



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 305 OF 2018

YAHYA MOHAMED SULEIMAN.....PLAINTIFF

VERSUS

1. NATIONAL LAND COMMISSION

2. COUNTY COUNCIL OF KILIFI.....DEFENDANTS

RULING

1. Before me for determination is the notice of preliminary objection dated 20th January 2020 by the 2nd defendant which seeks to strike out the plaintiff's amended plaint with costs on the grounds that the court lacks jurisdiction to hear and determine the suit herein pursuant to the provisions of Section 6 of the Civil Procedure Act, that the suit is sub judice, the subject matter being directly and substantially in issue in Malindi ELC No. 135 (Mohamed Salmin Khamis & Another –v- Yahya Mohamed Suleiman & 7 Others), and in Mombasa Judicial Review No. 9 of 2013; that the suit is fatally defective, incurable and cannot stand in law; that the suit is an abuse of the court process, violates mandatory provisions of the law and cannot stand, and that the suit as filed is incompetent, bad in law and should be dismissed with costs to the respondent.

2. The 2nd defendant submitted that being aware that there was a suit pending before a court of competent jurisdiction over the same subject matter involving the same parties, preferred this suit, and failed to disclose to the court that other pending suit and therefore is guilty of forum shopping. The 2nd defendant submitted that Malindi ELC No. 135 of 2018 is over ownership of PLOT NO. 151/IV/N, the subject matter of this suit and that the property is in Kilifi County and thus within the jurisdiction of the court at Malindi. The 2nd defendant's counsel cited Section 6 of the Civil Procedure Act and relied on the cases of **Republic –v- Registrar of Societies – Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others (2017) eKLR; Kampala High Court Civil Suit No. 450 of 1993 – Nyanza Garage –v- Attorney General; Muturi Investments Ltd –v- NBK (2006) eKLR; Geoffrey Chege Kirundi –v- Dispute Resolution Committee of Kenya Tea Development Agency Holdings Ltd & Another (2017) eKLR, and Nguruman Limited –v- Jan Bonde Nielsen & Another (2017)eKLR.**

3. The plaintiff vehemently opposed the preliminary objection and submitted that the same is based on disputed facts and do not therefore qualify to be valid objections as outlined in the case of **Mukisa Biscuit Manufacturing Co Ltd –v- West End Distributors Ltd (1969)E 696**. It was submitted that the reliefs sought in Malindi ELC No. 235 of 2018 are injunction and declaration of ownership of the suit property whereas the reliefs sought herein are inter alia, compensation for the value of the suit property that defendants have caused to be compulsorily acquired, cancellation of allotment illegally issued and vacant possession. Therefore it was submitted that the reliefs in the two cases are distinctively different and the allegation of sub judice must fail. Counsel for the plaintiff relied on the case of **Oraro –v- Mbaja (2005) eKLR** and **Corporate Insurance Company Limited –v- Benjamin Mwangi Harun (2017)eKLR**.

4. It was further submitted that the suit before the Malindi court has other parties who are not parties to the present suit. Further that a court would need to receive evidence to enable determination as to whether or not the matter herein is sub judice, and that no evidence has been adduced before this court and the same cannot be introduced through submission in a preliminary objection. It is the plaintiff's contention that the 2nd defendant should have considered bringing an application with appropriate supporting evidence. Counsel for the plaintiff relied on the case of **Esther Nzingo –v- Stephen Juma & Another (2015)eKLR** and urged the court to dismiss the preliminary objection with costs to the plaintiff. That in the event the court sustains the plea of sub judice, it should exercise its discretion to stay the proceedings herein pending the hearing and determination of the Malindi matter as provided for in the marginal notes in Section 6 of the Civil Procedure Act. It was further submitted that this court has the jurisdiction to hear and determine the suit herein.

5. I have considered the submissions made. The preliminary objection by the 2nd defendant is mainly on the grounds that the suit herein is sub judice and that this court lacks jurisdiction to hear and determine the suit.

6. I begin my determination of the issue relating to the jurisdiction of this court. The Environment and Land Court is a creation of Article

162 (2) (b) of the Constitution which mandated Parliament to establish courts with the status of the High Court “to hear and determine disputes relating to the environment and the use and occupation of and title to land” Under sub-article 3, Parliament was mandated to legislate on the jurisdiction and functions of the courts contemplated in clause 2. Parliament indeed enacted the requisite legislation which spelt out the jurisdiction of this court titled the Environment and Land Court Act No. 19 of 2011. The ELC jurisdiction is litigated in Section 13 of Act No. 19 of 2011 which states “ that the court shall have original and appellate jurisdiction hear and determine disputes in accordance with Article 162 (2) (b) of the constitution and with the provisions of this Act or any other law applicable to Kenya relating to the environment and land”. The dispute before this court relates to compensation over the compulsory acquisition of PLOT NO. 1524/IV/MN. Section 13 of the ELC Act is clear that in exercise of its jurisdiction, the court shall have power to make any order and grant any relief as the court deems fit and just, including compensation. I do not therefore agree that this court has no jurisdiction over the matter. It is my finding that this court has jurisdiction to entertain the dispute.

7. The preliminary objection by the 2nd defendant is also on the ground that the suit is sub judice. In the case of **Mukisa Biscuit Manufacturing Ltd –v- West End Distributors Ltd (supra)**, it was stated as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by ways of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice must stop.”

8. The 2nd defendant has submitted that the suit is sub judice because of pending Malindi ELC No. 135 of 2018 which is over ownership of PLOT NO. 151/IV/MN which is directly and substantially in issue in both suits. The 2nd defendant referred the court to the plaintiff’s further list of documents filed in court on 24th July 2019. The plaintiff on the other hand has submitted that the suit before the Malindi Court has other parties who are not parties to this suit and that the reliefs sought are also different. It is therefore apparent that both parties are not in agreement on the issues herein. In my view, the issues raised herein cannot be resolved through the preliminary objection raised. This is because it raises some issues of fact which have to be ascertained. Indeed the 2nd defendant has raised some issues of facts through submissions. In my view, raising issues of fact through submissions amounts to giving evidence from the bar which in my view, is not proper as there is a clear legal procedure on how facts or evidence ought to be laid before a court of law. One such mechanism is the filing of application. Indeed, the authorities relied on by the 2nd defendant in support of his submissions related to decisions made pursuant to applications and not through a preliminary objection.

9. For the foregoing reasons, I am inclined to dismiss the preliminary objection dated 20th January 2020 and decline to strike out the suit as requested. The plaintiff shall have costs.

10. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE