



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 100 OF 2019**

**RONALD WERE MWACHI.....APPLICANT**

**VERSUS**

**JOHN ANYANGU MOYI**

**JOSEPH MUKUBA MOYI.....RESPONDENTS**

**RULING**

The respondents herein, raised a preliminary objection in to the hearing thereof on the following grounds that, the applicant's claim is res judicata by reason of this honourable court's decision in the judgment dated 27<sup>th</sup> February, 2019 in Kakamega ELC Case No. 79 of 2013 Ronald Were Mwachi vs. Jane Omukamba & 5 others in which the court found as a fact, that the 2<sup>nd</sup> and 6<sup>th</sup> defendants (1<sup>st</sup> and 2<sup>nd</sup> respondents herein) are beneficial owners of land parcel No. Butso/so/Shikoti/1778 on the 6<sup>th</sup> January, 2011 by transmission. The family of the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> defendants then gave permission to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants to cultivate the land and further that the plaintiff (applicant herein) has failed to prove his case on a balance of probabilities and the same is dismissed with no orders as to costs, granting orders that, an injunction to restrain the plaintiff by himself, his servants and agents or otherwise howsoever from trespassing, continuing to occupy, constructing, cultivating or in any other way interfering with Butso/so/Shikoti/1778 and possession

The applicant filed a Notice of Appeal dated 13<sup>th</sup> March, 2010 but has yet to file an appeal in the Court of Appeal for the setting aside of the decree and order of this honourable court which remains in force to date. That the applicant's continued occupation and alienation of the property Butso/so/Shikoti/1778 during the pendency of the case in court is in utter contempt and abuse of the processes of this honourable court. Kakamega ELC case No. 79 of 2013 was a matter under active litigation until 27<sup>th</sup> February, 2019 and any dealing with the property then in dispute was null and void.

The applicant submitted that the issue of adverse possession was never dealt with in the previous suit Kakamega ELC case No. 79 of 2013. That the cause of action in the present suit is different. That the issues raised in the preliminary objection requires evidence to be adduced and to be subjected to cross examination. That the same cannot be determined at the preliminary stage.

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 respondents submitted, the matter herein is res judicata. That the applicant's claim is res judicata by reason of this honourable court's decision in the judgment dated 27<sup>th</sup> February, 2019 in Kakamega ELC Case No. 79 of 2013 Ronald Were Mwachi vs. Jane Omukamba & 5 others. The plaintiff submitted that this is a suit for adverse possession while the other one was for permanent injunction. I have perused the proceedings and judgement in Kakamega ELC Case No. 79 of 2013. Indeed I find that the applicant is the plaintiff therein and the respondents are the 7<sup>th</sup> and 2<sup>nd</sup> defendants. The subject matter in the said suit is land parcel No. Butso/1778. It is not in dispute that this suit was filed in 2019 after the previous suit in 2013. I find that indeed the parties are the same in the two suits and so is the subject matter. I find that this matter is res judicata Kakamega ELC Case No. 79 of 2013 between the same parties and 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 1<sup>st</sup> and 2<sup>nd</sup> respondents.

It is so ordered.

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

**N.A. MATHEKA**

**JUDGE**