



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 316 OF 2017

FELISTA OMANI..... PLAINTIFF

VERSUS

EMMANUEL ISADIA..... DEFENDANT

RULING

The Defendant raised a preliminary objection on the grounds that:

1. That the issues raised herein have been heard and determined in Vihiga SRMC Miscellaneous application No. 21 of 1977 and 140 of 2016 between the same parties and concerning the same subject matter.
2. That the matter is sub judice as there is Kakamega Succession Cause No. 163 of 2016 and Court of Appeal No. 103 of 2018 which matters are pending hearing and determination.

The plaintiff/respondent submitted that her case is based on new issues and cause of action that has never been determined and the defendant's assertions of res judicata are unfounded. That Vihiga SRMC Miscellaneous Application No. 21 of 1977 simply granted the defendant's eviction orders and he appealed vide Constitutional Application No. 52 of 2006 that was dismissed by this court. Civil suit No. 140 of 2016 sought to bar the defendant's father from burying his son on the suit land was dismissed for lack of jurisdiction. That Succession Cause No. 163 of 2016 that seeks revocation of the grant and Court of Appeal No. 103 of 2018 that seeks to set aside the court's refusal to reinstate the suit Constitutional Application No. 52 of 2006 are all different causes of action

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.”

I have perused the pleadings referred to in the preliminary objection and find that That Vihiga SRMC Miscellaneous Application No. 21 of 1977 granted the defendant’s eviction orders and he appealed vide Constitutional Application No. 52 of 2006 that was dismissed by this court. Vihiga PMCC Suit No. 140 of 2016 sought to bar the defendant’s father from burying his son on the suit land was dismissed. That Succession Cause No. 163 of 2016 that seeks revocation of the grant and Court of Appeal No. 103 of 2018 that seeks to set aside the court’s refusal to reinstate the suit Constitutional Application No. 52 of 2006 and I find that indeed the parties are similar in all the above mentioned suits and so is the subject matter. I find that this matter is sub judice the Succession Cause No. 163 of 2016 and res judicata Kisumu Court of Appeal No. 103 of 2018 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 defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE