



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 318 OF 2017

STEPHEN SARAMBA VIRAGHI.....PLAINTIFF/RESPONDENT

VERSUS

HILLARY SAVARI

WALTER MUDAKI.....DEFENDANTS

GOSPEL CENTER CHURCH.....APPLICANT/INTERESTED PARTY

AGNETTA GAZEMBE MULAMA.....PROPOSED 3RD PARTY

RULING

The application is dated 4th June 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 the proposed 3rd defendant be joined as the 3rd defendant in this suit.
3. That upon prayer 2 being granted the court be pleased to set aside the exparte judgement entered herein.
4. That the proposed 3rd defendant be granted leave to file a defence and counterclaim in this matter.
5. That an interim order of injunction do issue restraining the plaintiff 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.
6. Costs of the application be provided for.

It is brought on the following grounds that the 3rd defendant is the proprietor of land parcel No. Kakamega/Budonga/2163 having purchased the same in 1983 from the father of the respondents. That the 3rd defendant has been working and owning the land for the last 37 years uninterrupted and was surprised when in March 2020 she was informed by her neighbours and tenants that the plaintiff has been moving around the plot destroying structures. That the interested party has been the 3rd defendant's tenant for the last 31 years. That the plaintiff concealed facts that the 3rd defendant was the owner of the suit land.

The respondent filed a replying affidavit opposing the application and raised a preliminary objection that the application dated 4th June, 2020 is res judicata. That the 3rd defendant has raised a similar application of joinder which was dismissed by this court on the 26th September 2019.

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 on the 14th June 2019 the 3rd proposed defendant and one George Havi Mulama filed a similar application through Musiega Advocates. The application was dated 13th June 2019 and was brought under Article 50 (1) and 159 (2) (d) of the Constitution, Section 1A & B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 10, Rule 11 and Order 50, Rule 6 of the Civil Procedure Rules 2010 seeking orders that;

1. The application be certified urgent and be heard on priority basis.
2. All other proceedings in this matter be stayed pending hearing and or determination of this application.
3. The judgment of this honourable court entered against the defendants/applicants on or about the 31st day of May, 2018 together with the decree arising there from and all subsequent proceedings thereto and or orders be set aside and or vacated.
4. The defendants/applicants be granted leave to defend the suit.
5. The defendants/applicants joint statement of defence together with the defence pleadings filed herewith be deemed to have been validly filed and served.
6. The suit proceeds to hearing and or determination in a manner authorized by law.
7. Costs of the application abide the outcome.

By a ruling dated 26th September 2019 the said application was dismissed with costs. I find the present application is res judicata and an abuse of the court’s process. I find the preliminary objection has merit and I uphold the same. This application is struck off with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE