



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 22 OF 2020

AGNETTA GAZEMBE MULAMA

REV PHARAS NYABERA ZAVANI

SIMON MUSYOKI MBINDYO

GOSPEL CENTER CHURCH.....APPLICANTS

VERSUS

STEPHEN SARAMBA VIRAGHI.....RESPONDENT

RULING

The application is dated 17th April 2020 and is brought under Article 150 of the Constitution, Section 1A, 3A & 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40, Rule 1 & 2 and Order 51, Rule 1 of the Civil Procedure Rules 2010 seeking orders that;

1. The application be certified urgent and be heard on priority basis.
2. That an interim order of injunction do issue restraining the respondent whether by himself, their servants and or agents or anyone whomsoever claiming title, deriving authority or acting on their behalf from entering, constructing, breaking into, demolishing, pulling down, destroying, erecting, taking over or trespassing onto or in any way interfering with land parcel No. Kakamega/Budonga/2163 pending the hearing and determination of this application.
3. That the applicant be permitted to use and utilize that property as they have been doing so for the last 31 years until the suit is heard and determined.
4. Costs of the application be provided for.

It is brought on the following grounds that the 1st applicant is the proprietor of land parcel No. Kakamega/Budonga/2163 having purchased the same in 1983 from the father of the respondent. That the 1st applicant has been working and owning the land for the last 37 years uninterrupted and was surprised when in March 2020 she was informed by the 2nd 3rd and 4th applicants that unknown people had been moving around the plot with a view to demolish the structures. That the applicants have been the 1st applicant's tenants for the last 31 years.

The respondent filed a replying affidavit opposing the application dated 17th April 2020 and raised a preliminary objection against the entire suit that it is res judicata. That the matter was already determined in Hamisi SRMCC No. 40 of 2018 and ELC No. 318 of 2017 and Succession Case No. 861 of 2013.

The preliminary issue for determination before me is whether or not this matter is res judicata. 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 is therefore properly raised as a Preliminary Objection and the court will consider the same first. 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 in Hamisi SRMCC No. 40 of 2018 and ELC No. 318 of 2017 and Succession Case No. 861 of 2013 the subject matter is the same, however some of the parties are different. In ELC No. 318 of 2017 the defendants appear to be different and they never entered appearance or filed a defence. It appears there were different parties on the suit land which was not disclosed to this court. I find the present suit is not res judicata. I find the preliminary objection has no merit and I dismiss the same. I find the application dated 17th April 2020 is merited and I order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE