, unprocedural and fall for striking out in limine.
2. That the honourable court has no jurisdiction to hear and determine neither the application dated 16<sup>th</sup> June, 2017 nor the entire suit and urge the honourable court to down its tools immediately.
3. That the orders sought herein are unprocedural to the extent that the applicant is not a party to the family or the estate of the suit property.

The plaintiff submitted that he sued the defendant herein for an order of eviction against from the portion of land parcel number South Kabras/Shamberere/83 which the defendant had sold voluntarily to the plaintiff vide an agreement dated the 11<sup>th</sup> day of May, 2013. That the defendant sold the portion of land to the plaintiff and promised to complete succession proceedings and give the plaintiff his title deed for the portion sold. That the defendant voluntarily allowed the plaintiff to take possession of the portion of land sold to him. That the defendant also allowed the plaintiff to start developing his portion of land immediately after the signing of the agreement. That the plaintiff filed the case herein on the basis of the land sale agreement between himself and the defendant after the defendant declined to remove his house from the portion of land sold to the plaintiff. The plaintiff had no role to play in the succession proceedings which are between the defendant and his family members. The plaintiff filed the case to enforce the contract between himself and the defendant. That the plaintiff has not sued the administrator of the estate of defendant's father since he doesn't have any dispute with the administrators who are fully aware of the contract between the plaintiff and the defendant.

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.”.*

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The issue of locus is properly raised as a preliminary objection. Be that as it may, it is not disputed that the parties entered into a sale agreement for the sale of the said suit land. It is also not disputed that the said suit land is subject to Succession cause No. 624 of 2014 before the High Court Kakamega. These are issues of fact of which this court is not privy to. The court needs to investigate the facts in order to make a final determination. For this reason, I find that this preliminary objection is not merited and I strike it out with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED THIS 30<sup>TH</sup> DAY OF APRIL 2020.**

**N.A. MATHEKA**

**JUDGE**