



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC CIVIL SUIT NO.92 OF 2010**

JOHN NJUGUNA KIMUNYA.....PLAINTIFF

=VERSUS=

TERSIAH WACHUKA KIMUNYA.....1ST DEFENDANT

GEOFFREY SITUMA WANYONYI.....2ND DEFENDANT

**RULING**

The Defendants herein raised a Notice of *preliminary objection* dated *7th March 2015* . The Defendants raised the said preliminary objection to the suit dated *2nd March 2010* and Summons dated *19th February 2015*, and applied for the same to be struck off on the grounds that :-

1. *The Plaintiff herein is deceased who died on 20th day of August ,2012 and therefore this suit has no probability of success.*
2. *The issues raised are res-judicata as they were heard and determined by a court of competent jurisdiction at Kiambu Principal Magistrates Court in Succession Case No.142 of 2006 and proprietorship of the properties registered by Lands Registrar at Kiambu Lands Office and this suit contravenes the principle of indefeasible claim. The registration of proprietorship carries with it the right to possession, occupation ,use and quite enjoyment of the property.*
3. *This suit is misconceived , bad in law and abuse of process, not of good faith and is miscarriage of justice and it ought to be dismissed with cost.*

The Preliminary Objection is opposed by the Plaintiff herein and the parties canvassed the said preliminary objection by way of written submissions.

The Court has considered the said written submissions.The Defendants submitted that the suit herein should be dismissed as there is no probability of success after the demise of the Plaintiff herein *John Njuguna Kimunya* on *20th August 2012* , and there is no application for substitution .

It was further submitted that the issues raised are res-judicata having been determined by Court of competent jurisdiction at *Kiambu Law Courts* in *Succession Case No.142 of 2006* and proprietorship of the land No *Ndumberi/Riabai/4089*, identified to their prospective owners as *Teresia Wachuka Kimunya* and *Geoffrey Situma Wanyonyi* .

The Plaintiff Objected to the preliminary objection and submitted that the Notice contains both issues of

**facts and Law** and cannot therefore be argued and determined without calling evidence and investigating facts . It was submitted that **James Gathu Njuguna** was substituted as the Plaintiff herein vide a Notice of Motion dated **7th March 2013**, and allowed on **5th June 2013**.

Further that the suit is not **res-judicata**, as the matter in issue in this matter is different from the **succession cause No. 142 of 2006**, at **Kiambu Law Courts** and that the parties in the two suits are different . Further that the issues raised in this suit have not been heard and finally determined by a competent Court of law in the past.

It was also submitted that the suit is not misconceived , bad in law and abuse of Court process and will not result to miscarriage of justice. The Plaintiff submitted that the Plaintiff's case is merited and should be allowed to proceed to full trial.

I have considered the Notice of preliminary objection and the written submissions. I will have to first determine whether the said Notice of Preliminary Objection qualifies to be a **Notice** of Preliminary Objection as envisaged in the **Mukisa Biscuits case**.

The criteria for determining what is a preliminary objection was laid down in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696:-**Where the Court held that:-

***“ A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law which is argued on the assumptions that all the facts pleaded are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of judicial discretion.***

Further in the case of **Quick Enterprises Ltd vs. Kenya Railways Corporation, Kisumu High Court Civil Case NO. 22 of 1999** the Court also held that.

***“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.***

Again in the case of **Avtar Singh Bhamra & Another VS. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, the Court held that;

***“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained”.***

Taking into account the description of preliminary objection in the above cited cases, the court finds that what the Defendants have raised are both points of law and facts which facts have to be ascertained from elsewhere. Though the Defendants alleged that the Plaintiff is deceased and no substitution has been done, that is not the correct position . An application for substitution was filed on **7th March 2013** and the same allowed on **5th June 2013**. However that was also fact that the court had to ascertain by going through the courts records . It is not a point of law stemming from the pleadings only.

Having carefully considered the Instant **Notice of Preliminary Objection** dated **7th March 2015** and the submissions and the relevant authorities , the Court finds that what the Defendants raised did not amount to a preliminary objection which raises pure points of law. The same cannot be upheld and it is accordingly dismissed entirely with costs to the Plaintiff.

It is so ordered.

Dated, Signed and Delivered this **5th of February,2016**

**L.GACHERU**

**JUDGE**

In the presence of

None attendance for the Plaintiff

None attendance for the 1st Defendant

None attendance for the 2nd Defendant

Court Clerk : Hilda

**L.GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the absence of the parties and their advocates. ***Ruling notices to issue.***

**L.GACHERU**

**JUDGE**

**5/2/2016**